IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 21688/2020

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

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SIGNATURE DATE: 26 June 2020

In the matter between:

FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION	APPLICANT
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	FIRST RESPONDENT
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	SECOND RESPONDENT

JUDGMENT

THE COURT

INTRODUCTION

[1] South Africa, like the rest of the world, faces an unprecedented crisis following the invasion of the COVID-19 virus, which poses a clear and present danger to human life. Through the Disaster Management Act[1] ("the Act"), the Government has imposed various measures in an effort to combat the virus and contain its escalation. In particular, the second respondent, the Minister of Cooperative Governance and Traditional Affairs ("the Minister") promulgated regulations pursuant to section 27(2) of the Act, which, amongst others, prohibit the sale of tobacco products, e-cigarettes and related products as part of the measures introduced to curb the escalation of the COVID-19 virus.

[2] The applicant, Fair-Trade Independent Tobacco Association ("FITA") takes issue with the prohibition on the sale of tobacco products and seeks an order declaring that:

> 2.1 cigarettes and tobacco products are essential goods in Annexure B (regulation 11A) of the regulations published in Government Gazette No.43148 on 25 March 2020 ("the level five regulations");
>
> 2.2 regulation 27 of the regulations published in Government Gazette No 43258 on 29 April 2020 ("the level four regulations") is invalid, alternatively is reviewed and set aside;
>
> 2.3 regulation 45 of the regulations published in Government Gazette No 43364 on 28 May 2020 ("the level three regulations") is invalid to the extent that the sale of tobacco products are prohibited, alternatively is reviewed and set aside;
>
> 2.4 the sale of tobacco products and cigarettes is lawful.

[1] Act 57 of 2002.

FACTUAL BACKGROUND

[3] On 15 March 2020, the Minister, as the Minister designated to administer the Act, declared a national state of disaster in terms of section 27(1) of the Act. On the same day, Cabinet decided that all Cabinet members who have a role to play in the disaster the country is facing, would form part of a National Coronavirus Command Council ("NCCC"). The NCCC is a Cabinet structure established and mandated to coordinate the work that would be required to manage the state of national disaster.

[4] Section 27(2) of the Act empowers the Minister to make regulations concerning *inter alia*, the regulation of the movement of persons and goods. On 18 March 2020, the Minister issued the initial regulations after consulting with the relevant Ministers. Following consultation with the NCCC, the President[2] announced on 23 March 2020 that a nation-wide lockdown would be imposed, beginning on 26 March 2020 and ending on 16 April 2020. On 9 April 2020, the President announced that the lockdown period would be extended until the end of April 2020.

[5] To govern the lockdown period, the amended lockdown regulations were published on 25 March 2020. These regulations imposed stricter limitations on the movement of persons and goods, and the provision of services during the initial level five lockdown. The regulations provided that only businesses involved in the provision of essential goods and services may operate during the level five lockdown period. Tobacco products including cigarettes were not regarded as "essential items" within the meaning of the level five regulations.

[6] On 23 April 2020, the President addressed the nation regarding the approach to be followed after the level five lockdown and announced that beyond Thursday 30 April 2020, a gradual and phased recovery of economic activity would begin. A risk adjusted strategy would be implemented to ease the lockdown restrictions. In terms of the strategy there would be five levels:

[2] President of the Republic of South Africa, Mr. Cyril Ramaphosa.

6.1 Level five means that drastic measures are required to contain the spread of the virus to save lives;

6.2 Level four means that some activity can be allowed to resume, subject to extreme precaution required to limit community transmission and outbreaks;

6.3 Level three means the easing of some restrictions including on work and social activities, to address a high risk of transmission;

6.4 Level two involves a further easing of restrictions but the maintenance of physical distancing and restrictions on some leisure and social activities to prevent a resurgence of the virus;

6.5 Level one means that more normal activity can resume, with precautions and health guidelines followed at all times.

[7] The President stated that the NCCC would determine alert levels based on an assessment of the infection rate and the capacity of our healthcare system to provide care to those who need it. In his address, the President stated that during level four, the sale of cigarettes would be permitted.

[8] On 25 April 2020, the Minister briefed the media regarding the implementation of the Risk Based Model for Economic Activity, and advised South Africans to send their inputs into the risk adjusted strategy for consideration prior to the finalization of the regulations. The closing date for the submission of inputs was midday on Monday 27 April 2020.

[9] A “draft framework for consultation” was made publicly available during the course of Saturday, 25 April 2020 (“the draft framework”), and it indicated that tobacco products would be permitted to be sold under level four. Sectors, business organisations, trade unions and members of the public were invited to submit comments on the draft framework. The Minister states that the indication in the draft framework that the sale of tobacco products would be permitted, was a “proposal” on which comments were sought.

[10] At the media briefing on 25 April 2020, the Minister stated that there would still be discussions on the tobacco issue after consultation. Tens of thousands of people took up the invitation to comment on the draft framework. FITA itself specifically made comprehensive submissions geared at persuading the Government not to prohibit tobacco sales under level four.

[11] On 29 April 2020, the Minister promulgated new regulations under the Act ("the level four regulations") to govern the post level five lockdown period, which set out the approach to be followed during level four, and applicable from 1 May 2020. The level four regulations allowed for both "essential" and "permitted" goods to be sold, but expressly excluded tobacco products. Regulation 27 of the level four regulations provided that the sale of "tobacco, tobacco products, e-cigarettes and related products" was prohibited during alert level four. The Minister announced this prohibition in a televised address on 29 April 2020, being the publication date of the level four regulations.

[12] On 28 May 2020, the level three regulations were promulgated. The level three regulations add a new chapter four which sets out the approach to be followed during level three and applicable from 1 June 2020 until such time as a different level is declared. Regulation 45 of the level three regulations provides that "the sale of tobacco, tobacco products, e-cigarettes and related products is prohibited, except for export".

THE RULE OF LAW

[13] As foreshadowed in the introduction above, FITA challenges the prohibition of the sale of tobacco products and cigarettes. Its overarching challenge to the decision to promulgate regulations 27 and 45 is firmly located in the rule of law concept in that it impugns the rationality underpinning that decision. FITA criticises the promulgation of regulations 27 and 45, which outlaw of the sale of cigarettes and tobacco products, based on the health hazards associated with tobacco use or smoking, as being misguided. According to FITA such health hazards cannot justify the total prohibition of cigarettes and tobacco sales. FITA's case reduced to its bare essentials is that the ends sought to be achieved by the Minister bear no relationship to the means adopted by her.

[14] FITA's criticism of the Minister's decision and overarching basis for launching this application is appropriately captured in the following passage in the supplementary founding affidavit:

> "[a]part from there being no rational basis for the prohibition …, there has been no consideration given to proportionality. The prohibition is also out of step with the vast majority of countries throughout the world. There is also not any rational consideration given to the enormous harm that has been and continues to be occasioned to not only the economy, employment, livelihoods, but also to the health and safety of individuals. It is undeniable that simply and summarily preventing smokers and users of tobacco products from using these products gives rise to very serious physical and emotional adverse consequences. This leads to many users resorting to illicit non-regulated products that pose a significant health hazard. The attitude of the Second Respondent (who has no basis for her bold clearly uninformed statements) in relation to these issues is high-handed and amounts to executive overreach."

