



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 538/2020

In the matter between:

**MINISTER OF CO-OPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

**APPELLANT**

and

**REYNO DAWID DE BEER**

**FIRST RESPONDENT**

**LIBERTY FIGHTERS NETWORK**

**SECOND RESPONDENT**

**COUNCIL FOR THE ADVANCEMENT OF  
THE SOUTH AFRICAN CONSTITUTION**

**FIRST AMICUS CURIAE**

**HOLA BON RENAISSANCE FOUNDATION**

**SECOND AMICUS CURIAE**

**Neutral citation:** *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (Case no 538/2020) [2021] ZASCA 95 (1 July 2021)

**Coram:** NAVSA, PONNAN AND MBATHA JJA AND ROGERS AND UNTERHALTER AJJA

**Heard:** 26 May 2021

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 1 July 2021.

**Summary:** Regulations promulgated under s 27(2) of the Disaster Management Act 57 of 2002 – regulations challenged as unconstitutional and irrational – virtual hearing challenged as contrary to open justice – need to plead a constitutional challenge with specificity and clarity – rationality, arbitrariness and equality challenges distinguished – rationality review must be circumscribed – high court order vague and unenforceable – unfounded and scandalous attacks on courts unacceptable.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Davis J sitting as court of first instance):

- 1 The appeal is upheld.
- 2 The high court's orders are set aside and replaced with the following order:  
'The application is dismissed.'

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## JUDGMENT

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### **THE COURT:**

**Navsa, Ponnan and Mbatha JJA and Rogers and Unterhalter AJJA**

### **Background**

[1] This is an appeal against an order of the Gauteng Division of the High Court, Pretoria (Davis J), declaring almost all of the regulations that the appellant, the Minister of Cooperative Governance and Traditional Affairs (the Minister), promulgated under s 27(2) of the Disaster Management Act 57 of 2002 (the Act), unconstitutional and invalid. The first respondent is Mr Dawid de Beer, who is a member and president of the second respondent, Liberty Fighters Network (the LFN), a non-governmental organisation, which acts primarily as a tenants' association. Mr de Beer and the LFN engaged in the litigation culminating in the present appeal in their own interests as well as in the interests of members of the LFN and, purportedly, in the public interest. The Hola Bon Renaissance Foundation (HBF) participated as an amicus curiae in the court below. The Council for the Advancement of the South African Constitution (CASAC) was admitted to this appeal as amicus curiae.

[2] This case, as we will show, is an object lesson as to how a constitutional challenge to promulgated regulations should not be brought. It also serves to demonstrate that there should be a disciplined and cautious curial response, lest diffuse, rhetoric-laden, emotive and jurisprudentially unfocused litigation is encouraged. All the more so in this case, as it raises issues of national and international importance. Before exploring the background to the appeal in detail, it is necessary to set out the material parts of the order sought by the respondents in their notice of motion:

'3. An order that the national state of disaster proclaimed by the [Minister] in GN No. 313 GG No. 43096 dated 15 March 2020 in terms of Section 27(1) of the Disaster Management Act, 2002 (Act No. 57 of 2002) - hereafter referred to as the "DMA" - is declared as unconstitutional, unlawful and invalid; and

4. That *all* the DMA Regulations promulgated by the [Minister] in terms of Section 27(2) of the DMA since 18 March 2020, be declared as unconstitutional, unlawful and invalid; and

5. In the alternative to paragraphs 3 and 4 *supra*, ordering that all gatherings as defined in the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993), are lawful and ordering that the processes as set out in that Act, if complied with, would render any gathering lawful.

6. In the alternative to paragraphs 3 and 4, and in addition to paragraph 5 *supra*, that all businesses, services and shops be allowed to operate further, having regard to the reasonable precautionary measures of utilising masks, gloves and hand sanitizers, until the Respondent has consulted with the Essential Services Committee (ESC) as intended in Section 70 of the Labour Relations Act, 1995 (Act No. 66 of 1995) and the ESC has legally declared any one or more service as an essential service to be included in any valid DMA Regulations further; and/or

7. In the alternative to paragraphs 3 and 4 and in addition to paragraphs 4, 5 and 6 *supra*, all other gatherings be allowed, observing the reasonable precautionary measures of utilising masks, gloves and hand sanitisers.' (Our emphasis.)

[3] For reasons that will become apparent, and for a better appreciation of the issues, it is necessary to have regard to the totality of the order made by the high court, which is the subject of the present appeal:

'1. The regulations promulgated by the [Minister] in terms of section 27(2) of the [Act] 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 republish 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 [d]irected to comply with the process ordered in paragraph 2 above within 14 ([f]ourteen) business days from date of this order, or such 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 finalisation of case no 21688/2020 in this court.'

The Minister was, additionally, ordered to pay the respondents' costs.

[4] The present litigation, as presaged above, has its genesis in regulations promulgated by the Minister under the Act. The regulations challenged in the notice of motion were all the regulations promulgated by the Minister under s 27(2) of the Act since 18 March 2020. The regulations so promulgated at the time the application was launched were those promulgated on 29 April 2020, which repealed the regulations of 18 March 2020 and, *inter alia*, regulated Alert Level 4 (the Level 4 regulations). On the day the case was argued in the high court, 28 May 2020, the Level 4 regulations were amended to cater for a new Alert Level 3 (the Level 3 regulations), though those regulations were not yet to hand at the time of argument. The regulations of April and May 2020 have in turn been amended or superseded by others. The Act, as noted by the high court, provides for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters and/or mitigating their severity. It also caters for emergency preparedness, rapid and effective responses to disasters and post-

disaster recovery. It accordingly provides for the establishment of national, provincial and municipal disaster management centres.<sup>1</sup>

[5] The regulations referred to in the preceding paragraph were published in response to the threat to national health and safety presented by the global outbreak and transmission of a novel contagious virus, which can lead to the disease known as COVID-19, and is the biggest health threat faced by the world in the past century. It has since resulted in millions of deaths globally.

[6] The respondents launched proceedings in the high court in May 2020, in response to the regulations and amendments thereto, published by the Minister since March 2020. The bases of the respondents' challenge, set out in their founding affidavit, described as a 'Summary of raised constitutional and other issues', are as follows:

- (i) The Minister, acting in terms of s 27(2) of the Act, was exercising delegated power.<sup>2</sup> Those powers unreasonably '[violate] *almost every section* contained in the Bill of Rights in the Constitution, but specifically regulating matters which are within the exclusive legislative competence of the National or Provincial Legislatures as intended in Schedule 5 of the Constitution', such as, amongst others, the control of businesses, persons, liquor establishments, cemeteries, funeral parlours and crematoria, beaches and amusement facilities, licensing and control of undertakings that sell food to the public;
- (ii) The regulations, '*by far*, exceed the purpose and objective of s 27(2) of the Act';
- (iii) The regulations failed to comply with s 146(6) of the Constitution, read with s 59 of the Act, which provides that a law made by an Act of Parliament or a provincial Act can only prevail if that law has been passed by the National Council of Provinces (NCOP);

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<sup>1</sup> The objectives of the Act are set out in s 9. Section 6 provides for the establishment of a National Disaster Management Centre. Section 29, for Provincial Disaster Management Centres and s 43, for Municipal Disaster Management Centres.

<sup>2</sup> Section 27(1) of the Act provides for the declaration of a national state of disaster by the Minister, if existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster, or other special circumstances warrant the declaration of a national state of disaster. Pursuant thereto, s 27(2), subject to subsection 3, bestows wide powers on the Minister, after consulting the responsible Cabinet member, to make regulations concerning, amongst others, the movement of people, the occupation of premises, the sale of alcoholic beverages and the implementation of the provisions of a national disaster management plan.

- (iv) The National State of Disaster, 'known generally as the Lockdown', was 'irrational and based on incorrect advice and/or reaction to unconfirmed and/or otherwise unreliable international and national medical and health results; not taking our country's unique socio-economic conditions into consideration';
- (v) The prohibition of gatherings provided for in terms of the Level 4 regulations is invalid, as it is in direct violation of the 'absolute-limitation' contained in s 14(1) of the Regulation of Gatherings Act 205 of 1993 (the Gatherings Act) – irrespective of the limitation of rights set out in s 36 of the Constitution. The result of which, it is argued, is that any protest against government action in relation to the National State of Disaster is unlawfully prohibited, and the regulations thus conflict with legislation that permits the gathering of people;
- (vi) The utilisation of the Act is only authorised in the event that existing legislation (such as the International Health Regulations Act 28 of 1974 (IHRA), which regulates a range of infectious diseases) or other 'contingency arrangements' do not cater adequately for dealing with a threatening disaster or there are special circumstances warranting the declaration of a state of disaster;
- (vii) The regulations are unlawful in that s 37 of the Constitution only allows a restriction of the Bill of Rights when there is a State of Emergency in the country, which is currently not the case;<sup>3</sup>
- (viii) The regulations are irrational in that they contain a reference to essential services when the determination of essential services falls within the exclusive competence of the Essential Services Committee (ESC) established in terms of s 70 of the Labour Relations Act 66 of 1995 (LRA), and the LRA provides that, in the case of a conflict with another law, the LRA shall prevail;
- (ix) The regulations permitted mineworkers to operate as an essential service when it has not been declared as such by the ESC, thus being 'hypocritical, unreasonable and irrational as this decision has put mineworkers [at risk in a high-risk environment], as recognised by the National Institute for Communicable Diseases (NICD) of South Africa';

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<sup>3</sup> Section 37(1) of the Constitution provides:

'(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when–

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order.'

(x) The regulations have ‘violated *almost all clauses in the Bill of Rights* of most of our citizens’ and the Minister ‘has especially humiliated and trampled upon the dignity of mostly the vulnerable low-to-medium income earners of our country and our foreign guests, who rely on informal trade, tips, commissions, day wages, ad hoc labour, and begging to survive’. (Our emphasis.)

[7] Following immediately thereafter, under the heading ‘Essential Facts’ in the founding affidavit, ostensibly to indicate that these facts are in substantiation of its challenge, the LFN stated that it had been inundated with complaints from its members in relation to the financial hardships they have had to endure, including the inability to pay rentals, resulting in landlords throughout the country resorting to illegal measures, such as cutting off electricity and water supplies, locking tenants out of their homes and evicting them. The LFN claimed that since the lockdown had started, they have dealt with 2000 such complaints and that the failure by the Minister to have regard to such hardships proves the irrationality of the decision to enact the regulations.

[8] The next part of the founding affidavit, under the same heading, has to be quoted, since we are uncertain as to what precisely it means or was intended to convey. Of particular concern is whether, on its own or with other parts of the founding affidavit, it provides an intelligible or cognisable basis of challenge to the regulations. Paragraph 4.2 of the founding affidavit reads as follows:

‘Notwithstanding that the Constitutional Court already ruled that inter alia the disconnection of electricity and water constitutes an eviction, and the Old and New Regulations making evictions without Court Orders also illegal and criminal, the law is increasingly disregarded in this context. In addition, LFN and I myself have experienced a massive lack of assistance and compassion from the side of the Police to come to the assistance of all the affected people leaving many of them without the use of electricity and water or evicted. It appears to us that the Police are primarily occupied with the duties imposed upon them under these DMA Regulations and that only very limited contingency provisions are in place to accommodate for other duties. These artificially created shortcomings we view as a further sign of the [Minister] having acted irrationally by imposing the [regulations]. Kindly find attached as Annexure “B” only a tiny number of these complaints.’

[9] Further, under 'Essential Facts', the LFN complained that it and like organisations received no funding or assistance during this time. The LFN asserted that its social media platforms, which advise tenants of their rights, were overwhelmed and that it was no longer able to cover its expenses in attempting to respond to affected persons. Mr de Beer complained that his salary could not be paid and that he was unable to buy sufficient food to feed his family.

[10] Mr de Beer also brought to the court's attention that the LFN represented a group of 90 out of a total of 347 employees of hair and beauty salons known as 'Bob Cuts', which refused to pay salaries for March 2020. This employer and others, according to the LFN, had failed to submit Unemployment Insurance Fund (UIF) contributions, leaving workers without an income, whilst complaints to the Commission for Conciliation, Mediation and Arbitration (CCMA) and Department of Labour could not be processed, as they were not operational during lockdown and it could take months before they are fully functional.

[11] A further 'essential fact' asserted was that parents were expected to home-school their children, using data for which they have no money, over and above the fact that they have no money for food. The LFN considered it lamentable that people were expected by Government to purchase data to keep up with legislative changes in the lockdown regime. Mr de Beer complained that the R350 per month promised as COVID-19 relief funding by the Government was difficult to access.

[12] As part of this litany of complaints under the rubric of essential facts, the LFN went on to accuse the Minister of mismanagement in the distribution of food parcels, and stated that the ruling party's branches had hijacked the distribution of essential aid. In support of this latter accusation, Mr de Beer attached an article that appeared in the publication, *Daily Maverick*. The LFN was adamant that its members were, as a result of the regulations, treated unfairly and discriminated against. Mr de Beer complained that his personal circumstances were such that his two daughters were, as a result of the regulations, losing out on proper schooling. In addition, their school's governing body had put him on terms to pay outstanding school fees.

[13] Still under the heading ‘Essential Facts’, the LFN, albeit repeating, in essence, some of the earlier allegations, commented that the ‘property industry’ has been ‘hit hard’, and that there was a war between landlords and tenants, and that tenants were compelled to secure microloans and sacrifice some of their belongings in order to survive financially. The following part of Mr de Beer’s narrative bears repeating:

‘Based on the foregoing and as *an expert* in my field I am highly concerned that if the Lockdown does not urgently come to an end, it is inevitable that the already tight tensions between tenants and landlords will spark into a [fully-fledged] conflict. Even the already volatile land distribution issue in our country could become entangled in the current crisis. There is a potential loss of lives, injury to people and other damages that could by far outnumber all *negative effects the COVID-19 disease is claimed to have.*’ (Our emphasis.)

