

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 3752/2019

In the matter between:

DUWAYNE ESAU First Applicant

NEO MKWANE Second Applicant

TAMI JACKSON Third Applicant

LINDO KHUZWAYO Fourth Applicant

MIKHAIL MANUEL Fifth Applicant

RIAAN SALIE Sixth Applicant

SCOTT HAIGH ROBERTS Seventh Applicant

MPIYAKHE DLAMINI Eighth Applicant

and

**THE MINISTER OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS** First Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA** Second Respondent

**THE MINISTER OF TRADE, INDUSTRY AND
COMPETITION** Third Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA IN HIS CAPACITY AS THE
CO-CHAIRPERSON OF THE NATIONAL
CORONAVIRUS COMMAND COUNCIL** Fourth Respondent

**THE MINISTER OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS IN HER CAPACITY
AS THE CO-CHAIRPERSON OF THE NATIONAL
CORONAVIRUS COMMAND COUNCIL** Fifth Respondent

THE NATIONAL CORONAVIRUS COMMAND COUNCIL Sixth Respondent

THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA

Seventh Respondent

THE NATIONAL DISASTER MANAGEMENT
CENTRE

Eighth Respondent

SUPPLEMENTARY SUBMISSIONS: MPIYAKHE DLAMINI

A. Common Cause Issues

1. There is now no longer a dispute about prayers 2 and 3 of the applicants' prayers being moot. Counsel for the Minister seem to confine that argument to the challenge on regulations in prayers 4.2 (and only in relation to reg 28) & 7 of the notice of motion.
 - Respondent's heads, paragraphs 6 & 133.
2. But if one considers the argument advanced in paras 6 & 133 of Counsel's heads, it is still in the interests of justice to determine those prayers. While Counsel leave the door wide open for those regulations to come back (para 6), they contradict that submission by saying the directions "would not resurrect" even if the country were to return to Alert Level 4 (para 133). It appears the Minister's prevarications and inconsistencies have rubbed off on Counsel.
3. We submit (1) the question is not moot and (2) in any event, it is in the interests of justice to determine it.
4. Also common cause, because the Minister has not filed a fourth set of affidavits as invited, are the following issues:
 - 4.1 There is no provision in the DMA in terms of which the NCCC was established, and that no one outside Cabinet serves on the NCCC.

- Dlamini Reply, paragraph 20.2; and
- Minister AA, paragraphs 16 & 17.

4.2 There is no empirical scientific evidence of the infection rate numbers put up by the Minister.

- Dlamini Reply, paragraph 23.2.
- Minister AA, paragraphs 33 to 37, 49, 63, 81, 191.

4.3 There is no evidence, aside from the Minister's word, that all members of Cabinet are members of the NCCC.

- Dlamini Reply, paragraph 25.5.
- Minister AA, paragraph 17.

4.4 There is no evidence, aside from the Minister's word, that Parliament has been kept apprised of the work of Cabinet including discussions in the NCCC since commencement of the lockdown.

- Dlamini Reply, paragraph 40.3.
- Minister Answer, paragraphs 291.

4.5 There is no lawful impediment to Mr. Dlamini accessing the minutes, recordings or transcribed record of the meetings, including Cabinet and NCCC meetings, at which the Minister says decisions were taken

- Dlamini Reply, paragraph 38.
- Minister AA, paragraph 238.

5. This Division has held that failure to explain an issue that clearly cries out for explanation even in a fourth set of affidavits invites an adverse finding on that issue against the party who so fails.

- *Premier, Western Cape v Acting Chairperson, JSC 2010 (5) SA 634 (WCC)* at para 18; *Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 (T)* at para 71.

6. Further, the Supreme Court has held that, in motion proceedings, respondents who bear particular knowledge of a fact must provide “*clear and compelling evidence*” of that fact. The respondents have failed that threshold, both in their answering papers, and in their failure to take up the opportunity to file a fourth set of affidavits.

- *New Balance Athletic Shoe Inc v Dajee NO and others [2013] JOL 30999 (SCA)* at para 17.

7. The Minister was expressly invited by Mr Dlamini to offer explanation on these 5 issues. She has elected not to do so. The court must then decide those issues against the Minister.

B. The Merits Questions

(i) *What is the NCCC?*

8. On this question we showed in our written submissions that the Minister offered four versions.

9. Now Counsel for the Minister offer a fifth version in their heads of argument. They now say,

“The NCCC’s composition was expanded on 20 March 2020 when the President requested that all other Cabinet ministers participate in the NCCC”

- Paragraph 28.1.