[15] Mr. Subel, counsel for FITA, submitted during oral argument that the basis of the challenge against the Minister's decision to promulgate the two regulations (and effectively outlawing the sale of tobacco products) is founded on the legality principle in that banning the sale of cigarettes and tobacco products bears no rational relationship to curbing the spread of the COVID-19 virus. This being the foundational basis of the application, clearly therefore the impugned conduct is executive action, even though FITA's counsel didn't go this far in clarifying the ambit of this application. This is conduct that is susceptible to legal challenges founded on the rationality standard which is in turn founded in the principle of legality. It is not administrative conduct which should be challenged under the Promotion of Administrative Justice Act[3] ("PAJA"). FITA's counsel confirmed this much during argument — that this is not a constitutional challenge nor was it reliant on PAJA.

[3] Act 3 of 2000.

CONSTITUTIONAL PRINCIPLES

[16] An important foundational value of our constitutional democracy is founded on the supremacy of the Constitution and the rule of law.[4] This implies that it is a fundamental principle of our law that the exercise of public power must comply with the law and the Constitution.[5] Accepting that the Minister may exercise no power and perform no function beyond that conferred upon her by the empowering Act[6] and that her actions must be rationally related to the purpose for which the power was conferred and exercised, the question arises whether the decision of the Minister in imposing a ban on the sale of tobacco products and cigarettes in the regulations is rationally related to the purpose for which the power was given in terms of section 27 of the Act.

[17] This calls for an objective enquiry as explained by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others:*[7]

> "[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

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[4] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) the Constitutional Court explained: "[38] There is nothing startling in this proposition — it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* the Supreme Court of Canada held that:

> 'Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution."

[5] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 ("***Fedsure"***) at para 56.

[6] *Ibid* at para 58.

[7] 2000 (2) SA 674 ("*Pharmaceutical"*).

> [86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle." [8]

[18] The enquiry does not, as explained by the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation and Others*,[9] extend to an interrogation of whether other or better means could have been used to achieve the purpose for which the power was given:

> "[51] The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. *But, where the decision is challenged on the grounds of rationality, 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 is that the purpose of the enquiry is to determine 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*."[10]

Or, as Professor Hoexter puts it:

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[8] The Constitutional Court in *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) ("*Masetlha"*) explains: "[80] Although within the context of ministerial regulation-making power, Ngcobo J restates the rationality test in the following terms:

> The exercise of public power must therefore 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, is 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… The exercise of such power must be rationally related to the purpose for which the power was given... As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate."

[9] 2010 (3) SA 293 (CC) (*"Albutt*").

[10] Court's emphasis.

> "A fundamental limitation is that the focus of review is essentially on legality of a decision rather than its merits: a court of review is not supposed to approve or disapprove of the decision but merely to consider whether it was arrived at in an acceptable fashion".[11]

[19] The legality principle is an incident of the rule of law, which is one of the constitutional controls on the exercise of public power. The Constitutional Court in *Pharmaceutical*[12] pointed out that the rule of law requires that the exercise of public power should not be arbitrary but rather must be rationally related to the purpose for which the power was exercised. The Constitutional Court made it clear that rationality was a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries.[13]

[20] In simple terms, the rationality standard requires that a decision taken by the executive ought to be in line with the purpose for which the power was given and if the requisite synergy between the decision and purpose is absent, the decision cannot be held to be rational and therefore falls short of the constitutional standard espoused by our apex Court. Importantly, in order to pass the test for rationality, there must be a rational connection between the impugned decision and the purpose sought to be achieved through such decision.

[21] In *Affordable Medicines Trust and Others v Minister of Health and Another*,[14] the Constitutional Court explained the role of the rule of law as a form of constitutional control on the exercise of public power as follows:

> "[48] Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of

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[11] Cora Hoexter *Administrative Law in South Africa* 2nd edition p 61.
[12] *Supra* at para 85.
[13] *Ibid* at para 90.
[14] 2006 3 SA 247 (CC) ("*Affordable Medicines Trust").*

its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.

[49] The exercise of public power must therefore 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, is 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."

[22] In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another*,[15] the Constitutional Court (quoting from *Prinsloo v Van der Linde and* Another)[16] confirmed that it falls beyond a Court's powers to prefer a means that it regards would have resulted in a better outcome:

"[41] (A) person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."

[23] In a similar vein, the Constitutional Court in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*[17] stated:

"[62] The exercise of public power has to be rational. In a constitutional state arbitrariness or the exercise of public power on the basis of naked preferences cannot pass muster. Judgments of this Court suggest that, objectively viewed, a link is required between the means adopted by the legislature and the end sought to be achieved. The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve

[15] 2002 (3) SA 265 (CC) ("*Bel Porto"*).
[16] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) ("*Prinsloo"*) at para 36.
[17] 2008 (5) SA 171 (CC) ("*Merafong"*).

an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature. Provided a legitimate public purpose is served, the political merits or demerits of disputed legislation are of no concern to a court. In *Pharmaceutical Manufacturers* Chaskalson, P made it clear that the rationality standard does not mean that courts can or should substitute their opinions for the opinions of those in whom the power has been vested. A court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately."

[24] And in a separate concurrence with the majority, Ngcobo J held that:

"[274] It is true, there might have been other options that could have been adopted to avoid the consequences feared by the Committee. But that is not the issue. It is not for this Court to tell the Legislature how it should have accommodated the views of the majority of the residents of Merafong while at the same time achieving the objectives of the Bill. That is for the Legislature to decide. In *Pharmaceutical Manufacturers* and in *UDM 2* we pointed out that rationality is a minimum requirement for the exercise of legislative power. This standard does not permit us to substitute our opinions as to what is appropriate for the opinions of the Legislature. Once it is established that the purpose sought to be achieved is within the authority of the Legislature, and as long as the Legislature's decision, viewed objectively, is rational, we cannot interfere with that decision simply because we disagree with it or because we consider that the power was exercised inappropriately."[18]

[25] The requirement of rationality is thus not a particularly stringent test and should also not be conflated with the requirement of reasonableness, even in those cases in which a law or the exercise of a public power infringes a fundamental right. This was confirmed by the Constitutional Court in *Law Society of South Africa and Others v Minister for Transport and Another*: [19]

"[34] It is by now well settled that where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved."

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[18] *Ibid* at para 274.
[19] 2011 (1) SA 400 (CC) ("*Law Society of South Africa"*)

And that –

> "[35] … the requirement of rationality is not directed at testing whether legislation is fair or reasonable. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad."

[26] In the final analysis, the exercise of power, as with the exercise of all forms of State power, is limited by the Constitution. This is one of the cardinal hallmarks of a vigorous democracy. Any exercise of public power that is irrational and therefore breaches the principle of legality being a founding principle of the Constitution, is *ultra vires* and must therefore be found to be unlawful. Ultimately in this matter, our Constitution requires that the regulations, being legislation, be rationally related to a legitimate governmental purpose. If not, they are inconsistent with the rule of law and therefore invalid.[20] It is through this prism that we consider the challenge to the Minister's decision to ban the sale of tobacco products through regulations 27 and 45.