That concluded the narration by Mr de Beer and the LFN of essential facts underlying the legal challenge.

[14] Proceeding from the ‘essential facts’, the LFN then contended that it was clear from the long title<sup>4</sup> of the Act that it was not intended to make severe inroads into personal freedoms. Mr de Beer and the LFN complained that the regulations were overbroad, but without providing a proper factual foundation for that conclusion, and without specifying why that was so. What follows is a six-page invective, in generalised and dispersed terms, against the Government’s COVID-19 response. It defies a concise summary. In this regard, it is important to have regard to the following relevant parts of the founding affidavit:

‘6.2 The virus leading to the COVID-19 disease, SARS-Cov-2, was only recognised as a newly identified novel virus by the International Committee on Taxonomy of Viruses (ICTV) when it was formally named on/or around 11 February 2020 (3 months ago) and subsequently the World Health Organisation (WHO) named the associated disease caused by this virus

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<sup>4</sup> The long title of the Act reads:

‘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 and rehabilitation;
- the establishment and functioning of national, provincial and municipal disaster management centres;
- disaster management volunteers; and
- matters incidental thereto.’

as COVID-19 on that same day. I attach and refer to the official announcement of this by WHO on their official website as Annexure “F”.

- 6.3 The problem created by this new naming of the virus and disease, confirming irrationality in the decision to declare a National State of Disaster due to COVID-19, is the fact that the WHO did not have a separate ICD-10 coding for this new disease at that stage and announced during March 2020 that member states like South Africa, should use the ICD-10 codes for Influenza and Pneumonia (J12 in particular) for the interim. Find attached the published notices and explanatory notes as Annexures “G” to “J”.
- 6.4 On 20 April 2020 (some three weeks ago), the WHO published a guide on how COVID-19 death cases should be reported and proposed that COVID-19 should be recorded on the medical certificate of primary cause of death for ALL deceased regardless of whether the disease indeed caused, or was simply assumed to have caused, or just contributed to the death. This implies *inter alia* that even if a person would have the SARS-Cov-2 but it did not turn into COVID-19 and in fact died of another cause like heart failure or cancer, WHO advised that such a death should also be reported as a COVID-19 case. This document by WHO is attached as Annexure “K”.
- 6.5 As per the latest available “*Mortality and causes of death in South Africa: Findings from death notification 2017*”, which was embargoed by Statistics SA (Stats SA) for release until 26 March 2020, it is interesting to note that while COVID-19 was not yet known, that the ICD coding and specifically code J12, for Influenza and Pneumonia (which were also shared for a while by COVID-19 until 1 April 2020), resulted in underlying, immediate or contributed to the death of 42385 people during 2017 implying that on an average 3532 people died every month in South Africa due to the underlying, immediate or contributing of Influenza and Pneumonia of which statistics from previous years were similar. Extracts of this Stats SA statistical report of some relevant parts are attached as Annexure “L” where the full report will be provided to the Court at the hearing.
- 6.6 Without the availability of the full historic number of deaths for the ICD-10 codes J12 to J18 in comparison to the so called reported COVID-19 cases, it is simply not possible to have made an informed decision and any decision not taking into consideration the already known diseases which normally are reported under those same ICD-10 codes, the decision of the COGTA Minister to have declared a National State of Disaster was therefore respectfully irrational and timed incorrectly.

- 6.7 Taking into further consideration that a recently published research report by the Center for Disease Control and Prevention (CDC), amongst others, established that the SARS-Cov-2 and Influenza A viruses can co-infect the same patient which is also possible within the science of virology where trillions of viruses and other microbes are already living inside every human body. It is interesting to note that in practice few people were historically tested for the Influenza viruses. Now, everyone is basically only tested for the SARS-Cov-2 virus and not the Influenza viruses which seem to have miraculously disappeared with the recent discovery of the SARS-Cov-2 virus. We can see no indication of how many of the cases are simply Influenza and how many are COVID-19. Logically, one will only establish the SARS-Cov-2 virus if the tests only target that virus and not the Influenza viruses. Extract of this report is attached as Annexure “M”.
- 6.8 It needs to be mentioned that WHO reported on 11 March 2019 (one year ago) that the Influenza viruses are a threat to the world health and result in approximately 1 billion cases annually; 5 billion among them being severe and causing 650,000 deaths annually. Had this been the criteria for a Lockdown requirement, we would need a Lockdown every year for Influenza alone, pre SARS CoV-2. Yet, this was never enacted even though the statistics for Influenza appear much worse than the COVID-19. Further: Merely having an infection of the SARS-Cov-2 virus without leading to COVID-19 is also very possible. Find attached the WHO report as Annexure “N”.
- 6.9 Only a few days after the Lockdown started, namely on 2 April 2020, the NICD in South Africa which is responsible for monitoring disease outbreaks, reported in its Influenza recommendations for the diagnosis, prevention, management and public health response, that it is estimated that approximately 11,800 seasonal influenza-associated deaths occur annually (which is based on 2013 results and not the latest figures available, namely 18,837 only for underlying deaths – with 42,385 combined cases). In addition, an estimated 47,000 episodes of influenza-associated severe acute respiratory illnesses occur annually of which 22,481 (at an average of 1,873 per month) result in hospitalization. The foregoing compares to the current total of just 411 reported COVID-19 cases which deserved to have been hospitalized. I refer to the NICD report as Annexure “O” as well as the official report of the Health Minister on 4 May 2020 attached as Annexure “P”.
- 6.10 Notwithstanding various reports relating to the allegation that SARS-Cov-2 was a newly created virus, it is unfounded and baseless to assume that this new virus was not already in existence for many Influenza seasons over many years and therefore might already have

been included in ICD-10 code reporting under respiratory illnesses under the J grouping. In history, the Influenza virus which was responsible for the 1918 Spanish Flu pandemic was not known at that stage and only discovered during 1930's. The CoGTA Minister is relying on unconfirmed and incomplete data to try and justify the Lockdown. In this context I attach an article by the Medscape Online Magazine as Annexure "Q".

6.11 It is important to note that the NICD has declared that for the 2020 Influenza Season which we have entered now – that, notwithstanding the computed 3,532 deaths per month due to Influenza, that they do not propose any public health response to that threat. This compares to the current COVID-19 combined underlying immediate or contributing 138 deaths since 26 March 2020, i.e. less than 70 deaths per month. The suspicion that COVID-19 as a newly discovered disease with almost identical symptoms as Flu and clearly less devastating results compared to actual WHO statistics relating to Influenza and Pneumonia (ICD-10 Code J) could evolve in the mass extermination of the people is simply irrational and based on absolutely no scientific proof. Therefore, the continuation of the Lockdown for that reason is, respectfully, unwarranted and irrational.'

[15] There are major problems with these passages. First, Mr de Beer is not a qualified virologist, pathologist, immunologist, medical doctor, laboratory analyst, or indeed any kind of scientist. He does not attempt to qualify himself as an expert so as to analyse the many reports to which he refers. Mr de Beer does not claim any professional qualification. It will be recalled that the only expertise claimed by Mr de Beer is in relation to the conflict between landlords and tenants. Further, none of the reports referenced are confirmed by anyone qualified to do so. Thus, their authenticity and reliability is not proven.

[16] The underlying theme of the founding affidavit is one of COVID-19 denialism. In para 6.14 Mr de Beer makes the following statement:

'Knowing that the symptoms of COVID-19 and the Flu are similar I would like to remain in control of my own health and body and wish to rely on my natural immune system to again protect me just like it has been doing for the past 43 years, saving me from trillions of invasive viruses and microbes. I believe further that it is the constitutional right of both our members and myself to choose whether we wish Government to make decisions on our behalf about our own bodies and health'.

Mr de Beer's real complaint is that a National State of Disaster is unconstitutional, and he has the right to rely on his immune system, without Government interference.

[17] Mr de Beer and the LFN also contended that South Africa should have followed the example of Sweden, which, rather than engage in a lockdown as was done in our country, concentrated on protecting the elderly and left 'nature to run its course by way of natural immunization'. The unconfirmed report relied upon in this regard provides no basis as to how the experience of Sweden may be compared to South Africa.

[18] In relation to the mandatory wearing of masks, the following is said:

'I have also noted, that in a country like South Africa where the crime rate is one of the highest in the world that the requirement that everyone must wear masks of sorts, covering both mouth and nose (which in itself has not been proven to prevent people from becoming infected or to prevent infection of others) might become a further crisis where criminals will walk our streets with their faces covered and the possibility of identifying them would be reduced to almost zero.'

This assertion is to be compared with the alternative relief sought by Mr de Beer and the LFN in paras 6 and 7 of their notice of motion, set out in para 2 above, in which they accept masks as a precautionary measure.

[19] We now turn to deal with the basis of opposition on behalf of the Minister. Reliance was placed on the provisions of s 27(1) of the Act, which permits the Minister to declare a national state of disaster, if existing legislation and contingency arrangements do not adequately provide for the Executive to deal with a disaster, or where special circumstances warrant such a declaration. The declaration of a national state of disaster, it was pointed out, permitted the promulgation of regulations concerning matters contemplated in s 27(2)(a) to (o).

[20] The deponent on behalf of the Minister, the Director-General of the Department of Cooperative Governance (the Director-General), proceeded to set out 'Notorious Facts about COVID-19', based, in large part, on information sourced from UNICEF and the

World Health Organisation.<sup>5</sup> The following are the relevant parts of the answering affidavit:

- '26. The COVID-19 is a respiratory disease caused by a novel strain of the coronavirus. Its symptoms include, amongst others, fever, coughing and shortness of breath. It has virulent effects if left untreated, as it can cause pneumonia or breathing difficulties in fatal cases. In some cases, it can be asymptomatic (showing no signs of fever, coughing or shortness of breath) in the early days of infection, and thus, a person may be infected but not show any physical signs of infection, resulting in the spread of the virus to other people without knowing.
27. COVID-19 is easily transmissible from people who are asymptomatic, pre-symptomatic or mildly symptomatic. It can be transmitted from one person to the other through fluids droplets excreted from the mouth, nose or eyes of an infected person. As it is an airborne disease, it can [stay] in the air and on a surface for hours or days where the fluids droplets of the infected person have been transferred through touch, coughing or sneezing. This disease posed a unique challenge in that the carrier of this disease may not be aware that he or she is infected.
28. Due to its virulent nature, it has the potential to infect a large number of people in a short space of time and therefore, its rate of infection is exponential. Currently, there is no known and approved vaccine available, efficacious treatment or cure.
29. COVID-19 affects all regardless of race, age, religion, qualification, background and standing in the society. The elderly and people with pre-existing health conditions are the most vulnerable.
30. On the 30th of January 2020, the [WHO] declared the outbreak of the disease a public health emergency of international concern. On 11th of March 2020, the WHO declared the COVID-19 a pandemic.
31. As the infection rates rose exponentially, countries around the world saw their healthcare systems overwhelmed by infected people overnight in need of hospitalisation, intensive care and respiratory support for prolonged periods of time. The death toll in some of the countries rose significantly, for example, in Italy and Spain.

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<sup>5</sup> South Africa is a member of the WHO. Its international health regulations are binding on members and form part of international law. Its recommendations are invariably followed by member states.

32. In early March 2020, when the first COVID-19 case was confirmed in the Republic of South Africa, it became clear that the South African population would be affected. There was a high probability that some individuals would be infected by the coronavirus as evidenced by the events in China and other countries. Given South Africa's unique challenges relating to the provision of public healthcare, *inter alia* socio-economic challenges, we feared the worst and the government had to be proactive in putting plans in motion to manage the COVID-19.
33. The government sought medical advice from medical and scientific experts (National Coronavirus Task Team) to prepare in order to manage and minimise 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 arrangements to adequately manage COVID-19.
34. 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.
35. 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.
36. 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 [the] 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.
37. 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 Minister declared a national state of disaster.’

It is to be noted that according to the Director-General, the Government took advice from medical and scientific experts on the ministerial task team which had been established locally to advise government on its response to the pandemic, the National Coronavirus Task Team. The statement that medical and scientific experts were consulted and had

been advising government is not disputed. Unlike the unsupported opinions offered by Mr de Beer and the LFN as to how COVID-19 should be understood and dealt with, the position of the Government and its response to COVID-19 are based on the advice it sought from the medical and scientific experts, including the National Coronavirus Task Team.

[21] Based on what is set out above, it was contended on behalf of the Minister that the jurisdictional facts for the declaration of a national state of disaster contemplated in s 27(1)(a) and (b) were met. The declaration, so it was submitted, was entirely rational and in line with what had been done in other countries such as Italy, Spain and France.

[22] The Minister was emphatic that the IHRA was inadequate to deal with COVID-19, especially since it was enacted more than four decades ago in 1974, and had been overtaken by technological, scientific and biological developments. If this were not so, it was submitted on behalf of the Minister, the WHO would have advised countries to make use of the IHRA. The Minister stated that the declaration of a national state of disaster was an appropriate measure to deal with COVID-19, because there was no other available legislative measure or other contingency measure that could be invoked to deal with the threat posed to national health and safety.

[23] The Director-General said the following:

‘The conditions posed by the COVID-19 warranted the decision to declare a national state of disaster because the human and financial cost associated with the management of the disease was expected to be overwhelming. The state had to release the national government resources to coordinate the response in order to slow down the rate of infection in order to prepare to deal [with] an increase of infections.’