10. Now, the other Cabinet ministers are no longer mere invitees to attend the NCCC; they are now part of the composition of the NCCC to participate in its deliberations and, presumably, in its decision-making.
11. But, there is a difference between invited guests at a meeting, and participants who form an integral part of the structure. Minutes of meetings usually tell you who the members are and who the invitees are. The Minister has refused to produce those minutes without giving a lawful reason.
12. Counsel also offers a sixth version. They say the NCCC is in fact Cabinet by another name.
 - Paragraph 28.2.
13. These new versions compound the Minister's problem of lack of transparency and accountability in terms of s 195 of the Constitution.

(ii) *Was the NCCC Lawfully Established?*

14. On this question we showed that the Minister offered four versions.
15. But, under what specific provision of what law the NCCC was established, the Minister does not say. In fact, she says its establishment is not regulated by the Constitution and that, despite admitting that establishment of the NCCC is not regulated by the Constitution, the Minister says the establishment is nonetheless "*constitutionally permissible*".
16. Now, in the heads of argument filed on her behalf, the Minister's Counsel concede that there is no specific "**statutory or constitutional provision empowering Cabinet to establish the NCCC**".
 - paragraph 15.

17. But, they say, s 85 of the Constitution affords the Cabinet a wide berth to organise itself as it sees fit, including establish committees, such as the NCCC.

- paragraph 15.

18. But s 85 does nothing of the sort. It reads:

“Executive authority of the Republic

(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by-

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.”

19. Nowhere does the section talk about the establishment of committees. Nowhere does it give *carte blanche* to Cabinet to do as it pleases in the performance of executive functions. In fact, s 85(2)(e) says, expressly, only such executive function as is provided for in the Constitution or in national legislation may be exercised by the President together with other members of Cabinet.

20. There is a good constitutional and rule of law reason for this and it hardly even needs mentioning. If the President and cabinet could do as they please, then the nature of the function they perform would be defined not by the act itself but by whom it is being performed. So, if the President decides to marry 5 wives, that would be an executive function. If Cabinet decides to establish a committee to spy on members of the opposition, that would be permissible executive function. Just as neither of these are provided for in the Constitution or national legislation, so, too, the power to establish a committee that, on the Minister’s

own version, makes decisions that could be termed “critical decisions” or, as her Counsel would have it, takes “binding decisions on behalf of government” without any legislative or constitutional authority or delegation (as the President’s answer says to a Parliamentary question in “**RSA3.1**”).

21. So, in the absence of any law regulating the establishment of the NCCC, as the COGTA Minister herself concedes, its establishment fails the legality and constitutionality test. The only appropriate, just and equitable remedy is to declare the establishment of the NCCC unconstitutional for that reason and set it aside.

(iii) Does the NCCC have decision-making powers in law?

22. On this question, we have demonstrated that six versions have been provided.

23. Now there’s a seventh version provided by Counsel in their heads of argument. They say the NCCC, as a cabinet committee, is “**empowered, like Cabinet itself, to take binding decisions on behalf of government**”.

- paragraph 23.

24. For the first time, and in Counsel’s heads of argument, we are now told – in what is an eighth version – that the NCCC makes policy decisions.

- paragraph 28.2.

25. But there is more. The ninth version provided by Counsel for the first time is that the NCCC’s functions, actions and decisions are in fact the Cabinet’s functions, actions and decisions.

- paragraph 28.3.

26. No longer is the NCCC not a decision-making committee but merely a high-level debating society: a policy-making variety of Cabinet.
27. Yet, and here comes the tenth version in the same paragraph, Counsel tells this court that notwithstanding the NCCC's decisions being Cabinet's decisions, "**some decisions**" that the NCCC (also known as Cabinet) takes, are "**escalated**" to Cabinet.
 - paragraph 28.3.
28. What those decisions are, we are not told. What decisions do not require escalation to Cabinet, we are not told. Why Cabinet has to take decisions outside its incarnation as the NCCC that it has already taken sitting as the NCCC, we are not told.
29. This is all "**constitutionally innocuous**", says Counsel.
 - paragraph 28.3.
30. With respect, this characterisation of such grave inconsistencies and contradictions at the highest executive level of State demonstrates an unpardonably louche attitude towards not only the intellectual capacity of this court but also towards what Counsel themselves admit are considerable limitations of the fundamental rights of law-abiding South Africans.
35. These versions as regards whether the NCCC has the power to make decisions, and what the legal source of that power is, are inconsistent with one another. Again, this is demonstrative of a lack of transparency, accountability and openness in a democratic and constitutional State.
36. We ask this court to declare the decisions taken or purportedly taken by the NCCC unconstitutional and invalid.