EVALUATION

[27] As such, the question should plainly be whether the Minister, in placing a ban on the sale of tobacco products in response to the COVID-19 pandemic, acted irrationally and in so doing breached the principle of legality.

[28] In determining whether a link exists between the purpose and the means chosen to achieve such purpose, it should be reiterated that the means opted for by the Minister need not be the best nor the most suitable means through which the purpose may have been attained as the discretion to choose suitable means is that of the repository of public power.[21] The exercise of the Minister's public power in this regard is not susceptible to review on the ground of irrationality unless there is no rational link between the chosen

[20] *Pharmaceutical supra* at para 85.
[21] See *Albutt supra* at para 51.

means and the objective for which power was conferred. All that we have to determine as a Court is whether a rational connection between a legitimate governmental purpose (i.e. containing the spread of the virus and saving lives) and the means chosen (i.e. banning the sale of all tobacco products) exists.

[29] It is against this backdrop that the rationality of the Minister's decision to ban the sale of tobacco products has to be determined. If the end sought to be achieved by imposing a ban on the sale of all tobacco products is to "save lives and health and to reduce the potential strain on the health care system", does the ban, as the means adopted by the Minister, assist in achieving the stated objective? Put differently, is there a rational connection between a legitimate governmental purpose (i.e. saving lives and health and preventing the overwhelming of the country's health care facilities) and the means chosen (banning the sale of all tobacco products)? A related question is whether the evidence relied on by the Minister sufficiently justifies her decision to ban the sale of tobacco products and cigarettes.

[30] It is correct that on 23 April 2020, during a televised address to the nation the President seemingly gave the greenlight for the sale of tobacco products by announcing that during level four of the national lockdown, tobacco products would be sold. However, the new regulations, promulgated by the Minister on 29 April 2020, particularly regulation 27, appeared to be at odds with the President's announcement on the sale of tobacco products as these new regulations expressly prohibited the sale of all tobacco products and cigarettes during alert level four.

[31] The Minister explains that the President's statement (which was the same as what was contained in the draft framework) that under level four, tobacco products would be permitted to be sold, was a mere "proposal" which was still subject to further consideration. She explains that the decision to impose the ban on the sale of all tobacco products (notwithstanding the President's announcement) came after careful consideration of not only the public comments and submissions received but relevant medical literature and that this decision was endorsed by the NCCC and Cabinet.

[32] The Minister also confirms that regulation 45 of the level three regulations was a decision separate from the decision to promulgate regulation 27 given that the decision to promulgate regulation 45 was informed by additional medical literature which only came to the Minister's attention after regulation 27 was promulgated and was not a decision arbitrarily arrived at by her despite the President's announcement.

[33] Although FITA endeavours to exploit this seeming difference between the Minister and the President, no basis has been laid upon which to reject the Minister's contention that the President's statement was nothing more than a "proposal" and that the issue was still subject to further consultation and discussion.

RATIONALE FOR THE DECISION

[34] The primary reason provided by the Minister for the decision to promulgate regulation 27 and ban the sale of tobacco products was "to protect human life and health and to reduce the potential strain on the health care system." This in turn will ensure that our healthcare facilities are not overwhelmed to the extent that those in need will be denied access to healthcare. The Minister refers to the general *status quo* that COVID-19 is a worldwide pandemic that has infected and killed hundreds of thousands of people globally.

Healthcare facilities

[35] The Minister also refers to the reality that South Africa faces as a developing country that has a shortfall of essential healthcare resources such as ventilators and ICU facilities. It is estimated in a report from the Department of Health that South Africa has less than half the ventilators that the Health Department estimates will be needed to treat patients at the peak of the COVID-19 virus crisis. It is furthermore estimated that between 25,000 and 70,000 hospital beds would be required for COVID-19 patients at the epidemic's peak, and between 4,000 and 14,000 ICU beds.[22] The Minister asserts that this reality, which is uncontested, places a duty upon her as part of Government to take

[22]https://www.medicalbrief.co.za/archives/sa-has-less-than-half-the-ventilators-it-will-need-says-health-department/

measures that would prevent an unnecessary strain on these scarce healthcare facilities to ensure that COVID-19 virus patients have access to such facilities.

The impact of smoking

[36] As part of her thinking about how she could fulfill her constitutional responsibilities towards dealing with this pandemic, the Minister considered the impact of smoking on the general health system of the country. She points out that, although studies around the potential link between the use of tobacco products and COVID-19 are still being undertaken, from the medical literature that has been consulted by her thus far, the evidence shows that the use of tobacco products increases not only the risk of transmission of COVID-19, but also the risk of developing a more severe form of the disease. The authorities relied on by the Minister to this end conclude that smoking is a risk factor for progression of COVID-19, with smokers having higher odds of COVID-19 progression than non-smokers. The evidence further shows that smokers are 1.4 times more likely than non-smokers to have severe symptoms and are 2.4 times more likely to be admitted to ICU, and to require medical ventilation or die when compared to non-smokers. The Minister submits that these are serious figures which she, as a responsible decision-maker, cannot in good conscience ignore.

[37] The Minister further states that available studies conducted by the World Health Organization ("the WHO") also suggest that — though not as yet conclusive as research is ongoing — smokers are at a higher risk of developing severe diseases and death.[23] In the 11 May 2020 report conducted by the WHO, it is stated that "tobacco smoking is a known risk factor for many respiratory infections and increases the severity of respiratory diseases." The same report mentions that a review of studies by public health experts convened by the WHO found that smokers are more likely to develop severe disease with COVID-19 when compared to non-smokers. This report also confirms that the COVID-19 virus "is an infectious disease that primarily attacks the lungs" and that "smoking impairs lung function making it harder for the body to fight off coronaviruses and other

[23] The World Health Organization is a specialized agency of the United Nations responsible for international public health.

diseases." This report also states that smokers with conditions such as cardiovascular diseases, cancer, respiratory disease and diabetes are at a higher risk of developing severe illness when affected by the COVID-19 virus.

[38] Referring to a further report dated 26 May 2020, the WHO records that "the available evidence suggests that smoking is associated with increased severity of disease and death in hospitalized COVID-19 patients." Relying on expert reports and opinions from various experts, the Minister submits that the overall consensus is that there is a "clear association" between cigarette smoking and poor outcomes in COVID-19 and that "the weight of the available evidence confirmed that smoking was associated with severe COVID-19 disease notwithstanding outlier studies that found otherwise." On the authority of the various expert views and opinions, the Minister concludes that smoking is a risk factor for the progression of COVID-19 with smokers having up to twice the odds of COVID-19 progression.[24]

[39] The Minister also refers to the findings by the Human Sciences Research Council ("the HSRC"), in terms of which it is stated that, assuming that 1% of South Africa's estimated 8 million smokers were infected by the COVID-19 virus and 5% of these required ICU or high care facilities, the healthcare system would not be able to cope. The applicant did not engage with this assertion, preferring to characterize it as unproven and fanciful but proffering no factual foundation for this assertion.