She denied that the decision to declare a national state of disaster was based on unconfirmed, unverified and incorrect medical advice. She pointed out that at the time that the national state of disaster was declared, major European countries were already struggling to contain the virus, which was evident from the statistics and data collated and disseminated by the WHO. That carriers of the virus are oftentimes asymptomatic made it all the more difficult to detect and contain the virus.

[24] In relation to the substance of the regulations, the Minister's view was that she was careful to have regard to the limitations placed on her power by ss 27(2) and (3) of the Act and she insisted that she kept within the bounds of her power. The Minister noted that s 27(2) required her to consult with the relevant Cabinet Minister, and she did. She asserted that in compliance with that subsection, she consulted with the Minister of Health, the entire Cabinet and the National Coronavirus Command Council (the NCCC).

[25] In relation to the contention by the LFN that she was required to consult with the NCOP, the Minister took the view that this was not so. In this regard, she indicated that regulations that required approval by the NCOP were those made under s 59(1) of the Act. Section 59(1) provides that NCOP approvals were those which resort under s 146 of the Constitution. Section 146(6) of the Constitution provides:

'A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.'

According to the Minister, there is no conflict between the regulations and provincial legislation.

[26] The Minister also took issue with the contention of the LFN that the regulations were in conflict with the Gatherings Act. That legislation, like the regulations, she pointed out, regulates the holding of public gatherings and demonstrations. The right to assemble, demonstrate, picket and petition is guaranteed by s 17 of the Constitution. The Minister contended that what was required was to test the regulations against s 36 of the Constitution to see if they pass muster. The Minister insisted that the limitation imposed on fundamental freedoms by the regulations was justifiable, when viewed against the provisions of s 36 of the Constitution.

[27] The following factors were relied on as justification:

'66. The purpose of the limitation is to save lives. It is a notorious fact that the COVID-19 disease is spreading rapidly, and it is transmissible from one person to another. It was, therefore, imperative to limit the freedom of movement of people to reduce the rate of infection. I have mentioned in this affidavit that if the rate of infection increased exponentially, public healthcare facilities would be overwhelmed and it would lead to a collapse of the system

and both COVID 19 patients and other ordinary patients who suffered from other types of maladies will not receive medical attention or adequate medical attention. Consequently, deaths will be inevitable.

67. I have to interpose and state that the Constitution enjoins the State to respect, protect, promote and to fulfil the rights in the Constitution. The right to life, the right to have access to health care and [an] environment that is not harmful, are implicated.
68. The consequence of the lockdown is that people are restricted to their places of residence, and they can leave their residence only if it is necessary for example to seek medical attention or to purchase food or perform essential service[s], the lockdown measures are reasonable and justifiable to protect public good[s] and services. Thus the extent of the limitation is necessary to reduce the rate of infection and protect [people's] lives.
69. Without the restricting or prohibiting of public gatherings, it would have been virtually impossible to reduce the rate of infection because it is conceivable that in large public gatherings for example soccer or rugby matches it would be impossible for the spectators to maintain a recommended social distancing of 1 and half metre[s]. As COVID-19 can be transmitted through passing fluids droplets by coughing, sneezing or touching, it will be challenging [to] maintain the recommended distance.
70. There is a close connection between the limitation and its purpose. If free movement and congregations [are] minimised, the rate of infection will be reduced. If people keep social distancing, the rate of infection will be slower. If people are confined to their homes, the risk of infection is reduced. I have said in the paragraph *supra*, people may carry this virus without showing any symptoms. The scientific evidence locally and abroad indicates that one infected person may infect two or three people. The purpose of the limitation cannot be over emphasised. It is to save lives. Saving lives takes precedence over freedom of movement and the right to assemble or demonstrate.
71. It is evident from other countries such as the United Kingdom, United States of America, Russia, Italy just to mention a few, that it became practically difficult to reduce the rate of infection without implementing the lockdown. The lockdown measures employed were the less restrictive measures to achieve the governmental purpose of saving lives of the South African population and use state resources where most needed.'

Reliance was also placed on the decision in *Mohamed and Others v President of the Republic of South Africa and Others*,<sup>6</sup> where the court accepted that the government consulted extensively and that it could not find that the restrictions imposed were either unreasonable or unjustifiable.

[28] It is to the high court's reasoning and the resultant order that we now turn. On 2 June 2020, the high court declared all the regulations irrational, unconstitutional, unlawful and invalid in their entirety, with the seeming exception of the prohibition on tobacco and related products. This broad formulation included and was intended to include, within its scope, the Level 3 regulations, even though they were not dealt with in the affidavits and were not before the court when the case was argued. It did so essentially on the grounds that they are irrational and constitute an unjustifiable limitation of rights in the Bill of Rights. In that regard, the high court held:

'[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, despite 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

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<sup>6</sup> *Mohamed and Others v President of the Republic of South Africa and Others* [2020] ZAGPPHC 120; [2020] 2 All SA 844; 2020 (7) BCLR 865; 2020 (5) SA 553 (GP). In *Mohamed*, the question was whether the refusal to allow an exemption to permit congregational worship, in terms of regulations issued under the Act, were reasonable and justifiable in the circumstances under which the regulations were promulgated. The court held that the virulent nature of the pandemic, the rate of infection, and the high risk of exponential infection meant that the social distancing measures put into place had to be enforced as far as possible. Granting relief of the nature sought, would be tantamount to opening the floodgates. The restrictions imposed were neither unreasonable nor unjustifiable. The application thus failed.

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 Africans 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 [the] 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 limitation 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[(1)](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)).
- ...
- 7.16 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 [of] 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, healthcare, food, or social security, which are all guaranteed basic 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 left 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 [has] not demonstrated that the limitation of the Constitutional rights already mentioned, [has] been justified in the context of section 36 of the Constitution.’

[29] The high court rejected the submission on behalf of the present respondents concerning the approval of the NCOP. It reasoned as follows:

‘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 (“NCP”). Section 59(4) of the DMA provides that regulations made by the Minister should also be referred to the NCOP for approval first. This proviso, 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 5(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.’

[30] On 30 June 2020, the high court granted leave to the Minister to appeal against the declaration of invalidity of those regulations that were not expressly identified in its judgment (ie those discussed in paras 7.1-7.10 of the judgment, which we quoted earlier). The high court refused leave to appeal against the regulations specifically addressed in its judgment, namely, regulations 33(1)(e), 34, 35 and 39(2)(m) and the exceptions to regulations 46(1) and 48(2), all as contained in the Level 3 regulations (the six Level 3 provisions). This Court granted leave to the Minister to appeal in respect of the six Level

3 provisions on 22 September 2020. Accordingly, the appeal before this Court is against the high court's order in its entirety.

[31] We must note that the high court declined to grant the relief sought by the present respondents in para 3 of their notice of motion, namely, an order that the proclamation of the national state of disaster was unconstitutional, unlawful and invalid. The high court refused leave to the present respondents to cross-appeal. They thereafter brought an application for such leave to this Court. The said application was refused on 22 January 2021 on the basis that it enjoyed no reasonable prospects of success and that there was no other compelling reason for the cross-appeal to be heard. It needs to be mentioned that the HBF had sought direct access to the Constitutional Court on an urgent basis, which was refused on 30 March 2020.

### **The virtual hearing and recusal**

[32] Before turning our attention to the merits of the appeal, it is necessary to deal with what transpired in the period after the judgment of the high court was delivered and the petition to this Court to extend the scope of the appeal succeeded. The events described relate, in the main, to the objection by the present respondents to the hearing of the appeal by this Court on a virtual platform (a digital videoconferencing facility) and to an associated attempt to secure the recusal of the judges assigned to hear the matter. The objection raised by the respondents has to be seen in the context of measures taken by the Office of the Chief Justice (OCJ) and by this Court to deal with the threat posed by COVID-19. That requires a historical excursus before dealing with the stance adopted by the respondents and the exchange of correspondence involving the Court, the parties, CASAC and the HBF.

[33] On 17 March 2020, the OCJ issued a media statement entitled 'Measures adopted by the heads of court to curb the spread of COVID-19 in all courts'. The media statement commenced with the recognition that the Cabinet, on 15 March 2020, had decided that gatherings of more than 100 people were prohibited and where gatherings of smaller groups were unavoidable, organisers would have to put in place 'stringent

measures of prevention and control, in order to curb the spread of COVID-19 in South Africa’.

[34] The media statement then went on to set out measures that would be taken by courts to counter the threat posed by COVID-19 and to curb its spread. These included decontamination measures, temperature checks on people seeking entry, personal protective equipment for court personnel and social distancing measures. In line with s 165 of the Constitution<sup>7</sup> and the provisions of the Superior Courts Act 10 of 2013 (the SC Act), so the statement proceeded, the heads of court may make proposals to the Executive to issue regulations impacting on the operations of courts. The statement ends with an exhortation to all to comply with the directives and guidelines when dealing with confirmed or suspected cases of COVID-19.

[35] On 20 March 2020, acting in terms of s 165 of the Constitution and s 8(3) of the SC Act,<sup>8</sup> the Chief Justice issued a directive pursuant to which access to courts was restricted to people with a material interest in a case. Non-essential visitors were allowed entry only with the permission of the head of court. On 17 April 2020, the Chief Justice issued a further directive. He also delegated to heads of court the authority to take such action and issue such directions as may be necessary to give effect to ‘these Directives’. Parties to litigation were, in terms of the directive, given the option to agree to have matters that were set down during the lockdown, removed from the roll.

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<sup>7</sup> Section 165(4) reads as follows:

‘Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.’

<sup>8</sup> Section 8(3) reads as follows:

‘The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers—

- (a) in respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6); and
- (b) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.’

Subsection (5) permits directive only if the majority of the heads of court agree and makes it obligatory to have it published in the Government Gazette. These directives were so published in GN 43117, GG187, 20 March 2020.

[36] The directive provided that only urgent applications and ‘urgent matters arising from the activities associated with disaster management may be heard in open Court during the lockdown period, provided that the Judge or Magistrate . . . hearing the matter may, if he or she deems it necessary, having regard to the exigencies of each case, hear any such matter through videoconferencing or other electronic means which are appropriate in the circumstances, after consultation with the parties concerned’.

[37] The directive also dealt with opposed applications. Heads of argument were required to be filed electronically, save where a litigant was unrepresented and did not have access to email. Parties were required to endeavour to reach agreement on dispensing with oral argument. In the absence of agreement being reached, the judicial officer concerned may direct that the matter be heard by way of videoconferencing or other appropriate electronic means.

[38] In relation to appeals, the directive dictated that appropriate measures ‘shall be taken to eliminate the need for practitioners to attend court, and the presiding Judge may direct that the hearing be by video conference or other electronic means which are appropriate . . . and on such terms as she or he may determine’.

[39] The directive ended by stating that the heads of court shall, during lockdown, issue such Directions as may be necessary to manage particular circumstances and that the measures set out in the directive issued on 17 March 2020 shall remain in force during the lockdown period.

[40] On 21 April 2020, the President of this Court addressed a letter to attorneys, the General Council of the Bar, Law Societies and the Legal Practice Council pointing out that courts, throughout the world, have found it necessary to direct that hearings should ‘proceed remotely’. The profession was notified that this Court had resolved not to conduct physical in-person hearings during May 2020 – the first term after lockdown measures were put in place. Parties were given a choice to agree to dispense with oral argument in terms of s 19(a) of the SC Act. Lawyers were notified that hearings would proceed via web-based videoconferencing. Parties who took the view that a physical

hearing could not be dispensed with were required to communicate that view to the Registrar and to say why a physical hearing was imperative, whereafter the presiding judge would issue an appropriate directive, including, if necessary and where appropriate, an order that the matter be adjourned *sine die*.

[41] On 29 April 2020, the President of this Court issued a practice directive in relation to appeal video or audio hearings during the COVID-19 pandemic<sup>9</sup>. The directive stated that '[v]irtual hearings are the default position until further direction'. The primary aim was to 'ensure ongoing access to justice by all parties to cases before the court and safety from infection whilst facilitating hearings that allow parties to participate as fully as possible'. The directive also dealt with the variety of available options for the conduct of web-based hearings and set out hearing protocols in respect of the digital videoconferencing platforms.

[42] On 2 May 2020, a further directive was issued by the Chief Justice. Parties were once again informed that matters set down during the lockdown may be removed by agreement. It went further and stated that matters not removed from the roll would be dealt with in accordance with a procedure determined by the head of court. In relation to opposed applications, the directive was that in the event that parties failed to reach agreement dispensing with oral argument, a judicial officer may direct that the matter be heard electronically. In relation to appeals, the following is stated:

- '15. Barring changes and adaptations in relation to process and hearings necessitated by the period of the national state of disaster, the Constitutional Court shall process and dispose of all matters in line with its Rules and the Constitution.
16. The Presiding Judge shall solicit the views of the parties prior to the appeal panel making a determination in terms of section 19(a) of the Superior Courts Act.
17. In the event of the appeal panel determining that oral submissions are to be made, appropriate measures shall be taken to eliminate the need for practitioners to attend court, and the presiding Judge may direct that the hearing be by video conference or other electronic means which are appropriate . . . on such terms as she or he may determine.'

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<sup>9</sup> The WHO declared COVID-19 outbreak a pandemic on 11 March 2020.

[43] The directive ended by stating that the Directives issued on 20 March 2020 shall remain in force during the period of the national state of disaster, but that the measures issued on 17 April 2020 were repealed.

[44] On 1 August 2020, the President of this Court issued a practice protocol. The purpose is stated right at the outset:

‘The purpose of this protocol is to prescribe the manner in which the virtual hearing is to be conducted. Insofar as possible given the nature of the technology being used for the hearing it will be conducted in the same manner as a conventional hearing in the Supreme Court of Appeal. It is essential that ordinary conventions are followed in regard to dress, mode of address and the like in order to maintain proper decorum in the court.’