(iv) Has the NCCC made decisions, including policy decisions?

31. Under this question, we have shown that the Minister and President have given contradictory versions.

32. In their heads of argument, Counsel for the Minister now admit that:

“on some occasions, [the NCCC] is taking decisions relating to COVID-19, and on other occasions those are being escalated to formal Cabinet meetings. In either event, such decisions are decisions of Cabinet, and are constitutionally compliant”.

- paragraph 30.

33. In other words, some NCCC decisions are Cabinet decisions even though there is no legislative or constitutional provision that confers any power on the NCCC (or any committee of cabinet) to make binding policy decisions, and despite the fact that the President, no less, has told Parliament that no such power has been delegated to the NCCC (“**RSA3.1**”).

34. It is now established law, since the *Fedsure Life* judgment of the Constitutional Court in 1999, which has been followed in long line of cases, that no one may perform a public function or exercise a public power except as conferred upon him by law.

- *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para [58]; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at para [34]; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para [49]; *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at para [80]

35. There is no law that confers on the NCCC a power to make policy decisions on behalf of government. Not in the Constitution. Not in the DMA. Not by executive delegation of powers.
36. In any event, even if the President were now to say (as he has done before) he made a mistake when answering that Parliamentary question about delegation of power to the NCCC to make decisions on policy issues that inform the content of covid-19 regulations, such a delegation would be impermissible because policy-making (as s 85(2)(b) of the Constitution tells us) is an executive function, and the making of regulations (which is law) is the function of the legislature (as s 43 & 44 of the Constitution tells us). A delegation of executive functions and/or legislative function would run counter to the separation of powers so clearly calibrated in the supreme law of the country, the Constitution.
38. In the circumstances, we ask this court to find that the NCCC did make decisions pertaining to the regulation of the government's covid-19 intervention. This is manifest in the facts provided by the Minister herself, and from the President's public utterances.
39. Since the NCCC has no power in law to make these decisions, we ask that this court declare them unconstitutional and invalid and set them aside.

C. Appropriate Remedy in relation to Prayers 2 and 3

40. On remedy, Counsel for the Minister seek to urge this court, upon a finding that the NCCC is "**unlawfully occupied**", to declare only the composition of the NCCC as being invalid but to leave its decisions intact. Then they say those decisions of the Cabinet taken by it sitting as the NCCC should be set aside on a case by case basis.
41. But this proposition goes against the jurisprudence of the Constitutional Court.

- 41.1 Firstly, Counsel mischaracterise the problem. The problem is not – and never was – that the NCCC is “**unlawfully occupied**” or populated by persons who should not lawfully be there. Rather, it is that (1) the NCCC is an amorphous body that has no constitutional or legislative provenance on the Minister’s own version; and (2) it has made policy decisions (again, on Counsel’s own argument) despite having no constitutional or legislative power so to do. Thus, whatever decisions it has taken are fruits of the poisoned tree and must fall with it.
- 41.2 Secondly, the Constitutional Court jurisprudence says a court has no discretion. Once it has found conduct to be inconsistent with the Constitution, it must declare that conduct to be invalid
- *Dawood* 2000 (3) SA 936 (CC), para 17 & 60.
42. While the court has a discretion to make a just and equitable order, it requires assistance in that regard by way of evidence that would assist in that process
- *Dawood*, para 17; *Khosa* 2004 (6) SA 505 (CC), para 19.
43. While these cases deal with constitutional challenges to legislation, there is no reason in principle why the same approach should not be required where the constitutionality of bodies established by the executive and their decisions taken on behalf of government outside what is constitutionally permissible is under attack.
44. Counsel says the court should grant an order “**refusing to recognise any further consequences arising from the invalidity**” of the NCCC.
- Paragraph 31.
45. But the consequences arising from the invalidity of the NCCC are the effect of its decisions. So, in effect what Counsel for the Minister are saying, is that this

court should refuse to recognise the NCCC's decisions because those decisions flow from the declaration of invalidity of the NCCC. We agree.

V Ngalwana SC
F Karachi
E Richards

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12 June 2020