[40] FITA takes issue with the expert reports, medical literature and other documentation referred to by the Minister contending that such material is inadequate and does not support her decision to ban the sale of tobacco products. FITA further contends that the Minister ignored material that propounded a view contrary to that relied upon by her. In this regard FITA contends that the Minister disregarded a whole body of empirical evidence that negated her position of accelerated COVID-19 virus progression

[24] The expert views and opinions relied on by the Minister are sourced from – Professor London, a Professor at the School of Public Health and Family Medicine at the University of Cape Town; Professor Nyamande, the Head of the Department of Pulmonology at the Nelson R Mandela School of Medicine; and Dr Egbe, the Head of the Tobacco Control Unit of the South African Medical Research Council.

amongst smokers. FITA would therefore have this Court undertake an exercise that entails evaluating each side's material and then express an opinion as to which material is more cogent and persuasive than the other, especially relating to the question whether there is a conclusive link between smoking and COVID-19 progression.

[41] The exercise that FITA would have us undertake is not countenanced by the principle of legality. The question before us is not whether the evidence; medical literature and research relied on by the Minister is so cogent and conclusive as to establish a substantive or direct link with higher COVID-19 disease progression in smokers when compared with non-smokers. Our task is to determine whether such evidence provides a sufficient rational basis for the Minister to outlaw the sale of tobacco products and cigarettes, as a means of curbing the COVID-19 virus spread and preventing a strain on the country's health care facilities. Although a legitimate governmental purpose may exist, if the evidence relied on does not speak to the objective sought to be achieved by imposing the ban, the exercise of public power through the tobacco ban may very well be arbitrary and stand to be set aside. It is not our task, in line with the principle of legality, to undertake an in-depth comparison as to which of the parties' medical research reports and opinions are better or more cogent than that of the other.

[42] We hold the view that a vigorous attempt to contain the spread of the virus at all costs had to be made especially bearing in mind the high COVID-19 mortality rates and the fact that, as a developing country with limited resources as well as an already overwhelmed healthcare system, South Africa is ill-equipped to survive the full brunt of the pandemic at its peak if no concerted efforts are made to contain the virus. In line with its constitutionally mandated duties to preserve life and provide adequate health care, the State was under a duty to adopt measures to ensure that the already fragile healthcare system was not overwhelmed even further.

[43] In our view, the medical material and other reports, inclusive from the WHO, considered by the Minister, though still developing and not conclusive regarding a higher COVID-19 virus progression amongst smokers compared to non- smokers, provided the

Minister with a firm rational basis to promulgate regulations 27 and 45, outlawing the sale of tobacco products and cigarettes. This in our view is a properly considered rational decision intended to assist the State in complying with its responsibilities of protecting lives and thus curbing the spread of the COVID-19 virus and preventing a strain on the country's healthcare facilities.

[44] A further aspect relied upon by the Minister is the conclusion reached in the HSRC report to the effect that, since the introduction of the lockdown and outlawing the sale of tobacco products, 88% of smokers had not been able to buy cigarettes during level five of the lockdown which is indicative of the fact that the ban was effective in reducing access to cigarettes and in turn, use. Although a study conducted by the University of Cape Town ("the UCT study") and relied upon by FITA shows that 90% of smokers had purchased cigarettes during lockdown, even this report indicates that a percentage of smokers have given up smoking. As such, both studies relied on indicate that, overall, the ban on tobacco sales has been effective in reducing access to cigarettes and as a result, effective in reducing smoking overall. Given the link between the adverse effects of COVID-19 and smoking, it can be said that the objective of containing the virus through imposing the ban on the sale of tobacco products was achieved.

Better means to achieve the objective?

[45] Could the Minister have tendered "better, more convincing" and "less limited" evidence? Perhaps.[25] But this is not the question before us.[26] As pointed out by the Minister in her papers, it is not for this Court to determine which of the various studies and reports are "better evidence" and could have led to the adoption of "better means". The question is rather whether the evidence considered by the Minister as it stands provides a rational basis for the prohibition. Put differently, the question before the Court is rather, having regard to the evidence considered and relied on by the Minister, could it

[25] Given that COVID-19 is a novel virus and research regarding the association between smoking and Covid-19 is still evolving, it would be understandable that "better, more convincing" evidence cannot at present be tendered.

[26] *Law Society of South Africa supra* at paras 34-5.

be said that there is enough to conclude that the prohibition placed on the sale of tobacco products is justified? In our view the answer is clearly in the affirmative.

[46] We must also point out at this juncture the relevant and important principle that where the decision in question relates to technical subject matter, a Court must exercise a measure of judicial deference when assessing whether the impugned decision is irrational.[27] As a separate and distinct branch of government, it is important for the judiciary to remain cognizant of the nuanced role that it plays as a custodian of the law and not overreach and thus exceed the limits of judicial authority so as to not offend the doctrine of separation of powers. In *Van Rooyen v The State and Others (General Council of The Bar of South Africa Intervening)*[28] the Constitutional Court held that —

> "[48] In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the Judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the Judiciary, in its comments about the other arms of the State, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the Judiciary and one another. They should avoid gratuitous reflections on the integrity of one another."

[47] In *Minister of Health v Treatment Action Campaign (No 2)*[29] the Constitutional Court similarly held:

> "[38] Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation... In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

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[27] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) ("*Bato Star*") at para 48.
[28] 2002 (5) SA 246 (CC).
[29] *Minister of Health and Others v Treatment Action Campaign and Others II* 2002 (5) SA 721 (CC) ("*Treatment Action Campaign*").

[48] It is therefore important for the Court, in considering the rationality of the decision taken by the Minister, to bear in mind that the rationality standard does not mean that as Courts we can or should substitute the executive's decision for what we would prefer or view as appropriate. Rather, it is important to be guided by the fact that —

> "[56] The discretion to choose suitable means is that of the repository of public power. The exercise of that discretion is not susceptible to review on the ground of irrationality unless there is no rational link between the chosen means and the objective for which power was conferred."[30]

[49] The Minister states that she did consider alternative measures such as reduced trading hours for the sale of tobacco products similar to what was done in the case of alcohol. She concluded that reducing the trading hours for tobacco products was ultimately considered to not have the same efficacy given that persons using tobacco products remained at risk of contracting a more severe form of COVID-19 regardless of the trading hours thereby increasing the strain on the healthcare system.

[50] The question before us is not so much whether the Minister could have adopted less restrictive means. The question that is before us is rather whether the means used were rational and not whether other or better-suited means could have been adopted by the Minister. We find that the argument on potentially less restrictive measures tendered by FITA is misplaced given that in terms of rationality review, the question is not whether better, or less restrictive means could have been adopted but rather whether the means that were adopted forged a rational connection with the intended end.[31] We find that here too, the means adopted do indeed forge a rational connection with the intended end. Although much was made by FITA regarding the limited nature of the Minister's evidence, in terms of the test for rationality, the Minister's evidence does not have to be infallible.

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[30] *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) ("*Minister of Constitutional Development*").
[31] See *Albutt supra* at para 51.