The directive announced that the preferred videoconferencing platform was Microsoft Teams. The protocols for the hearing were then spelt out.

[45] Those then were the directives, which it will be seen were consistent in relation to hearings during the lockdown period. This Court applied them and conducted hearings in accordance with the directives.

[46] On 18 March 2021, the parties, CASAC, as well as the HBF were sent a notice of set-down of this appeal by this Court’s Registrar. They were informed that the appeal would be heard on Wednesday 26 May 2021. Paragraph 3.2 of the notice contained the following customary paragraph, in line with the directives set out above:

‘If any party is of the view that an in-person oral hearing cannot be dispensed with, such party will be directed to make representations in writing to the registrar as to why the appeal requires an in-person oral argument and the presiding judge will issue an appropriate directive, including, if necessary, an order that the matter be adjourned *sine die*.’

It is necessary to note that the present respondents had, in anticipation of the appeal being heard, filed heads of argument that are 38 pages long.

[47] On 30 March 2021, the state attorney, on behalf of the Minister, responded to the notice of set-down, by stating that CASAC and the Minister were both of the view that the

matter should be disposed of by way of a remote virtual hearing. The state attorney ended that written communication as follows:

'We understand that the respondents seek an in-person hearing . . . We attach the letter we sent to them, requesting their consent to a virtual hearing . . .'

On 30 March 2021, the LFN and Mr de Beer responded to that request as follows:

- '1. Writer refers to the Notice of Set Down in the Supreme Court of Appeal for 26 May 2021.
2. The Respondents *will be attending Court at 09h45 on 26 May 2021 for a physical hearing* in line with their rights in terms of Section 34 of the Constitution of the Republic of South Africa, 1996 read with Section 32 of the Superior Courts Act, 2013 (Act No. 10 of 2013).'<sup>10</sup>  
(Our emphasis.)

[48] On 31 March 2021, the respondents addressed an email to the Registrar's office, apparently in relation to a communication from CASAC in respect of its stated preference for a virtual hearing, which, from its perspective, included a cost saving. The respondents reiterated their uncompromising stance, namely that they would tolerate nothing other than an in-person hearing. As will also be seen, the respondents asserted quite emphatically that in the event that they are forced by a court directive to participate in a virtual hearing, they 'will respond by bringing an application to challenge the constitutionality and validity of virtual Court hearings in South Africa'. It is insinuated that if the court persisted with a virtual hearing it would effectively be prejudging the case against the respondents. Since the letter accords with the tone and tenor of the founding affidavit in the matter and is not entirely intelligible, it is best that it be reproduced in its entirety:

- '1 Writer refers to the letter addressed to you by the attorneys of the admitted *Amicus Curiae*, Council for the Advancement of the SA Constitution (CASAC), dated 30<sup>th</sup> instant.
- 2 The Respondents do not wish to litigate by letter, but as an actual party to the dispute itself writer wishes to clarify certain points raised in the letter under response.

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<sup>10</sup> Section 34 of the Constitution provides:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

Section 32 of the Superior Courts Act reads as follows:

'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'

- 3 The *Amicus Curiae*, respectfully, is not in any position to dictate which process might be most suited to be followed by the actual litigants in this matter.
- 4 Like any *amicus curiae*, CASAC became part of these proceedings out of [its] own free will. With quite a number of senior advocates on its advisory council the issue of costs and expenses relating to litigation simply cannot come as surprising as it is made out to be. Further, writer finds it preposterous for an organisation of CASAC's stature to even insinuate financial hardship. According to CASAC's published Statement of Comprehensive Income contained in [its] 2018/2019 Annual Report, its operating expenses amount to in excess of R23 million. Under the circumstance, writer is quite certain that some additional fuel and travel expense from Cape Town to Bloemfontein should not be too problematic.
- 5 Further, the very COVID-19 measures referenced are also the interventions by the Appellant which are under dispute in this matter; at this point, adjudication by the SCA is outstanding.
- 6 The Respondents do not believe that there is any special circumstance present preventing a hearing on 26 May 2021 in open Court; as a Court should be. In this context, writer reminds the *Amicus Curiae* that the Criminal Procedure Act, 1977 (Act No. 51 of 1977) had to be amended to specifically make provision for virtual hearings.
- 7 Regretfully the parties are not in agreement on this issue, thus the hearing should proceed in an open court, at the SCA's Building, Bloemfontein, on 26 May 2021 at 09h45.
- 8 In the event that the Judge would direct that the Respondents must attend a virtual hearing against their constitutional rights, this Court would then find itself in the position to openly favour the arguments of the Appellant even before the commencement of the hearing.
- 9 In this context, the Respondents are humbly submitting that the Court order in question in any event already came into operation and effect on 24 June 2020, resulting in the COVID-19 measures prescribed by the Appellant to be of no effect and to be discarded by this Court.
- 10 The Respondents have taken a non-negotiable position that in the event that they are forced by a directive of the Judge into a virtual hearing violating their constitutional right to have an open Court hearing, they will respond by bringing an application to challenge the constitutionality and validity of virtual Court hearings in South Africa.
- 11 Resultantly, the Respondents will appear in person before the open Court on 26 May 2021 as per the Notice of Set Down.

12 If this standpoint by the Respondents, which is to ensure the protection of the authorities of our Constitution and Courts, are in any way regarded as contempt of this Court, the Respondents are prepared to accept the associated punishments.

13 Our rights remain reserved *in toto*.’

[49] On 8 April 2021, the Registrar was directed by the judges assigned to hear this appeal to address the following note to the parties:

‘Since the second quarter of last year the Supreme Court of Appeal has successfully conducted its entire roll each term by way of remote hearings on Microsoft Teams. At the end of each session legal representatives of the parties acknowledged that they had a full and satisfactory hearing. Appeal hearings have the added advantage that there is a full record before the court and a hearing is preceded by heads of argument. Appellate courts in other comparable jurisdictions have successfully conducted web-based appeal hearings.

In many of the matters that have been successfully finalised by this court thus far, the records have been as substantial and the issues as complex (if not more so than this). The health and safety concerns that prompted the SCA to opt for virtual – in preference to in-person – hearings still obtain. It is still unclear when the SCA will be able to safely resume in-person hearings. It bears mentioning that the Supreme Court of Appeal has on a number of occasions been subjected to a sanitisation program which necessitated the court building having to be vacated temporarily after support staff tested positive.

In the circumstances, the appeal scheduled for Wednesday 26 May 2021 will, subject to what appears below, proceed by way of remote hearing on Microsoft Teams. If the respondents persist in their objection to a virtual hearing, it may, at the hearing of the matter, address full argument on the prejudice, if any, that it will suffer. To that end: (i) the respondent may file supplementary heads of argument by 20 April 2021, in which this aspect is addressed; and, (ii) the appellant and the amicus may, if so advised, file heads of argument in response by 3 May 2021. This notwithstanding, the parties must nonetheless be prepared, if called upon to do so, to address the substantive merits of the appeal on 26 May 2021.’

[50] On 10 April 2021, the respondents wrote in response as follows:

‘1. Writer refers to your letter dated 8<sup>th</sup> instant.

2. Where writer does not respond to any specific matter raised therein, it should not be construed as if the Respondents are in agreement with same and that such will be addressed at the relevant forum, if required.
3. Kindly note that the very measures which had instigated the SCA and other Superior Courts to move to the controversial virtual “Court” hearing system are the actual subject which is under this appeal by the Appellant. The Respondents have already been successful in having same declared as unconstitutional and invalid. The fact that the Court order of 2 June 2020 (held in the open) came into operation on 24 June 2020 need not be confirmed by the SCA as the authority in support of this argument stems directly from the Constitutional Court. This is addressed in our Heads of Argument.
4. As stated prior in the letter to the Registrar, Mr Paul Myburgh, dated 30<sup>th</sup> last instant, the right of the Respondents to have an open Court hearing is not negotiable. It is an enshrined right in the Bill of Rights. Should the SCA [try] to push the Respondents into any type of virtual hearing in this matter same shall be accepted as a confirmation that the SCA has become a mere extension of the Appellant’s argument and that, consequently, the SCA is no longer independent.
5. As stated prior, the Respondents will attend the open court hearing in Bloemfontein on 26 May 2021 as per Notice of Set Down. In the alternative, and if instructed to do so by the Court, the Respondents will attend the hearing in this matter to be set down for hearing at a date after the Appellant has eventually uplifted the National State of Disaster. Kindly note that a postponement of the hearing will not alter the Respondents argument.
6. Our rights remain reserved *in toto*.’

As can be seen, the respondents adopted an uncompromising position. In this response the respondents make what can only be described as a scandalous accusation: that in the event that the Court proceeds with a virtual hearing, this Court will have become a mere ‘extension of the Appellant’s argument and that consequently the SCA is no longer independent’.

[51] On 5 May 2021, the Registrar, as instructed by the judges appointed to hear the appeal this Court, sent the following note to the parties:

‘This Court’s previous directive, dated 8 April 2021, refers. The matter has been set down for hearing on 26 May 2021. As stated earlier, the appeal is scheduled to proceed on that date by

way of a virtual hearing on a Microsoft Teams platform. A link will be provided to the parties and the amicus for participation in a virtual hearing. The grounds for objection to the appeal not being heard in person may be raised during the first part of the virtual hearing. That will include the question of whether there is any prejudice to the respondents and whether or to what extent any of their rights have been attenuated. As stated in the prior directive, heads of argument on this preliminary aspect may be filed in advance of the 26 May 2021.

The judges adjudicating the matter will, on the 26 May 2021 log in from locations remote from Bloemfontein.

The media and members of the public may, as always, approach the Registrar to provide the link for access to the virtual hearing.

The registrar's office requires the respondents' last written communication, in response to the directive, which indicated that it was "sent electronically without a signature", to be verified by way of a signed hard copy being sent to the court in Bloemfontein.'

[52] The appellant and CASAC were of the view, expressed in writing to the Registrar, that the respondents' stance on the appropriateness of a virtual hearing was without merit and expressed their regret at the remarks made concerning this Court. The communication on behalf of the Minister pointed to decisions of our courts confirming the legality of virtual hearings.

[53] On 18 May 2021, the Respondents wrote to the Registrar as follows:

- '1. Writer refers to your letter dated 5<sup>th</sup> instant and apologises for the delayed response. Writer was in the field and had no access to a computer.
2. Where writer does not respond to any specific matter raised therein, it should not be construed as if the Respondents are in agreement with same and that such will be addressed at the relevant forum, if required.
3. Writer notes that the Appellant misdirects the Court in respect of her claims in relation to the declaration of unconstitutionality and invalidity of the DMA Regulations.
4. The Appellant appears to have overlooked the fact that both Chapters 1 and 2 of the 29 April 2020 set of DMA Regulations, applicable during all levels, were before the Court *a quo* which specifically dealt with all the COVID-19 measures. Relying on the previously cited *New Clicks* Constitutional Court case where Adv. Trengove SC, here appearing for the

Appellant, led the argument and should thus be very well aware of the fact that the DMA Regulations have become null and void since 24 June 2020. Without the DMA regulations in place, however, which question is before this Court here, this Court has no basis to even consider so-called virtual “court” hearings.

5. If, nevertheless, the Appellant wished to rely on her argument that the 2 June 2020 Court order was suspended pending the outcome of the appeal, in contradiction to the *New Clicks* judgment, she would have been obliged to approach the Court for a declaratory order in that respect. In absence of such order, the Respondents are well within their rights to rely on the full extent of the 2 June 2020 Court order.
6. The inference to be drawn is that the Appellant has been, either way, enforcing unlawful regulations as of 24 June 2020.
7. Further, if this Court should continue trying to enforce a virtual “Court” hearing onto the Respondents, in the clear absence of any lawful measure in place which could justify such a special deviation, same would confirm that this Court has become a body, dependent on legislative and executive powers and decisions. This would not only be a grave violation of the Doctrine of Separation of Powers, it would further, by the same token, confirm that this Court lacks the jurisdiction to adjudicate this matter any further.
8. In light of the above, the Respondents herewith request the Court to proceed hearing the appeal as set down for an open hearing in Court A on Wednesday, 26 May 2021.
9. Respectfully, please be reminded, Madam, that in letters addressed to SCA Madam Justice President Maya, dated 4 November 2020 and again 13 November 2020, the Respondents clearly outlined that, in their view, a need existed to urgently address the points *in limine* which have at present become a burning issue. Both letters did not receive any response from Maya P. On the eve of the hearing, the parties are now forced to attend to matters which could have been adjudicated several months ago – if the Respondents had been respected enough to have received any form of response. For your convenience, these letters together with the letter by the State Attorney for the Appellant in connection thereto, are transmitted with this letter. (See Annexures “A” to “C”).
10. From your letter under response it further does not appear who directed the virtual “Court” hearing. It does, however, appear as if such a directive was given by you, as the Chief Registrar. If that was indeed the case the Respondents would like to respectfully further remind you, Madam, that Section 32 of the Superior Courts Act, specifically states that all

hearings must take place in open court unless the Court (sitting with the appropriate presiding officers) and in special cases only, directs otherwise.