The same can be said in response to the contention that the ban on the sale of tobacco products was not effective given that not all smokers ceased smoking as a result of the ban. Again, the means adopted by the Minister in ensuring that smokers ceased smoking may not have been the most effective or the best means possible but, the test for rationality is not concerned with this. In terms of the rationality inquiry, there merely needs to be a rationally objective basis justifying the conduct of the Minister. Once this hurdle is overcome, the conduct of the Minister is deemed rational. As it was pointed out during oral argument on behalf of the Minister, her task involved striking a balance between a number of complex economic, medical and social considerations in order to protect the public from the devastating effects of the pandemic and this entailed making informed policy choices, which in our view, she did in this matter.

Objective rationality

[51] FITA contended, as pointed out above, that the Minister, in arriving at the decision to impose the ban, failed to consider all relevant and competing "empirical" evidence. FITA contends that the Minister "simply cherry-picked that which suits her agenda but which has no probative value and disregarded much that is relevant." In particular, FITA argues that the Minister failed to consider a considerable body of empirical medical literature that concludes that there is no evidence of a link between smoking and COVID-19 as well as that which shows an inverse link i.e. that nicotine usage can protect smokers from the COVID-19 virus.

[52] In her answering affidavit the Minister explains that she considered the evidence FITA relies on, assisted by her experts. According to the Minister none of these documents provide a basis that there is no evidence of a link between smoking and the COVID-19 virus. The Minister attached an affidavit from an expert which provided a "detailed rebuttal" of the opinions expressed in the documents FITA relies on. She also says that she discounted these reports as they suffered from a number of limitations such as inadequate reporting; unreliable sources; poor data quality, sampling bias as well as being of a self-publishing nature as opposed to peer reviewed material. She also referred

to a report from the WHO dated 11 May 2020 which cautioned against "amplifying unproven claims that tobacco or nicotine could reduce the risk of COVID-19".

[53] As such, having had regard to the Minister's submissions, we are satisfied that in arriving at the decision to impose the ban, the Minister considered all of the relevant medical literature — even evidence that may have been at odds with the view linking high COVID-19 virus progression amongst smokers when compared with non-smokers. This fortifies our view that the objectivity requirement has been fulfilled. .

AUDI ALTERAM PARTEM

[54] Counsel for FITA contended that the Minister has failed to allow for a proper public consultation process before making a decision to prohibit the sale of tobacco products. It is argued that the ban seriously restricts the freedoms of millions of South Africans, and has far-reaching implications, yet the approach adopted by the Minister reveals a trivialization of those very grave considerations and a reliance being placed on materials which have no real probative value. FITA's submission is that the total disregard for the principle *audi alteram partem* demonstrated by the Minister is indicative of the manifest irrationality in the decision-making process.

[55] In support of these submissions, Mr. Subel referred to the decision in *Administrator, Transvaal and Others v Traub and Others*:[32]

> "The maxim express a principle of natural justice which is part of our law. The classic formulations of the principles state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter see *Chikane's* case supra at 379G), unless the statute expressly or by implication indicates the contrary".

[32] 1989 (4) SA 731 (A) at 748F-H.

[56] Counsel further referred to a further explication of this principle in *Doctors for Life International v Speaker of the National Assembly and Others.*[33] The Constitutional Court held:

> "[205] Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in a formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy and thus the acceptance of legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that Government should be open, accessible, accountable and responsive. And this enhances democracy".

[57] FITA, with specific regard to the exercise of "executive action", referred to the decision in *Albutt,* where the Constitutional Court held that in some cases, the exercise of public power might be irrational if the decision-maker does not follow a fair procedure and hear both sides before making a decision.[34] On the basis of these legal principles, FITA argues that it was denied *audi* and therefore that the promulgation of the regulations is procedurally unfair.

[58] Counsel for the Minister, Mr. Moerane, submitted that FITA appears to be confused regarding the standard of review in that it refers to cases concerning the requirement of public participation in the legislative process and the requirement of *audi* in administrative decision-making, and then seeks to apply these to a case concerned with executive action. This, he argued, FITA cannot do. Invoking the decision in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*,[35] Mr. Moerane submitted that executive action carries no general obligation to consult the public:

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[33] 2006 (6) SA 416 (CC).
[34] *Albutt supra* at para 49.
[35] 2019 (3) SA 30 (CC) (*Law Society*).

> "[87] Public participation in the law-making process is a requirement, specifically provided for in our Constitution that must be met by our law-making institutions. But participatory democracy is not provided for in similar terms in relation to the exercise of presidential or executive power. The negotiation and signing of international agreements like the impugned Protocol is an exercise of executive power. And there is no legal exercise of executive power. And there is no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making processes as proposed. Desirable though it may be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement. It is always open to the Executive, whenever it deems it fitting to do so, to involve the public. But a failure to do so, however enriching to the decision making process it might otherwise have been, can never rise to the level of a failure to fulfil a constitutional obligation to consult the public."

[59] Mr. Moerane also submitted that even if there were such a requirement, the Minister in fact consulted with the public and FITA had made submissions in support of its position, which were considered in the decision-making process. He further submitted that FITA can also not claim that its procedural rights were undermined by the change in position as this submission does not take into account the Minister's explanation that she has gone to lengths to point to the comments she received especially regarding a possible ban on the sale of tobacco products including comments received from FITA.

[60] In our view, FITA's contention that the process followed by the Minister was flawed is ill-conceived and must therefore be rejected. In this regard, the Minister is correct when she points out that given that executive conduct is only required to be procedurally rational and not fair, the fact that FITA alleges that it was not given an opportunity to be fairly heard is immaterial. All that is required is that the process leading up to the promulgation of the regulations is rationally related to achieving the purpose sought to be achieved through the regulations. In this regard, we agree with the Minister. In *Masetlha v President of the Republic of South Africa and Another*[36] the Constitutional Court found –

[36] 2008 (1) SA 566 (CC).

> "[78] The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement."

[61] In *Law Society*[37] Mogoeng CJ (for the majority) had the following to say on the nuanced difference between procedural fairness and procedural rationality in the exercise of public power –

> "[64] Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power."

Other considerations

[62] FITA also contended that the Minister failed to consider a number of other relevant factors such as the economic impacts of the prohibition; the potential health and psychological impact on smokers as well as the illicit trade in cigarettes. On the contention that she failed to consider the economic impacts of the prohibition, the Minister submits that the economic impacts of the prohibition were indeed considered but that it was decided that any impact that the prohibition may have on the economy would be outweighed by the harm posed to life and the healthcare system by allowing the continued sale of tobacco products. The Minister also pointed out that if tobacco use did indeed give rise to more people with a more severe form of COVID-19, a failure to impose the ban would have in turn resulted in additional healthcare costs for the State.

[63] As regards to the contention that she failed to consider the psychological and other effects on people when they suddenly stopped smoking, the Minister sets out in sufficient detail the medical facilities that are available to assist smokers in dealing with the effects

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[37] *Supra.*

of smoking cessation. This was not disputed by FITA. FITA's contention in this regard is therefore rejected.

[64] FITA also argued that the fact that only South Africa and Botswana have banned the sale of tobacco products in dealing with the pandemic is indicative that no proper consideration was given to the necessity of the prohibition. The argument was that as many other countries had not banned the sale of tobacco products, this showed that this was an ill-conceived decision that was unwarranted and especially that there was widespread support for this application. As argued on behalf of the respondents, decisions of other countries have no impact on decisions about what happens in this country. The decision to ban tobacco products was, as explained by the Minister, taken with reference to the South Africa context and its preparedness to deal with the COVID-19 virus. It is of no consequence nor does it retract from the firm rational basis underpinning the ban, that other countries have not adopted similar measures.

ILLICIT TRADE OF TOBACCO PRODUCTS

[65] Much was made of the thriving trade of illicit tobacco products as a result of the ban. In this regard FITA contended that, rather than preventing smoking, the ban has rather had the effect of encouraging trade in illicit cigarettes. According to FITA, the inflated prices of illicit cigarettes has resulted in people not following social distancing recommendations as more people in informal settlements or "townships" are sharing cigarettes which in turn defeats the purpose of the ban. FITA further asserted that this unintended consequence of the ban has resulted in "tobacco bootleggers" garnering millions in revenue through illegal trade whilst tobacco farmers, producers and manufacturers — who are all fully compliant with the law — bear the brunt of the prohibition and suffer financially.

[66] Rather than preventing people from smoking and in so doing curbing the spread of the virus, FITA submits that the ban has resulted in people buying illicit products from criminals. As such, given that smokers are still able to access cigarettes — albeit illegally — and in so doing the rise of criminality in society is encouraged, FITA submits

that this together with the knock-on effects of the ban, proves that the ban is not feasible and has not been effective in preventing people from smoking.

[67] In response, the Minister refers to the HSRC report. We have already referred to this report and the Minister's reliance on this report. In brief, the Minister holds the view that, based on this report, the ban was effective in reducing access to cigarettes and as a result, the use thereof. Even if the ban has not resulted in every smoker in the country stopping the habit, this does not render the ban irrational given that the test for rationality is not whether the means chosen were the best possible means but rather whether the chosen means, being the ban, could rationally achieve the objective.

[68] Whilst it is correct that the ban has not resulted in each and every smoker in the country quitting in an effort to contain the virus, it should be borne in mind that when the Minister took the decision to ban the sale of tobacco products, her objective was not to stop every smoker from continuing with smoking, it was to alleviate the potential devastating burden on the already constraint healthcare system.

[69] Our view is that the reality of the illicit trade of tobacco products is not fatal to the rationality of the ban given that the Minister only needs to show that the means chosen to achieve the intended objective were reasonably capable of achieving it. In fact, the continuing illicit trade in tobacco products does not negate the overwhelming view that smoking affects the respiratory system and renders smokers more susceptible than non-smokers to the heightened progression of the COVID-19 virus especially amongst persons with comorbidities such as diabetes etc.

[70] We once again reiterate that an important consideration that should not be lost sight of is that the means chosen by the Minister, i.e. the ban, need not be the most effective nor the best suited. Ultimately, the question remains whether there is a rational connection between the ban, as the means preferred, and the saving of lives through curbing infections and preventing a strain to the country's healthcare facilities. This, we are satisfied, the Minister has been able to demonstrate.

EX POST FACTO JUSTIFICATION

[71] FITA's contention is that the record and the reasons are "*replete with material"* obtained after the date upon which the regulation 27 was promulgated, and such is a contrived *ex post facto* justification for the ban. In this regard FITA's counsel relied on *Turnbull-Jackson v Hibiscus Coast Municipality and Others (eThekwini Municipality as amicus curiae)* [38] where the Constitutional Court held:

> "[37] Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function. . ."

[72] The high-water mark of FITA's case on this point is that evidence was included in the Minister's answering affidavit in support of the prohibition which had been gathered after regulation 27 had already been promulgated. Mr. Moerane argued that reference to additional material was necessitated by FITA's own action in bringing a new review in its supplementary founding papers to regulation 45. It was accordingly necessary, with reference to regulation 45, for the Minister to attach material to the answering affidavit that was considered after regulation 27 had been promulgated, in deciding whether to continue the prohibition into level three.

[73] We agree that the inclusion of additional material in the answering affidavit does not amount to an *ex post facto* attempt to justify the prohibition. FITA elected to review regulation 45 without affording the respondents an opportunity to file a record or reasons. It was accordingly necessary, with reference of regulation 45, to attach material to the answering affidavit that was considered after regulation 27 had been promulgated.

ARE REGULATIONS 27 AND 45 *ULTRA VIRES?*

[74] In the supplementary founding affidavit, FITA makes the statement that the prohibition of the sale of tobacco products, in regulation 27 and 45, is "at the most

[38] 2014 (6) SA 592 (CC).

fundamental level" *ultra vires* and that these regulations "purport to legislate beyond" the powers vested in the Minister. There is no further elaboration in the supplementary founding affidavit regarding what this assertion means. In a nutshell, other than this bare contention, FITA doesn't provide any basis in that affidavit to make out a case based on these regulations being *ultra vires*.

[75] FITA took up this issue further in its replying affidavit and heads of argument arguing that the prohibition of tobacco sales is not authorized by section 27, particularly section 27(2) and (3) and that section 27(2) does not specifically empower the Minister to make regulations concerning the suspension of the sale of cigarettes and tobacco products. FITA submits with reference to section 27(2)(i) of the Act which provides for "the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken area", that, because no similar power is granted to the Minister to issue regulations in respect of the sale of cigarettes and tobacco products, the regulations are *ultra vires*. The high-water mark of FITA's argument therefore seems to be, relying on the expression *unius est exclusion alterius*,[39] that section 27(2) of the Act does not empower the Minister to impose a "ban" on the sale of cigarettes and tobacco products. FITA further argues that the Minister bears the onus to show that regulations 27 and 45 are necessary "for the attainment of the objects identified in section 27(2). FITA makes the case that regulations 27 and 45 are restrictions on otherwise lawful activities and for this reason, the Minister bears the onus to show that they are necessary, i.e. that the ban is necessary. Unfortunately, FITA has not made out this case in the supplementary founding affidavit. However, despite this glaring omission, we nonetheless briefly deal with these submission as they were properly ventilated before us.

[76] We have already referred to the principle that the exercise of power must be authorized by law. In the present matter the Act broadly provides for the legislative

[39] The application of this principle was explained in *Die Bestuursraad van Sebokeng & 'n Ander v TIelima* 1968 (1) SA 680 (A) as follows: "For instance, if legislation states the grounds upon which a licence may be refused, it may not be refused on any other grounds, an approach which is in conformance with the rule inclusion unius est exclusion alterius."

framework within which the State[40] must deal with and implement measures aimed at preventing, reducing or mitigating the severity and consequences of a disaster.[41]

[77] Section 27(2) of the Act affords the Minister the power to promulgate (after consultation with the responsible Cabinet Minister) regulations concerning those issues listed in subparagraphs (a) – (o). The Minister's powers under section 27(2) are constrained by the provisions of section 27(3) of the Act which states that the Minister may exercise those powers "only to the extent that it is necessary for the purpose of" any of the listed outcomes in this section. The Minister's powers must therefore be sourced within the confines of this Act. Any constraints on the exercise of discretionary powers is likewise a matter of construction of the empowering statute.[42]

[78] The Minister confirms that the source of her power to promulgate regulations 27 and 45 lies in section 27(2) of the Act. She principally relies on two sections: In terms of section 27(2)(f) she may make regulations concerning "the movement of persons and goods to, from or within the disaster-stricken or threatened area"; and in terms of section 27(2)(n) she may make regulations concerning "other steps that may be necessary to prevent an escalation of the disease, or to alleviate, contain and minimise the effects of the disaster". She submits that not only do regulations 27 and 45 both fall within the ambit of these subsections, but that these regulations are "necessary" to prevent an escalation of the pandemic and to alleviate, contain and minimise the effects of the pandemic as required by subsection (n) of section 27(2) of the Act.