11. The letter under reference also indicates that the judges are supposed to log in from remote locations, in plural. The immediate question is what would be those various venues and locations of the Court and which of them is going to hear the matter? Will it still be regarded as the SCA seated at Bloemfontein or may it be a new cybernetic SCA practically seated at one or more simulated Courthouses in various simulated Bloemfonteins? In absence of either a venue or location, the Respondents contest that the “remote” judges have the required authority to, for example, hold anyone of the parties in contempt of court if such need arises. Unless, of course, such holding would be as virtual as the contempt itself and the convicted party would receive a virtual sentence, to be served in either some form of virtual confinement or be paid by virtual money. Which would, in actual fact, not even reach the level of trying to settle by, say, toy money, as same at least does physically exist. For your convenience and purely demonstrative purposes, the Respondents have attached a copy of a 100 Monopoly-Dollar note as Annexure “D”. In difference to a virtual fine, a virtual court or even a virtual judge, same can be actually looked at, can physically be touched and examined and can, for instance, be turned around as, in reality, it actually does exist; albeit without much real value. *On a personal level, the Respondents invite you, Madam, to try to switch on a real virtual Court room. You are welcome to report the results to the Respondents, if you wish; in particular if the light went on in reality, on imaginary level or not at all.*
12. Virtual “court” hearings, in fact, have made a mockery of our judiciary while the Appellant knowingly had been enforcing invalid COVID-19 measures against our people, and even our Court, for the past 11 months.
13. The Respondents are not aware of any existing law or regulation which would force them into accepting a virtual “Court” hearing, neither by the Appellant herself nor the Rules Board in terms of Section 30 of the Act. *It appears as if virtual “Court” hearings have merely been made as a tool of authoritarian convenience, for reasons possibly known to the legal fraternity as, in the view of the Respondents, virtual “Courts” emphasize a monopoly by some – privileged – over our Courts, at the cost of the unprivileged masses of our people.*
14. The decision to have a virtual “Court” hearing under these very unique circumstances applicable in this matter, is not just a simple procedural dispute which could perhaps be addressed in an informal way. If the Court and other parties are adamant to proceed

virtually, in deviating from the prescribed laws and against the consent of the Respondents, such would require a proper application supported by affidavits to be lodged by the Appellant and *Amicus Curiae*. The Respondents are in support of the neutral position – which is an open court hearing, as prescribed. This Court is obliged to accept this norm in absence of the other parties formally lodging such an application in terms of Rule 12 read with Rule 11(1)(b) of the Rules.

15. The Appellant has made extensive reference to the High Court cases where those judges concerned ruled in support of holding virtual hearings. However, in none of those, the Courts considered that the order in case number 21542/2020 had come into operation on 24 June 2020, making all those rigid measures obsolete.
16. **In the event that the directive was made by you Madam, in terms of Rule 4(4) of the SCA Rules the Respondents kindly request you to urgently refer your decision to a judge as prescribed.**
17. **If such claimed directive by the SCA was given by one or more SCA judges, the Respondents would further kindly require the names of those judges and when, where and how such directive was made as a matter of urgency.**
18. *The Respondents will remain with their commitment and right to appeal in an open hearing in Court A on Wednesday, 26 May 2021 without having to comply with any of the Chapter 2 declared unconstitutional and invalid measures.*
19. Our rights remain reserved *in toto*. (Italicised for emphasis. The parts in bold were in that form in the original.)

This communication from the Respondents is quite extraordinary, most especially para 11 and the attachment of a copy of ‘Monopoly money’. It is crass, insulting to the Registrar, disrespectful towards the Court and inexcusable. The issue of the enduring validity of the order of the high court will be dealt with in due course. For now, it needs to be stated, as shall presently become clear, that the issue of the declaration of a national state of disaster was not before us on appeal. There could thus be no question of us having prejudged that issue. Although premised on the existence of the national state of disaster, the directives issued by the OCJ and the President of this Court, to which reference has been made, were founded on the powers vested in the judicial authority by virtue of ss 165 and 173 of the Constitution and ss 8(3) and 8(4) of the SC Act.

[54] The reference in para 6 of the letter from Mr de Beer and the LFN, set out in the preceding paragraph, refers to correspondence sent by them to the Registrar for the attention of President Maya. The correspondence was sent electronically. Hard copies were not subsequently filed by them,<sup>11</sup> and the Registrar's office, in accordance with Rule 4(1)(b) of the Rules of this Court,<sup>12</sup> and in terms of the Court's standard practice, did not therefore place the correspondence before her. Shortly after the present appeal was heard, and the abovementioned correspondence was made public, President Maya made enquiries of the Registrar, who provided the reason for not placing the correspondence before her. That notwithstanding, the Deputy Registrar, without there being a need for it, wrote to Mr de Beer and the LFN on 2 June 2021, tendering an apology for not following-up on the need for a hard copy to be filed. This elicited an uncouth, scandalous and totally unacceptable written response from Mr de Beer and the LFN, which we will deal with towards the end of this judgment.

[55] On the day before the scheduled hearing of the appeal, the respondents caused to be filed with the Registrar an application for the recusal of all the judges assigned to hear the appeal. Paragraph 3.2 of the founding affidavit bears repeating: 'What this application is not about, is a challenge in relation to the holding of virtual hearings by this Court and therefore it is not the case of the Applicants that the decision by the allocated judges were wrong, but rather that the issuing of the Directive by them shows signs of bias. The Applicants, thus, fear that they will not receive a fair adjudication of the appeal.' Making sense of that, in light of the repeated strenuous objection to a virtual hearing and as will be described later, the refusal to participate in a virtual hearing, is an impossible task.

[56] The founding affidavit in support of the application for recusal then proceeded to set out the exchanges with the Registrar's office outlined above. It repeated what had

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<sup>11</sup> This could be done by dispatching them by post to the local correspondents or to the court directly.

<sup>12</sup> '4. General Powers and Duties of Registrar.

(1) Filing of documents.

...

(b) The registrar may provisionally accept, in lieu of the original document tendered for lodging, a copy (including a facsimile or other electronic copy) thereof, but the original shall be filed within 10 days thereafter.'

already been indicated in prior communications by the respondents that this appeal was unique, in that COVID-19 measures were at the heart of it, and because the Court had issued the directives in question and insisted on hearing the argument on whether the hearing should proceed virtually, the respondents were compelled to bring the application for our recusal.

[57] The respondents adopted the position that they were well within their rights to assume that the impugned regulations, to which COVID-19 measures owed their existence, no longer existed. The founding affidavit castigated this Court for seeking the views of CASAC in relation to both virtual hearings and the application for recusal, and for treating it as an ‘actual litigant’. Paragraph 5.8 of the founding affidavit is quoted, because it is an example of the unbridled criticisms of the respondents:

‘It further appears to the Applicants that the judicial act of directing the format (method) by which to proceed with the hearing had been “outsourced” by the judges, for lack of the better word. This inference is drawn from the fact that the Chief Registrar informed the Applicants on 20 May 2021 that the Directive to proceed virtually was made “*under the authority of the judges allocated to the matter.*” *In terms of Section 168(2) of the Constitution “[a] matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.*” This judicial task cannot be allocated to an administrative officer of the Court.’

[58] For the same reason, it is necessary to set out the concluding parts of the founding affidavit:

‘The Applicants’ decision for filing this Application has not been made lightly. However, as set out above in detail, the Applicants have indeed, in their view reasonable, the apprehension that the judges allocated to this matter might not bring their impartial minds “*to bear on the adjudication of this case*”, as set out in the Constitutional Court *SARFU* case, which judges might therefore be biased. The reasons for saying so are as follows:

6.1 Following the clear expressions of the Applicants’ absolute request to be heard in open court, the judges still attempted to accommodate the Appellant’s desire to argue not in open Court, paragraphs 4.7 and 4.11 *supra*. In doing so, the judges failed to observe Article 13 of the *Code of Judicial Conduct* and thereby casted doubt over their ability to impartially adjudicate the matter.

- 6.2 The directive to proceed by virtual hearing was made before the dispute over the continued existence of the DMA Regulations had been adjudicated. It is the reasonable suspicion of the Applicants that, by doing so, the continued existence of the Regulations had, in the minds of the judges, already been accepted. In consequence, the requirement that the minds of impartial judges must be open to arguments and presentations where at a later stage the dispute over the Regulations would be adjudicated, has in the view of the Applicants not been fulfilled.
- 6.3 This apprehension by the Applicants is further exacerbated by the Directive cited *supra* in which the Applicants would be “permitted” to argue their constitutionally enshrined right to have an open court hearing, and were requested to do so by way of a virtual hearing, planned by the Court to immediately precede the one in which to argue the appeal. For the Applicants to presume the Court’s impartiality, they are in clear doubt as to how the Court would, even in the event of the judges suddenly being open to the Applicants’ arguments, practically be able to abandon their view point. If the judges had intended to adjudicate the matter with an open mind they would have, in the least, set aside a separate, earlier day for that virtual hearing in order to allow for the litigants and themselves to potentially travel to the Court house in Bloemfontein.
- 6.4 Further to the above, from the letter by the Chief Registrar dated 20 May 2021 (Annexure “REC13”), the Applicants reasonably understand that the allocated judges have delegated their authority to have made the Directive in question or parts thereof to, possibly, the Chief Registrar or other unknown third entity. Neither the Constitution nor any other law the Applicants are aware of, allow for presiding officers, and here specifically judges of the Supreme Court of Appeal, to make a decision in any matter, inclusive of Directives, by way of proxy. However, in terms of the judges’ Constitutional oath, all judges are bound to “*uphold and protect the Constitution and the human rights entrenched in it*” and to “*administer justice to all persons alike without fear, favour or prejudice.*” The Applicants, in finality, humbly reaffirm that judges who are not impartial enough to at least follow their own affirmation, in their view might well lack the impartiality to adjudicate this matter in an unbiased manner.’

[59] The night before the appeal was due to be heard, the HBF, which was represented in the high court by an office bearer, forwarded a set of heads of argument to the Registrar electronically, to be brought to our attention. On the morning before the

appeal was heard, we directed the Registrar to notify the HBF that we would not receive the heads of argument until we had an explanation for their late filing. Important in this regard, the high court in its judgment recorded that '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', the HBF should bear its own costs. It is necessary to record that in the high court Mr de Beer represented himself, and the LFN was represented by an attorney, who has since withdrawn. Mr de Beer obtained permission from the President of this Court to represent the LFN in the appeal. He also continued to represent himself.

[60] When the Court convened on the morning of 26 May 2021, Mr de Beer, in his personal capacity and representing the LFN, joined the virtual hearing using the Microsoft Teams platform. Mr Mothopeng, from the HBF, also appeared. We enquired from Mr de Beer whether he was willing to make submissions concerning the propriety of a virtual hearing and whether he intended to move the application for our recusal. After a fairly lengthy exchange with the Court, Mr de Beer elected not to participate in the virtual hearing. He repeatedly stated that he would be shooting himself in the foot by doing so and subverting his argument about the unique nature of this case. Mr de Beer and the LFN were offered the opportunity to advance argument on the propriety of virtual hearings, the recusal application and the merits of this appeal whilst reserving their rights to later argue that the entire process was irregular, but this offer was spurned.

[61] Mr Mothopeng echoed Mr de Beer, and if what the high court recorded concerning his foundation's submissions on the merits is anything to go by, he once again aligned himself with the respondents. Both were excused and counsel for the Minister and CASAC indicated that they were ready to advance submissions in support of the appeal.

[62] The recusal application was not formally moved. Each member of the Court recorded that they could conceive of no reason *mero motu* to recuse him or herself.

[63] Mr de Beer, the LFN and the HBF insisted that this Court was required to conduct the oral hearing in person, and in a court in Bloemfontein, failing which we would not be acting in accordance with our judicial duties. Indeed, we would be making manifest our

disposition to prejudge the merits of the appeal before us. If we did not accede to a hearing, as required by Mr de Beer and the LFN, then the appeal should, it was submitted, be postponed, until such time as the court was convened in accordance with their stipulations.

[64] Litigants may not specify the conditions under which they are willing to have a matter heard and adjudicated. The Constitution, in terms of s 34, gives everyone the right to have any dispute, that can be resolved by the application of law, decided in a fair public hearing before a court. Section 9(1)(a) of the SC Act requires that all superior courts must be open to the public. Mr de Beer and the LFN did not provide a basis as to why the convening of the oral hearing in this appeal, on a virtual platform, to which the public enjoyed access, was not a fair public hearing. No one who sought access to the virtual platform was denied it. No evidence was placed before us to suggest that anyone who might have wished to attend the hearing could not do so on the virtual platform. The parties and their representatives did appear on the virtual platform, without evident detriment to the value of a public and open hearing. In the prevailing circumstances, as long as the parties, their representatives, the public and the media enjoyed proper access to the proceedings, the requirement of s 32 of the SC Act, requiring hearings in open court, are substantially satisfied. For similar reasons, the fact that article 9 of the Judicial Code of Conduct states that, unless special circumstances require otherwise, a judge must conduct judicial proceedings in open court, is not a stipulation traduced by open proceedings conducted on a virtual platform. Absent special circumstances, proceedings are no less open because they take place on a virtual platform. Indeed, such proceedings may be more accessible to the public, and no less open to the parties. As indicated above, the directives issued by the Chief Justice and the President of this Court, having been agreed by the heads of court, although premised on the national state of disaster, were founded on the power of the judicial authority provided for in ss 165 and 173 of the Constitution and ss 8(3) and 8(4) of the SC Act. This was done to deal with prevailing circumstances and to preserve and advance open justice. The alternative would be for the administration of justice to grind to a halt, thus negating open justice.

[65] That being so, it does appear that Mr de Beer and the LFN took up their position simply because they object to any revision as to how oral hearings are to be conducted that is responsive to COVID-19. That, however, is not a relevant consideration in determining whether a hearing should take place on a virtual platform. If the virtual hearing proposed to the parties gave rise to no infringement of their right to a fair, open and public hearing, then it was open to this Court to regulate its own process. A party cannot dictate how the proceedings will be conducted. That is a matter for the court to determine. Nor may a party use its failure to secure the form of proceedings it favours as a tendentious basis for claiming that the court may not adjudicate the merits of the matter, much less to level the unwarranted accusation that the court is biased. Yet this is what Mr de Beer, the LFN, and belatedly, the HBF (which had not actively participated in the appeal until the day of the hearing) sought to do. These efforts to frustrate the proceedings cannot be countenanced.