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[40] Section 25 of the Act.
[41] Preamble of the Act.
[42] See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* ; 2007 (1) SA 343 (CC): "[68] This is a matter of the application of the rule of law and the principle of legality which flows from the value of the rule of law enshrined in s 1 of the Constitution. This Court has held that '[t]he exercise of all 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 requires that power should have a source in law, is applicable whenever public power is exercised. Private power, although subject to the law and, in certain circumstances, the Bill of Rights, does not derive its authority or force from law and need not find a source in law. Public power, on the other hand, can be validly exercised only if it is clearly sourced in law."

[79] Dealing firstly with the *maxim unius inclusio est alterius exclusio* argument: Although this principle has been applied in our law on occasion, it would seem it has been applied with "great caution".[43]

[80] This much is clear from the decision in *Administrator of the Transvaal and Others v Zenzile and Others*[44] where the Appellate Division (as it then was) held that:

> "… the *maxim unius inclusio est alterius exclusio*. It is not a rigid rule of statutory construction… and it must at all times be applied with great caution…"

[81] Similarly, in *National Director of Public Prosecutions and Another v Mohamed NO and Others*[45] the Constitutional Court warned against the rigid application of this principle:

> "[40] Although there is no express reference thereto in its judgment, the High Court clearly relied implicitly on the interpretative maxim that the 'specific inclusion of one implies the exclusion of the other', in coming to this conclusion. This maxim has been described as 'a valuable servant, but a dangerous master'. 'It is not a rigid rule of statutory construction'; in fact it has on occasion been referred to as a 'principle of common sense' rather than a rule of construction, and 'it must at all times be applied with great caution'.
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> [41] There are circumstances when the inclusion of a particular provision occurs because of excessive caution, or where the Legislature is 'either ignorant or unmindful of the real state of the law', or for some other reason that does not warrant the inference that its inclusion in one provision means that it was intended to be excluded in the other provision."

[82] We are not persuaded, in the context of the Act and the general purpose thereof, that the principle of *unius inclusio est alterius exclusio* should be invoked in support of the contention advanced by FITA: By their very nature, natural disasters may often result in unforeseen consequences requiring a government to implement measures not

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[43] In *S.A. Estates and Finance Corporation Ltd*. v *Commissioner for Inland Revenue*, 1927 AD 230 at p 236 the court similarly held that "the maxim expressio unius est exclusio alterius is one which must at all times be applied with great caution".
[44] 1991 (1) SA 21 (A) ("*Administrator of the Transvaal"*) at 37G – H.
[45] 2003 (4) SA 1 (CC) ("*Mohamed"*).

necessarily foreseen at the time legislation was drafted to manage and contain a state of natural disaster. The COVID-19 pandemic unfortunately bears testimony to this: This pandemic has created an extraordinary situation unlike anything that this country, and in fact the entire world, has seen in recent history. Due to the newness of the disease, Governments are struggling to understand the effects of the disease. Medical experts likewise are struggling to understand why certain patients are more susceptible than others to the ravaging effects of the disease. It is in the context of the unpredictable nature of the disease that Governments must take measures that are "necessary" to protect the public and to deal with the destructive effects of the disease. To apply the maxim of *inclusio est alterius exclusio* in the context of section 27(2) of the Act will not, in the words of the Constitutional Court in *Mohamed* be "a valuable servant" but will, in our view, be "a dangerous master".[46]

[83] The legislature could therefore not possibly have contemplated every sort of disaster that may occur and attempt to confer specific powers on the Minister relevant to apply to all conceivable disasters. This is why section 27(2)(n) of the Act empowers the Minister to adopt regulations regarding "other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster". This section is therefore, in our view, sufficiently wide enough to serve as a source empowering the Minister to take other steps or measures outside of those specifically listed in section 27(2) but only to the extent that they "may be necessary" to deal with the containment or minimizing of the effects of the disaster (in this instance the COVID-19 pandemic).

[84] As to the argument that the regulations are not necessary, the principal point of departure between the parties appears to be disagreement on whether the regulations were indeed "necessary" and what the definition of necessary in this context would be. FITA contends that the meaning of necessary in terms of sections 27(2) and (3) is "indispensable" or "absolutely necessary" whereas the Minister submits that the meaning of necessary in this context should only be limited to "reasonably necessary". From this

[46] *Ibid.*

it can be gathered that the meaning of necessary contended for by FITA would entail the highest threshold meaning that the Minister would have to show that the enactment of the regulations in terms of the Act was "strictly necessary" as opposed to only "reasonably necessary".

[85] We are persuaded by the Minister's submission that FITA's argument is misconceived as it ignores the context under which the regulations were promulgated. Given that an unprecedented disaster had just hit South Africa requiring swift and effective action from the State, it would be illogical to require the Minister to meet a higher threshold (that is "strictly necessary") and require her to jump through proverbial hoops when the enactment of the regulations was for a laudable purpose and was, in the literal sense, a matter of life and death. Such a view would in turn undermine the Minister's attempts at meeting her constitutionally mandated duties of promoting and protecting the right to life and the right to access to healthcare. In our view the necessity requirement is met once it is shown that there is a rational connection between the ban on tobacco sales and curbing the scourge of the COVID-19 virus in an attempt to prevent a strain on the country's healthcare facilities, a finding which we have already made.

[86] Moreover, having regard to context, our view is that reliance on the decision in *Pheko and Others v Ekurhuleni Metropolitan Municipality*[47] by FITA for the interpretation of "necessary" as found in section 27(3) is misplaced. Firstly, *Pheko* concerned a disaster that was confined to the Bapsfontein Informal Settlement and was not a disaster on a national and global scale as is the case in this matter. Hence the evictions and demolition of the residents' homes were said to have been brought in terms of section 55 of the Act by the Ekurhuleni Metropolitan Municipality. Section 55 is headed "Declaration of *local* state of disaster" as opposed to section 27 which is headed "Declaration of *national* state of disaster". This is quite telling because, when a local state of disaster is declared and evictions and demolitions are being contemplated, it would seem that an organ such as

[47] 2012 (2) SA 598 (CC) ("*Pheko*").

the Municipality would have to show that the eviction and demolition of the homes of residents is “strictly necessary” to avert the disaster.

[87] The Court in *Pheko* was essentially concerned with the interpretation of the term “evacuation”. In this context it is understandable that the Court focused on the meaning of the term in the section. This was for the reason the Municipality destroyed dwelling huts of residents and stated that it was necessary that it do so in evacuating the affected residents. Destruction of the residents’ homes was clearly not strictly necessary and was a clear violation of their human rights. However, in this case, given the global and national (and not local) scale of the disaster, the enactment of regulations in an attempt to avert the COVID-19 disaster in our view would only have to be shown to be “reasonably necessary”. In the grips of a national (and global disaster) that has astronomic fatal consequences, the stakes are quite high, and it stands to reason that it was important that the Minister did whatever was reasonably necessary in compliance with her constitutional obligations and faced with a disaster of this magnitude, to save lives in particular. For this reason our view is that the promulgation of regulations 27 and 45 passed the required threshold of section 27.

CRIMINALISING CONDUCT

[88] Section 31(2) of the level four regulations makes it an offence to not comply with or to contravene *inter alia* regulation 27 (providing for a sentence of imprisonment up to 6 months or a fine or both). Section 48(2) of the level three regulations makes it an offence to not comply with or to contravene *inter alia* regulation 45 (providing for a sentence of imprisonment of up to 6 months or a fine or both).

[89] A new case was made out in FITA’s heads of argument. Mr. Subel submitted that in considering the rationality of the ban on cigarettes and tobacco products, the Court must be cognizant of the criminal sanction which it carries, as the regulations that create offences unlawfully criminalise the sale of tobacco products.

[90] By contrast Mr. Moerane submitted that the regulations prohibiting the sale of tobacco products are distinct from the regulations that make the contravention of the prohibition regulations an offence ("offence creating regulation"). It is also argued that FITA does not challenge the offence-creating regulations; its challenge is only to regulations 27 and 45. Neither regulations creates an offence nor criminalises conduct.

[91] We agree that a challenge of the legality of the offence creating regulations is not before the Court. FITA's case is not whether the Minister, acting under Parliament's delegated authority in terms of an Act, has the power to create new offences under the Act. In any event, section 27(4) of the Act provides that the regulations made under section 27(2) may include "regulations prescribing penalties for any contravention of the regulations", and section 59(3) says that the Minister may prescribe a penalty of imprisonment for a period not exceeding six months or a fine "for any contravention of, or failure to comply with a regulation". FITA has therefore not made out a case in this regard.

CIGARETTES AND TOBACCO PRODUCTS ARE "ESSENTIAL GOODS"

[92] FITA submits that the first category of declaratory relief, *viz* that cigarettes and tobacco products are "essential goods" relates to the regulations published on 25 March 2020 in which there had not as yet been an express prohibition on the sale of cigarettes and tobacco products. It is submitted that during that period and prior to regulation 27 being published, these products qualified as "essential goods", and were therefore not prohibited by the regulations of 25 March 2020 (the initial regulations).

[93] It is argued that cigarettes and tobacco products ought to be viewed in the same way as those products that were considered to be essential goods under the initial regulations. FITA further submits that it is common cause that cigarettes and tobacco products are addictive and the withdrawal from these products could lead to serious physical, psychological and emotional harm. This is aggravated by the freely available illicit, non-regulated products that are most hazardous to health. In this respect, FITA contends that the legal regulated products are not dissimilar from medication, which was understandably permitted under the initial regulations.

[94] In terms of regulation 11A, “essential goods” meant goods referred to in paragraph A of Annexure B, which sets out the following list of “essential goods”:

> *“1. Food*
>
> *(i) Any food product, including non-alcoholic beverages;*
>
> *(ii) Animal food; and*
>
> *(iii) Chemicals, packaging and ancillary products used in the production of any food product.*
>
> *2. Cleaning and Hygiene Products*
>
> *(i) Toilet paper, sanitary pads, sanitary tampons, condoms;*
>
> *(ii) Hand sanitisers, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment; and*
>
> *(iii) Chemicals, packaging and ancillary products used in the production of any of the above.*
>
> *3. Medical*
>
> *(i) Medical and Hospital supplies, equipment and personal protective equipment; and*
>
> *(ii) Chemicals, packaging and ancillary products used in the production of any of the above.*
>
> *4. Fuel, including coal and gas.*
>
> *5. Basic foods, including airtime and electricity”.*

[95] In interpreting the ambit of “essential goods”, the level five regulations must be interpreted in context, and in light of their purpose. An interpretation that falls within

constitutional bounds must be preferred to one that does not.[48] Tobacco products did not fall within the ambit of "essential goods" and their sale was prohibited. Tobacco products are plainly not food, cleaning and hygiene products, fuel and clearly not medical products. They would constitute "essential goods" only if they could be considered 'basic goods' akin to airtime and electricity.

[96] It is in this context that we must consider the argument that cigarettes should be categorized as "essential goods". The categories of goods determined to be "essential" include food, cleaning and hygiene products, medical and basic goods. The interpretive principle of *euisdem generis* —that the meaning of general words is determined when they are used together with specific words —finds application here. The general term "essential goods" is qualified by the specific subcategories of goods listed in the regulations, and the general subcategories are, themselves, qualified by the specified items listed thereunder. It is clear that the essential goods listed share the common quality of being life-sustaining or necessary for survival (such as food and medicine) or necessary for basic functionality (such as airtime and fuel). Cigarettes and related tobacco products do not, by their nature, fall into the same category as goods which are life-sustaining or necessary for basic functionality. An interpretation of the regulations to expand to such a meaning would be insupportable in light of the purpose of the legislation and the nature of essential goods provided for in the regulations. Simply because a good is addictive it does not necessarily follow that it is therefore necessary for human survival or required for basic human functionality.

[97] We agree with the Minister's submission that seen in the proper context, the level five regulations cannot be interpreted as including tobacco products within the ambit of "basic goods". Many products and services were prohibited during the lockdown period in so far as they were defined as non-essential. Many industries were restricted as a goal of curbing and managing the pandemic. Differential or preferential treatment for tobacco products and /or the tobacco industry therefore cannot be countenanced as tobacco products were simply not considered to be essential.

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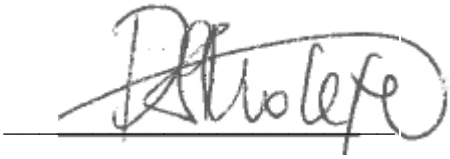
[48] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[98] FITA's argument that cigarettes ought to have been considered "essential" because they are additive has no merit. The fact that a substance is addictive does not render it essential. We therefore find no basis on which to interpret the level five regulations as permitting the sale of tobacco products.

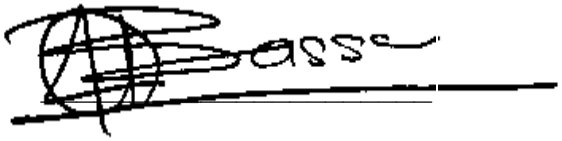
[99] In the circumstances, the following order is granted –

1. The application by Fair-Trade Independent Tobacco Association is dismissed with costs, such costs to include the costs of three counsel.

MLAMBO JP



MOLEFE J



BASSON J

Date of hearing: 10 June 2020

Date of judgment: 26 June 2020

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