[66] This Court, as indicated in the note to the parties, has for longer than a year successfully conducted virtual hearings. Parties have consistently been engaged on whether they objected to a virtual hearing and were required to indicate the basis of their objection and to set out the prejudice they considered might attach to a virtual hearing. The respondents were afforded that opportunity and were required to indicate which of their rights would be attenuated. The respondents were adamant, emphatic and uncompromising. They insisted that they would attend physically at court and indicated that they would not adhere to safety protocols in the event that these protocols were enforced. Save for repeating that this case was unique, we were offered nothing by the respondents in writing prior to the hearing, nor during Mr de Beer's appearance on the virtual platform, indicating what prejudice they would suffer in the event of a virtual hearing. No argument was presented on the attenuation of rights, if any.

[67] This Court acted in accordance with the practice directives of the Chief Justice and in line with the practice directives of the President of this Court. In seeking to engage with the respondents, we were met with obstinacy, and unfounded and contemptuous accusations. Our hearings on a virtual platform are open to the public and the media. Our experience is that more people 'attend' virtual hearings than they do when the court is in

session in Bloemfontein. On the day of the hearing of this appeal, the national broadcaster, the South Africa Broadcasting Corporation, obtained permission to record and livestream the hearing. Other media outlets attended the virtual hearing. Judgments are handed down electronically by circulation to the parties' legal representatives by email. It is then published on this Court's website and released to SAFLII. In short, this is a wider distribution and publication than is conventionally the case when a judgment is handed down in court in Bloemfontein, typically with only junior counsel in attendance to note it. In addition, a media summary is published on the website.

[68] As indicated in the note to the parties, this was an appeal with a full record and the heads of argument were available to the judges hearing the appeal. It is in this context that prejudice, if asserted, has to be measured. No prejudice was claimed. More significantly, the directives referred to above were premised on the provisions of ss 165 and 173 of the Constitution and the applicable provisions of the SC Act. They were agreed to by the heads of court and adhered to by judges. The measures set out in the directives were to ensure the safety of the public, legal representatives, judges and support staff. They have not been challenged and set aside.

[69] The high court has on at least two occasions pronounced on the legality of virtual hearings. In *De Villiers v De Villiers*, the court said the following:

'One of the methods to contain the spread of the virus is conducting court proceedings on a virtual platform. This method has the obvious benefit of limiting the chances of exposing oneself (that is all persons whose appearance/presence is pertinent to said court proceedings, be it Judges, court staff, legal fraternity, witnesses, interested parties, media, etc.) unnecessarily to contracting the virus.'<sup>13</sup>

In that case, a litigant insisted on an 'open court' hearing, but could not show why a virtual hearing would not result in a fair hearing.

[70] In the present circumstances, we can discern no reason why a virtual hearing for the purposes of hearing oral argument on any aspect of this appeal would attenuate the

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<sup>13</sup> *De Villiers v De Villiers* 2021 [2021] ZAGPPHC 209; JDR 0596 (GP); paras 5-6. See also *Union-Swiss (Proprietary) Limited v Govender and Others* [2020] ZAKZDHC 30; 2021 (1) SA 578 (KZD) para 26.

open justice principle. Neither the respondents nor the HBF referenced any prejudice they would suffer. No basis was offered as to why a deviation from the directives issued by the Chief Justice and the President of this Court was warranted. Virtual hearings have been utilised by this Court for more than a year to hear oral argument, without any discernable detriment to fairness or open justice. We decided in consequence to proceed with the oral hearing on the virtual platform.

[71] The respondents and the HBF having been excused, since they declined to address this Court on any issue, even under reservation of their rights, the Minister and CASAC were ready to make submissions and we conducted the appeal virtually and received their oral submissions.

### **Points *in limine***

[72] Before turning to the substantive merits of the appeal, it is necessary first to turn to a consideration of four points *in limine* raised by the respondents in their heads of argument. First, it will be recalled that the Minister obtained limited leave to appeal from the high court. The scope of the appeal was expanded by the granting of leave by this Court on petition to it. It is contended that, having obtained leave to appeal from this Court on 11 September 2020, the Minister failed to timeously file her amended notice of appeal by 11 October 2020, in terms of rule 7(1)(b) of this Court's rules. Accordingly, so the contention proceeded, the appeal against those parts of the order had lapsed. To cure the failure, the Minister sought condonation. It was submitted on her behalf that the oversight was fully cured on 4 November 2020 by the filing of heads of argument that covered the entirety of the orders granted by the high court. The respondents could thus not have been under any illusion as to the full extent of the appeal. In any event, they responded thereto.

[73] In the exercise of this Court's discretion, consideration has been given to all the relevant factors, including the degree of non-compliance with the rules, the explanation for the failure to comply with the rules, the prospects of success on appeal, prejudice to

the respondent and the importance of the case.<sup>14</sup> Upon consideration of the relevant factors, condonation is granted.

[74] The respondents' second point *in limine* was cast as follows. The high court declared the regulations unconstitutional and invalid. The high court suspended its declaration of invalidity until such time as the Minister reviewed, amended and republished the regulations, 'with due consideration to the limitation each regulation has on the rights guaranteed in the Bill of Rights contained in the Constitution'. The Minister was afforded 14 business days from the date of the high court's order to comply with the direction to review, amend and republish the regulations. The respondents contended that the Minister's application for leave to appeal and the grant of that application did not suspend the order of invalidity made by the high court. Proceeding from this premise, the 14-business-day period permitted by the high court having run out, the suspension of the order of invalidity came to an end. Consequently, by reason of the doctrine of objective constitutional invalidity, the regulations are invalid and must be taken to be a nullity. Without regulations, the order appealed against has no content, and the appeal is rendered moot.

[75] The place of the doctrine of objective constitutional invalidity in our law does not admit of simple application, because the Constitutional Court has recognised that what is done before a law or an executive or administrative action is set aside exists and cannot be ignored on the basis of its invalidity.<sup>15</sup> These complexities do not require further consideration in this matter. Whether the application for leave to appeal and its grant suspended the declaration of invalidity, pending the determination of the appeal, is not a matter we need to decide. Even if the respondents were correct, *arguendo*, that once the Minister failed to take advantage of the suspension granted under the order of the high court, the declaration of invalidity stood, that does not vacate the Minister's right to have the question of validity decided by this Court on appeal. It is the outcome of the appeal

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<sup>14</sup> *Uitenhage Transitional Local Council v South African Revenue Services* 2004 (1) SA 292 (SCA) paras 6 and 11.

<sup>15</sup> See the most recent expression of the principle expressed in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* [2009] ZASCA 85 (SCA) in *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO and Others* [2019] ZACC 36; 2020 (1) BCLR 41; 2020 (4) SA 375 (CC).

before this Court that will ultimately determine the validity of the regulations. If we should find that the high court's order of invalidity was granted in error, then the effect of our order will be to recognise the validity of the regulations *ex tunc*. The effect of such an order by this Court will not thereby resuscitate regulations that were, since the declaration of the high court, invalid. Such an order will determine that the regulations have always been valid. The issue as to the validity of the regulations thus remains very much a live issue before this Court. The appeal before us is not moot.

[76] The respondents' third point *in limine* was that the Minister could not appeal the high court's order, because it is an interim order, and hence it is not appealable. The declaration of invalidity was conjoined, so it was argued, to an order that the Minister review and amend the regulations, and then report upon her compliance to the high court. Until such time as the court had discharged its supervisory competence as to compliance, so it was contended, the high court's order is not final, cannot be appealed and the Minister's appeal is thus premature.

[77] The order of the high court cannot be interpreted as an interim order. The declaration of invalidity is final. The effect of the order is to strike down the regulations. The declaratory order of invalidity was not framed so as to render it subject to reconsideration by the high court. What the high court endeavoured to do was to regulate the consequence of its final declaration of invalidity. This it did by combining a regime of suspension with an obligation upon the Minister to review, amend and publish the regulations anew within 14 business days, and then report upon her compliance to the high court. The coherence and validity of such a regime is doubtful, even under the wide remit of s 172(1)(b) of the Constitution. But nothing of that regime renders the declaration of invalidity an interim order. It is a final order that was permissibly appealed to this Court. The orders requiring the Minister to review the regulations and to report thereon to the high court were premised on the invalidity of the impugned regulations. A successful appeal against the order of invalidity would necessarily lead to a setting aside of the order as a whole.

[78] The respondents' fourth point *in limine* was that the Minister acquiesced in the high court's order and her appeal, as a result, is subject to pre-emption. The respondents rely upon submissions in the Minister's heads of argument before this Court that the regulations, that were the subject of the high court's order, have since been revised and amended. It is explained in the Minister's heads of argument that the effect of the most recent amendments was to place the country on Alert Level 1, and the majority of the regulations that the high court declared invalid are no longer in force.

[79] In *Avusa Publishing*,<sup>16</sup> this Court reiterated the well-established principle that a party who unequivocally conveys an intention to be bound by a judgment abandons their right to appeal. The Minister however did no such thing. The amendment of the regulations was motivated by the changes required in response to the COVID-19 pandemic in the country. The amendments did not take place in compliance with the high court's order. It follows that there was no acquiescence on the part of the Minister, and hence no pre-emption of the appeal.

[80] The respondents' points *in limine* therefore cannot be sustained. We proceed to consider the merits of the appeal.

### **The merits**

[81] On appeal, the Minister contended that: first, the high court strayed beyond the pleadings; alternatively, second, the respondents had not properly pleaded the constitutional attack, which was upheld by the high court and the attack based on the Bill of Rights was too vague for the Minister to answer; third, the respondents had not raised a proper rationality attack and, in any event, the high court's application of the rationality test was fundamentally flawed; and, fourth, the high court's orders were impermissibly vague.

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<sup>16</sup> *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 3.

***As to the first***

[82] In the notice of motion, a prayer was sought that the proclamation of the national state of disaster was unconstitutional, unlawful and invalid. The high court dismissed that challenge. The respondents were refused leave to cross-appeal against the high court's decision in this respect. They were thus confined to the submissions made in their heads of argument concerning the validity of the regulations that followed. It is to the appeal of the high court's order in that regard that we now turn. Although the Minister first issued regulations on 18 March 2020, those were amended a number of times and were then repealed on 29 April 2020, when the Minister published the Level 4 regulations. On 28 May 2020, the very day on which the matter was argued before the high court, the Minister once again amended the regulations to include a new chapter 4 to govern Alert Level 3 (the Level 3 regulations). When the application was launched, the Level 3 regulations had not yet been promulgated. Unsurprisingly therefore, the founding affidavit made no reference whatsoever to them. On the contrary, the founding affidavit referred to the Level 4 regulations as the 'new regulations'. Accordingly, it was impermissible for the high court to have considered and made a determination in respect of the Level 3 regulations, which were not properly before the high court. What is more, it arrived at its conclusion without affording the Minister an opportunity to be heard. The breach by the high court of something so fundamental as the right to be heard taints the high court's judgment.

[83] The high court specifically considered the six Level 3 provisions mentioned earlier in this judgment. It held that those six provisions were unconstitutional and invalid on the grounds that they were irrational and unjustifiably limited fundamental rights. On the basis of these findings in respect of the six specific regulations, the high court declared invalid, not only those six regulations, but all the regulations promulgated until the date of judgment (save for certain specified exceptions). Extrapolating from its conclusion that the six specific provisions did not survive scrutiny, the high court proceeded to hold that all the regulations, including all of the Level 3 regulations (save for the specified exceptions), fell to be struck down. But, the Level 3 regulations were not before the court at all. The application was confined to the regulations that were current when it was launched; namely, all of the regulations up to and including the Level 4 regulations promulgated on 29 April 2020. Those are the regulations that the Minister was called upon

to defend. The Minister's answering affidavit was filed on 26 May 2020, before the promulgation of the Level 3 regulations. The Minister was accordingly never called upon to defend the Level 3 regulations. The Minister was not afforded an opportunity to do so. Nor was it permissible for the high court to strike down regulations which it had not examined for want of legality. Extrapolation may take place in drawing factual conclusions on the basis of inference. The legal invalidity of a body of regulations cannot be determined on the basis that since certain specific regulations are found wanting, all such regulations stand condemned.

[84] At the hearing of the matter, neither the high court nor the parties had even so much as seen the Level 3 regulations. Indeed, the high court had observed that the Level 3 regulations 'have neither been placed before me nor have the parties addressed me on them'. That notwithstanding, the high court appropriated to itself the right to consider and make a determination on the six Level 3 provisions. The judgment thus went beyond the respondent's pleaded case. It goes without saying that any judgment should be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on issues that are necessary for the decision of the case.<sup>17</sup> It ought to follow that on the strength of this fundamental error alone, the high court's orders fall to be set aside.

[85] What is more, even a superficial comparison reveals that the order which ultimately issued differed markedly from the compendious relief sought. First, the declaration of the national state of disaster was not set aside. Second, regulations which had not been dealt with in the affidavits and had not yet come into force were set aside. In truth, the respondents obtained very little by way of relief of what had initially been sought and a great deal more than had actually been sought. The high court ranged beyond what had been sought by the respondents. Thus, not only was the Minister denied a proper hearing, but the respondents were granted relief that had never been sought. In that sense, not only did the judgment suffer a failure of proper judicial reasoning, but it

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<sup>17</sup> *Western Cape Education Department & Another v George* [1998] ZASCA 26; [1998] 2 All SA 623; 1998 (3) SA 77 (SCA) at 84E.

also failed to recognise and respect – as it was constitutionally obliged to do – the limits of the judicial function, and hence the separation of powers.<sup>18</sup>

[86] As it was put in *National Director of Public Prosecutions v Zuma*:

‘It is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law. The underlying theme of the court’s judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the executive (para 161-162). This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.

Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office. . . .’<sup>19</sup>

[87] Likewise, in *Fischer v Ramahlele*, it was stated:

‘Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for “it is impermissible for a party to rely on a constitutional complaint that was not pleaded.” There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being

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<sup>18</sup> See *inter alia Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC) paras 110-111; *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC) paras 60-61.

<sup>19</sup> *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277; 2009 (1) SACR 361; 2009 (4) BCLR 393; [2009] 2 All SA 243 (SCA) paras 15 and 16.

decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

This last point is of great importance because it calls for judicial restraint. . . .<sup>20</sup>

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<sup>20</sup> *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614; [2014] 3 All SA 395 (SCA) paras 13-15. In *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123; [2014] 11 BLLR 1025; 2014 (10) BCLR 1195; (2014) 35 ILJ 2981 (CC) paras 217-218, the Constitutional Court put it thus:

‘The general principle of our law is that it is the parties themselves who identify and raise issues to be determined by a court. The parties may have their own reasons for not raising an issue which the court finds interesting or important to determine. The scope of what falls to be determined depends on what the pleadings contain. In *CUSA*, this Court formulated the principle in these terms:

“Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the [Labour Relations Act] specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not, on appeal, raise a new ground of review. To permit a party to do so may very well undermine the objective of the [Labour Relations Act] to have labour disputes resolved as speedily as possible.”

However, this principle is subject to one exception. The point raised *mero motu* by the Court must be apparent from the papers in the sense that it was sufficiently canvassed and established by the facts, and that its determination must be necessary for the proper adjudication of the case. Elaborating on the exception in *CUSA*, this Court said:

“Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.”

[88] The foundation of the respondents' case was based upon sweeping generalisations and broad conclusions. In the first place, the respondents did not file any confirmatory affidavits from those persons who had allegedly complained to Mr de Beer about the hardships that they were experiencing. In the second place, Mr de Beer simply annexed various reports to his affidavit (the provenance of which was not always clear), in support of what may somewhat loosely be described as COVID-19 denialism. As no affidavits accompanied these annexures, and Mr de Beer lacked the necessary expertise to testify to the truth of their content, the foundational hypothesis sought to be advanced by the respondents was unsupported. Regrettably, the high court simply failed to consider either the admissibility of the allegations advanced by Mr de Beer or their evidential weight, if any. Had it done so it would have arrived at the conclusion that, even on their own version, no cognisable case had been made out by the respondents.

[89] In the circumstances set out above, no answer, in truth, was called for by the Minister. That ought at the outset to have been appreciated by the high court. It found for the respondents on a case not made out in the founding affidavit and based largely on dispersed and inadmissible assertions and its own speculation as to how the regulations ought to have been framed.

[90] The Minister was compelled to deal, as best she could, with a case that was framed in almost unintelligible terms. Her explanations as to why she was moved to declare a national state of disaster and that she took scientific advice before formulating the regulations were not meaningfully contradicted.

[91] It is important to emphasise that the respondents had Uniform rule 53, which exists to facilitate applications for review, at their disposal.<sup>21</sup> It exists to assist an applicant

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<sup>21</sup> Rule 53 provides:

'(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

for review and, in the constitutional era, it serves to advance accountability and transparency. As explained in *Jockey Club of South Africa v Forbes*:

'Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record. In terms of para (b) of subrule (1) the official concerned is obliged to forward the record to the Registrar and to notify the applicant that he has done so. Subrule (3) then affords the applicant access to the record. (It also obliges him to make certified copies of the relevant part thereof available to the Court and his opponents. The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.) More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an interlocutory application, to "amend, add to or vary the terms of his notice of

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(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record dispatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall-

(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometers of the office of the registrar at which he will accept notice and service of all process in such proceedings; and

(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings.'

motion and supplement the supporting affidavit". Subrule (5) in turn regulates the procedure to be adopted by prospective opponents and the succeeding subrules import the usual procedure under Rule 6 for the filing of the applicant's reply and for set down.<sup>22</sup>

[92] Thus, the purpose of rule 53 is to 'facilitate and regulate applications for review' and to promote constitutional values.<sup>23</sup> In terms of rule 53, the production of the administrative record is usually necessary for a court to undertake the task of determining the regularity of the administrative action sought to be impugned.<sup>24</sup> Without the record, a court will often be hampered in its ability to perform its constitutionally entrenched review function.<sup>25</sup> As it was put by the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*:

'The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponents. This requires that "all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court".<sup>26</sup>

[93] When an applicant in review proceedings files its supplementary affidavit, after having had sight of the record, it is in effect fully stating its case for the first time.<sup>27</sup> In eschewing rule 53, the respondents placed both themselves and the court at a significant disadvantage. The rule 53 record helps shed light on what happened, why it happened and it may undermine *ex post facto* justifications offered by the decision-maker

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<sup>22</sup> *Jockey Club of South Africa v Forbes* [1992] ZASCA 237; [1993] 1 All SA 494; 1993 (1) SA 649 (A) at 660.

<sup>23</sup> *Ibid* at 661.

<sup>24</sup> *City of Cape Town v South African National Roads Authority Limited and Others* [2015] ZASCA 58; 2015 (3) SA 386; [2015] 2 All SA 517; 2015 (5) BCLR 560 paras 35-37.

<sup>25</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] ZASCA 15; [2012] 2 All SA 345; 2012 (6) BCLR 613; 2012 (3) SA 486 (SCA) para 37.

<sup>26</sup> *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1; 2018 (7) BCLR 763 (CC) para 15.

<sup>27</sup> *City of Cape Town v South African National Roads Authority Limited and Others* fn 23 above.

of the decision under review.<sup>28</sup> The respondents launched review proceedings in the dark ‘against an opponent with perfect night vision’, in that the Minister knew exactly what information had been considered.<sup>29</sup> The respondents could not contend with much insight that ‘the decision was irrational; that irrelevant considerations were taken into account; or that the decision was taken arbitrarily or capriciously’.<sup>30</sup> There was thus little, if anything, to gainsay the version advanced on behalf of the Minister. All the more reason why the Minister’s answer, which elicited no more than a rather elliptical response in reply, had to carry the day.

[94] It is so that the application in the high court was brought on an urgent basis. This may impose some constraints on the production of a full record. But the record is of importance, not only to the parties, but for the court that must exercise its review jurisdiction. Every effort should be made to secure the record, or at least, in urgent cases, the most salient parts of the record. In this the parties have a duty to co-operate. An applicant who proceeds without the benefit of the record may well do so at its own peril. Rule 53 has to be read in conjunction with Uniform rule 6, the long form of which can be departed from in cases of urgency and it does not have to be coupled with a prayer for interim relief.<sup>31</sup> There appears to have been no informal request by the respondents for a record of the decision. The replying affidavit was filed almost a full two weeks after the application was launched, which would have left sufficient time for a perusal of the record if it had either been sought informally or obtained by way of a preceding urgent interlocutory in the event that it had been refused.

### ***As to the second***

[95] The respondents did not plead, or in any event properly plead, the constitutional attack that was upheld by the high court. Constitutional questions ought to be approached by litigants and courts alike with the appropriate degree of care. The Constitutional Court

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<sup>28</sup> *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592; 2014 (11) BCLR 1310 (CC) para 37.

<sup>29</sup> *Bridon International GMBH v International Trade Administration Commission* [2012] ZASCA 82; [2012] 4 All SA 121; 2013 (3) SA 197 (SCA) para 31.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Safcor Forwarding (Pty) Ltd v NTC* 1982 (3) SA 654 (A) at 675B-H.

has repeatedly warned that constitutional attacks on the validity of legislation must be pleaded explicitly and with specificity to enable the State to know what case it has to meet and to adduce the evidence necessary to do so. Ngcobo J put the proposition as follows: 'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and relief that is sought.'<sup>32</sup>

[96] In *Public Servants Association obo Ubogu v Head of Department of Health, Gauteng and Others*, the Constitutional Court spoke thus:

'In *Garvas*, Jafta J (albeit the minority) emphasised the importance of accuracy in the pleadings. He remarked:

"Orders of constitutional invalidity have a reach that extends beyond the parties to a case where a claim for the declaration of invalidity is made. But more importantly these orders intrude, albeit in a constitutionally permissible manner, into the domain of the legislature. The granting of these orders is a serious matter and they should be issued only where the requirements of the Constitution for a review of the exercise of legislative powers have been met.

. . .

Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to

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<sup>32</sup> *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2001 (2) SA 388 (CC) para 22. See also *Shaik v Minister of Constitutional Development and Others* [2003] ZACC 24; 2004 (4) BCLR 333; 2004 (3) SA 599 (CC) paras 24 and 25.

satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.”<sup>33</sup>

[97] Before addressing pertinently the question of whether there was a discernible and appropriate Bill of Rights challenge, the reader is asked to pause to consider, after having regard to the relevant parts of the respondents’ founding affidavit, quoted above, how the Minister could be expected to respond intelligibly to the case sought to be advanced by the respondents. Had a properly pleaded case been advanced, no doubt, the Minister would have been expected to put up the necessary evidence to justify the regulations.

[98] The respondents made two fleeting references in the founding affidavit to an attack under the Bill of Rights. Paragraph 3.11 stated: ‘[i]n general, these regulations violated almost all clauses in the Bill of Rights . . .’. Later, para 10 added:

‘RE PARAGRAPH 3.11: BILL OF RIGHTS

We specifically challenged the right of the [Minister] to have implemented law which had extensively violated our Bill of Rights in various ways which we shall argue at the hearing.’

This constituted the sum total of the Bill of Rights attack and, as should be evident, was far from the degree of specificity that is required when pleading a constitutional attack.

[99] At the very least it was for the respondents to allege: (a) each specific regulation sought to be impugned; (b) which constitutional right was alleged to be violated by the impugned regulation; and, (c) how the regulation allegedly infringed the specific right. Absent this, it could hardly have been expected of the Minister to appreciate the scope of the challenge and put up the necessary evidence to justify the regulation. It was not for the Minister to justify each of the regulations in a vacuum.

[100] This was not merely a matter of form or ‘elegance’ as the high court suggested. The high court was willing to see a case where there was none and unjustifiably excused the manner in which it was framed. To sum up on this aspect of the case: The case put forward by the respondents was wholly inadequate. There was no cognisable case to

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<sup>33</sup> *Public Servants Association obo Ubogu v Head of Department of Health, Gauteng and Others* [2017] ZACC 45; 2018 (2) BCLR 184; 2018 (2) SA 365 (CC) para 50.

answer. The respondents ignored the fundamental principle that an applicant's case must be set out with sufficient specificity, clarity and supporting admissible evidence so that the functionary or repository of power knows the case that has to be met. The *dicta* of the Constitutional Court on how a constitutional challenge should be couched were ignored. That too ought to have been clear to the high court.

***As to the third:***

[101] The exercise of public power, including the decision to promulgate regulations under s 27(2) of the Act must have a rational basis. In *Democratic Alliance v President of South Africa*,<sup>34</sup> the Constitutional Court framed rationality review thus:

'The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship 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. Once there is a rational relationship, an executive decision of the kind with which we are concerned is constitutional.'

Rationality review applies both to the process by which a decision is made and to the decision itself. But an enquiry into rationality, as this Court observed in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others*, 'can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable'.<sup>35</sup>

[102] Here again, there was no properly pleaded case. There was a complaint that the proclamation of the national state of disaster was irrational and based on incorrect advice and unreliable information. There is no reference, in the summary set out in para 3 of the founding affidavit, to a cause of action based on the alleged irrationality of the regulations, nor does the rest of the founding affidavit raise such an attack in cognisable form. A rationality attack also needs to be properly pleaded so that the functionary knows what

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<sup>34</sup> *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297; 2013 (1) SA 248 (CC) para 32.

<sup>35</sup> *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134; 2013 (6) SA 421; [2013] 4 All SA 571 (SCA) paras 65-66.

he or she is being called upon to explain. Despite the fact that no such attack was pleaded, supposed irrationality was at the heart of the high court's condemnation of those particular regulations which it specifically considered.

[103] However, and even if a rationality attack were to have been open to the present respondents in the high court, it had to be approached in accordance with the Constitutional Court's rationality jurisprudence as encapsulated *inter alia* in the passage cited above from *Democratic Alliance*.<sup>36</sup> The high court was required to assess each regulation against the purpose and to determine whether there was a rational link between that regulation and the stated purpose of curbing the spread of COVID-19. But, the high court did not do this. Although the high court correctly stated the rationality test in paras 6.1 to 6.4 of its judgment, it did not thereafter apply it in para 7 when subjecting specific measures in the regulations to the rationality test. First, in each case the high court deduced irrationality from the fact that some other conduct, thought by the court to be equally or more worthy of restriction, had not been restricted. Second, instead of limiting itself to an enquiry into the presence or absence of a rational connection between the measure and its purpose, the court strayed into considerations as to whether other (and in the court's opinion, evidently better) means might have been adopted.

[104] The first error can be illustrated with reference to the high court's first case of supposed irrationality. Regulation 33(1) of the Level 3 regulations confined people to their homes except for certain permitted purposes. This meant *inter alia* that loved ones could not visit a dying person at home. This was said by the high court to be irrational on the basis that once the person died, regulation 35 permitted up to 50 people to attend the deceased's funeral. In terms of the objective rationality test, the high court should have asked whether the restrictions on movement contained in regulation 33(1) were rationally connected with the purpose for which the measure was enacted, namely to restrict the spread of the virus. If the answer to this question was yes (as we think it should have been), regulation 33(1) was not deprived of objective rationality merely because regulation 35 permitted up to 50 people to attend a funeral. This is so even if there was a

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<sup>36</sup> See fn 33 above.

case to be made that the regulations should have prohibited funerals or restricted attendance to a smaller number so as to reduce the spread of COVID-19 (we do not suggest that the Minister should have done so). That a regulatory scheme is under-inclusive does not make specific regulations or the regulatory scheme as a whole irrational, under the legal test for irrationality. Such a scheme may be open to challenge on the grounds of arbitrariness or unfair discrimination. But that was not the case brought by the respondents.

[105] The second error can be illustrated with reference to the high court's fifth case of supposed irrationality. Regulation 35, while permitting funerals with up to 50 attendees, prohibited night vigils. The high court asked itself, rhetorically, why night vigils were wholly banned if the purpose was to prevent the spread of the virus through close proximity. Why not rather impose 'time, distance and closed casket prohibitions'? Why not allow a vigil without the body of the deceased? Here the high court regarded the prohibition of night vigils as irrational because, in the court's opinion, there were more appropriate (ie less restrictive) ways of achieving the lawmaker's purpose. That is not an application of the rationality test. It engages in the very enquiry that the rationality test precludes, that is, whether the court can craft a better regulation than the Minister did. The high court should have asked itself whether prohibiting night vigils is rationally related to the purpose of restricting the spread of the virus, not whether a more limited restriction might also have achieved that purpose.

[106] These legal errors permeated the high court's findings in respect of the validity of the regulations. In that, the approach was also fatally flawed. The high court did not properly apply the rationality test to each of the impugned regulations. Instead, it embarked upon a comparative exercise and for the rest, it relied upon conjecture and speculation. It lost from sight that the question is not whether some other measure might better achieve the purpose or might be more appropriate, only whether the measure actually employed is rationally related to the purpose.

**As to the fourth:**

[107] An order of court binds all those to whom it applies. It must therefore be written in a clear and accessible manner. Here, aside from the first order striking down the regulations, the remaining orders are vague. Paragraphs 2 and 3 of the court order require the Minister to ‘review, amend and republish’ all of the regulations, save for the five that have been specified. These orders do not tell the Minister what is required of her to comply. More particularly, they do not indicate which regulations in particular should be amended, how and in what respects. The Minister is thus left to speculate as to the respects in which the regulations are unconstitutional and how that should be remedied. In the judgment on the application for leave to appeal, the court expressed the view that it is a ‘simple exercise’ to review the regulations and revise them so as to ‘remove the irrationalities’. But that is easier said than done, especially where the Minister has been left in the dark as to the basis upon which each of the regulations have been held to be irrational and, accordingly, what manner of amendment would cure the defect.

[108] As it was put in *Minister of Water and Environmental Affairs v Kloof Conservancy*: ‘Moreover, interrogating the suggestion appears to lead one to the conclusion that the order is indeterminate, open ended and irredeemably vague. For, it seems impossible for the Minister to know with any measure of confidence what she is obliged by the order of court to do. Here, the court offers the Minister no guidance as to when she is required to step in. Litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them . . . Courts are entitled to operate on the assumption that government will comply with orders of court . . . But, in order to do that, it has to know where its obligations start and end. It does seem to me to be difficult in the extreme for the Minister to know with any measure of confidence precisely what steps she is required to take to comply with the order of the high court.’<sup>37</sup>

**Other challenges**

[109] Finally, because it was persisted with in the respondents’ heads of argument, we deal with the question of whether the Minister was required to obtain approval for the

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<sup>37</sup> *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) para13.

regulations from the NCOP. In this regard, it is necessary to have regard first, to s 27(2) of the Act, which bestows on the Minister very specific regulation-making powers after declaring a national state of disaster. These involve, *inter alia*, the employment of resources, the release of personnel of a national organ of state for rendering emergency services and regulating the movement of persons, traffic and goods. That subsection contains a list of matters that is exclusively within the Minister's remit.

[110] The provisions of the Act following upon s 27 resort under Chapter 4 entitled 'Provincial Disaster Management' and set out a provincial disaster management framework. It obliges each province to establish a disaster management centre and sets out the powers and duties of such centres. Section 32 of the Act provides that a provincial disaster management centre must upon request assist the National Centre. Section 33 provides that '[a] provincial disaster management centre, to the extent that it has the capacity, must give guidance to organs of state, the private sector, non-governmental organisations, communities and individuals in the province to assess and prevent or reduce the risk of disasters'. Section 33(1)(a) sets out the ways and means of doing so. So too, a provincial disaster management centre has a duty to monitor, measure performance and evaluate disaster management plans and prevention, mitigation and response initiatives. Part 3 of Chapter 4 of the Act deals with the powers and duties of provincial government. Section 40 is significant. It states that '[t]he executive of a province is primarily responsible for the co-ordination and management of provincial disasters that occur in the province . . .' and to that end must employ existing legislation and contingency arrangements as 'augmented by regulations or directions made or issued in terms of s 41(2)'.<sup>38</sup> In terms of the last-mentioned subsection, the Premier of a Province may, after a consultation process, declare a provincial state of disaster and may then make regulations of the kind that the Minister may make in terms of s 27.

[111] Subsections 59(1) and (4), on the other hand, which the respondents contend should be read with s 146 of the Constitution, read as follows:

'59. Regulations.—

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<sup>38</sup> See s 40(2)(b).

- (1) The Minister may make regulations not inconsistent with this Act—
- (a) concerning any matter that—
    - (i) may or must be prescribed in terms of a provision of this Act; or
    - (ii) is necessary to prescribe for the effective carrying out of the objects of this Act;
  - (b) providing for the payment, out of moneys appropriated by Parliament for this purpose, of compensation to any person, or the dependants of any person, whose death, bodily injury or disablement results from any event occurring in the course of the performance of any function entrusted to such person in terms of this Act;
  - (c) concerning the focus areas of the national disaster management education, training and research frameworks; and
  - (d) concerning the declaration and classification of disasters.
- ...
- (4) Any regulations made by the Minister in terms of subsection (1) must be referred to the National Council of Provinces for purposes of section 146(6) of the Constitution.’

[112] Section 59(1), on the face of it, appears to provide for regulations by the Minister of a kind not specifically catered for elsewhere in the Act. It is true that the opening part of s 59(1) is couched in fairly broad terms. However, as one proceeds to subsequent subsections, such as subsecs 59(1)(b), (c) and (d), it is clear that they cater for specific areas not catered for under s 27. So, for example, s 59(1)(b) provides for compensation for bodily injury, disability or death resulting from the performance of any function entrusted to any person in terms of the Act. Section 59(1)(c) concerns the focus areas of the national disaster management education, training and research framework. It is in relation to these areas that regulations by the Minister, in terms of s 59(4), must be referred to the NCOP for purposes of s 146(6) of the Constitution. The regulations in issue do not resort under s 59(1).

[113] Even if we are wrong in that conclusion, the problem for the respondents is that s 146 of the Constitution caters for conflicts between national and provincial legislation, dealing with a functional area listed in Schedule 4.<sup>39</sup> Section 146(6) of the Constitution reads as follows:

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<sup>39</sup> See s 146(1) of the Constitution.

'A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.'

The respondents have not shown that the regulations in question, either in relation to Schedule 4 or any other provincial area of competence, are in conflict with provincial legislation. In that regard, the conclusion of the court below is correct.

[114] The respondents made two further submissions in their heads of argument before this Court that had failed to find favour in the high court. First, it was contended that the prohibition upon gatherings in the regulations is in violation of s 14(1) of the Gatherings Act. Section 14(1) provides that '[i]n 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'. Section 14(1) is not a derogation from the power of the Minister to make regulations under s 27(2) of the Act. The Gatherings Act regulates how and whether gatherings may take place in consideration of discrete issues, such as traffic disruption, and the risk of damage to property and injury to persons. Its sphere of regulation is entirely distinct from the regulatory scope of s 27(2) of the Act, upon the declaration of a national state of disaster. The primacy accorded to the Gatherings Act by s 14(1) simply has no application to the regulatory competence of the Minister under s 27(2) of the Act. The high court thus correctly dismissed this challenge.

[115] The second submission of the respondents was this. The regulations made declarations of additional essential services. The declaration of essential services, so it was contended, is the exclusive responsibility of the Essential Services Committee (ESC) in terms of s 70 of the LRA. Section 210 of the LRA limits the processes by recourse to which essential services may be identified. The regulations, in consequence, are invalid in so far as they make declarations of essential services. This can only be done in conformity with the requirements of the LRA. This submission cannot prevail. The ESC is given powers and functions in terms of s 70B of the LRA, because of the distinctive treatment given to essential services under the LRA. For example, no person may take part in a strike or lock-out if that person is engaged in an essential service. Section 210 of the LRA is a supremacy clause that gives primacy to the LRA, in the event of a conflict of laws, in the regulatory sphere to which the LRA has application. That sphere does not

extend to the regulatory competence of the Minister under s 27(2) of the Act. As a result, this submission cannot prevail.

## **Conclusion**

[116] For these reasons the appeal must succeed. The constitutional challenge made to the regulations was too diffuse and inadequately specified to make out a case for an infringement of the Bill of Rights. The rationality challenge, which was likewise not properly pleaded, failed to observe the tight strictures of means and ends that founds such a challenge. A generalised disquiet that the regulations constrain liberty, lack coherence or may have been less restrictively formulated does not suffice to secure a declaration of invalidity. The high court struck down regulations that had not been challenged, on a case not properly pleaded, and on the basis of reasoning that the invalidity of certain regulations must contaminate all the regulations. In sum, neither the challenge brought, nor the high court's reasons for sustaining that challenge can be allowed to stand.

[117] As indicated earlier, it is now necessary to deal with the response by Mr de Beer and the LFN to the apology tendered by the Registrar to Mr de Beer and the LFN. On 18 June 2021, Mr de Beer wrote to the President of this Court. Once again, it is necessary to reproduce the written response in its entirety. It reads as follows:

1. The email dated 17<sup>th</sup> instant received from the Chief Registrar, Ms. Van der Merwe, which carried your answer to our letter dated 10<sup>th</sup> instant, refers.
2. After careful consideration of your official response, writer has decided to herewith inform you that the entire Supreme Court of Appeal may stick its fictitious "apology" to us in its arse.
3. As the leader of the institution, you have allowed the COVID-19 flimflam to take over the Court's judicial functionality and for it to desecrate the institution to the point of pure codswallop which it is today – nothing but a mere extension of Government's narrative; a Court which has lost its independence and which has become incapable of protecting the Constitution of the Republic of South Africa and of protecting the very rights which Constitution and Bill of Rights afford the people.

4. Let writer remind you, Madam President of the Court, that neither you nor anyone of your judicial colleagues are divine and that the Court still belongs to the people of South Africa, and not the Government, which acts merely as their steward.
5. Even if the judgment in our very matter should be in our favour, LFN and writer shall appeal it as, either way, it will have come about by improper means and your bench will have made a charade of what was supposed to be a proper adjudication. Neither LFN nor writer are able to respect a judgment not rooted in true justice, as would normally have been delivered by the Appellate Division, something which the SCA used to be not too long ago.
6. Let God's water run over God's acre.'

[118] 'In a democratic society, one who assumes to act for the citizens in an executive, legislative or judicial capacity must expect that his official acts will be commented upon and criticised. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.'<sup>40</sup>

Courts are not above criticism. Legal commentators, the media, academics, and members of the public criticize judgments and court rulings on an almost daily basis. In that sense, courts can rightly claim that they are constantly held up to public account. No judge, indeed, no person, whatever his or her station is above scrutiny. Our concern in this case, however, is to draw a judicial line in the sand. We have set out in some detail the criticisms levelled against us. Our primary concern however, is the baseless criticism levelled, in the last communication of Mr de Beer and the LFN, against the President of this Court, the deplorable denigration of the Court, and the generalised contempt displayed towards all our colleagues, unconnected though they are to this case. We are concerned too about the scurrilous insults, set out in the communications referred to above, directed at those who serve in the Registrar's office.

[119] The last written communication from Mr de Beer and the LFN is crude, gratuitously insulting, clearly contemptuous and intended to denigrate this court. The Constitutional Court has most recently warned that unjustifiable defamatory and scurrilous utterances against judicial officers will not be tolerated.<sup>41</sup> In the present

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<sup>40</sup> *New York Times Co. v Sullivan* 376 U.S. 254 (1964) at 299.

<sup>41</sup> *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15 paras 23-27.

circumstances there seems to us to be no alternative but to refer this judgment to the National Director of Public Prosecutions (the NDPP) for her attention. In doing so we are mindful that Mr de Beer is a layperson. However, even for a layperson the statements are beyond the pale and there is no excuse for his conduct or that of the LFN.<sup>42</sup> The Registrar is thus directed to take the necessary steps to ensure that this judgment is brought to the attention of the NDPP.

[120] In the result:

- 1 The appeal is upheld.
- 2 The high court's orders are set aside and replaced with the following order:  
'The application is dismissed.'

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M S NAVSA  
JUDGE OF APPEAL

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V N PONNAN  
JUDGE OF APPEAL

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Y T MBATHA  
JUDGE OF APPEAL

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O ROGERS  
ACTING JUDGE OF APPEAL

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D N UNTERHALTER  
ACTING JUDGE OF APPEAL

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<sup>42</sup> See the latest Constitutional Court Judgment in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18 at para 136.

## APPEARANCES

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