Coram: Allie et Baartman JJ

Hearing date: Monday 15 June 2020

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 5807/2020

In the matter between:

DWAYNE ESAU AND OTHERS	First Applicant
and	
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND OTHERS	First Respondent

---

WRITTEN SUBMISSIONS ON BEHALF OF THE FIRST TO SEVENTH APPLICANTS

TABLE OF CONTENTS

I. INTRODUCTION

1. Professor Etienne Mureinik argued that the distinctive feature of the South African Constitution is that it transports South Africa from a culture of authority which epitomised the apartheid regime, to a culture of justification which requires the exercise of all power to be justified.[1]

2. This application concerns the Constitution's commitment to a culture of justification in a time of crisis.

3. In particular, it concerns the lawfulness of the executive's conduct when a state of disaster is declared in terms of the Disaster Management Act 57 of 2002 ("*DMA*" or "*the Act"*).

4. This application does **not** concern the choices the executive has made to deal with the Covid-19 pandemic, but rather **how** those choices have been made.

5. These written submissions are filed on behalf of the first to seventh applicants and only concern prayers 4 to 7 of the notice of motion.[2] It demonstrates two things:

    5.1. First, that the Regulations promulgated by the Minister of Cooperative Governance and Traditional Affairs ("*COGTA Minister"*) on 29 April 2020 (*"the Disaster Regulations"*), in terms of section 27(2) of the DMA are unlawful as a whole, and

[1] E Mureinik 'A Bridge to Where- introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31. The Constitutional Court has referred to Mureinik's notion of the Constitution as a bridge in several judgments including *S v Makwanyane* 1995 (3) 391 [306] and *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 CC [167] "*In Mureinik's celebrated formulation, the new constitutional order constitutes a bridge away from a culture of authority to… a culture of justification".*

[2] The first to seventh applicants align themselves with the eighth applicant in regard to prayers 2 and 3.

alternatively, that regulations 16(1)-(4), 28(1), 28(3) and 28(4) in particular are unlawful, unconstitutional and invalid.

5.2. Secondly, that the Clothing Directions issued by the Minister of Trade, Industry and Competition (*the Trade Minister*) are unlawful and invalid and should be set aside by this court.

6. The facts that give rise to this application are not repeated. The background to the Covid-19 pandemic, and the government's response thereto are set out in the papers before this Court and in the judgments of other divisions of this Court.[3]

7. These written submissions are structured as follows:

7.1. **Part II** provides a brief summary of the preliminary matters relevant to this application and the important constitutional principles that governs the adjudication of this application;

7.2. **Part III** demonstrates why no part of this application may be considered moot;

7.3. **Part IV** explains why the Disaster Regulations, as a whole, are unlawful;

7.4. **Part V** explains why the regulations 16(1)-(4), 28(1), 28(3) and 28(4) as well as the Trade Minister's clothing directions are irrational, unlawful and unconstitutional; and,

7.5. **Part VI** concludes with the relief sought by the first to seventh applicants.

[3] See in particular, *Khosa and Others v the Minister of Defence and Military Veterans and Others* (21512/2020) ZAGPPHC 147 (15 May 2020) and *De Beer v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) ZAGPPHC 184 (2 June 2020)

II. PRELIMINARY MATTERS AND CONSTITUTIONAL PRINCIPLES

8. The applicants approach this court in their own interest and in the public interest as contemplated by section 38(d) of the Constitution. The COGTA Minister accepts that the applicants have standing to seek the relief contained in the notice of motion.[4]

9. This application is self-evidently urgent and the COGTA Minister accepts this.[5]

10. The respondents are collectively responsible for the conduct impugned in this application in terms of section 92(2) of the Constitution. The COGTA Minister accepts this.[6]

11. As the relief sought by the applicants is final relief on motion proceedings, the *Plascon-Evans* rule applies, but this Court should not accept a version by the respondents where that version is untenable or dubious. In *Whiteman t/a JW Construction v Headfour Pty Ltd,* the Supreme Court of Appeal held:

> "*an applicant who seeks final relief on motion must in the event of a conflict accept the version set up by his opponent, unless the latter's allegations are, in the opinion of the court not such as to raise a real, genuine, or bona fide dispute or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers*".[7] (emphasis underlined).

12. In challenges of this kind, the onus of making the initial challenge rests on the applicant.

13. Having overcome this hurdle, the onus shifts to the respondents to demonstrate and justify **both** the rationality (both procedural and substantive) of the measures adopted **and** the limitation of rights satisfies the requirements of section 36 of the Constitution.

---

[4] COGTA Minister's answering affidavit page 88 at paragraph 228.
[5] COGTA Minister's answering affidavit page 96 at paragraph 271.
[6] COGTA Minister's answering affidavit page 63 at paragraph 160.
[7] *Whiteman t/a JW Construction v Headfour Pty Ltd* 2008 (3) SA 371 (SCA) [12].

14. In *NICRO,* the Constitutional Court held that "*the Minister has the onus of proving that the admitted limitation of the right… is reasonable and justifiable".*[8] And in *Moise,* the Constitutional Court held that "*the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section…the obligation includes not only the submission of legal argument but the placing before court of the requisite factual and policy considerations".*[9]

15. In summary: in considering this matter, this court is primarily concerned with the justifications provided by the COGTA and Trade Minister's in their answering affidavits, and whether they meet **both** the standard of rationality and the limitations clause inquiry. Below we demonstrate that they fail on the first leg as a whole, and on the second leg in parts.

III. MOOTNESS

16. Both the COGTA and Trade Ministers contend that parts of this application have become moot.[10] They are incorrect for three separate reasons.

17. First, an application is moot when it no longer presents an existing live controversy because the underlying dispute has been addressed in some way.[11]

18. The COGTA Minister contends that the making of new regulations on 28 May 2020, renders the applicants' challenge to Disaster Regulations made on 29 April 2020 moot.[12] The Trade Minister similarly argues that the challenge to the clothing directions issued in terms of section 4(10)(a) [13]

[8] *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) [34].
[9] *Moise v Greater Germiston Transitional Council* 2001 (4) SA 491 (CC) [18].
[10] COGTA Minister's answering affidavit page 9, paragraphs 24-26; Trade Minister's answering affidavit paragraphs 16-22.
[11] *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC) [17].
[12] COGTA Minister's answering affidavit page 9, paragraphs 24-26
[13] Regulation 4(10(a) of the Disaster Regulations reads:

of the Disaster Regulations is moot[14] because the Disaster Management Regulations have been replaced with new level 3 regulations.

19. As a factual matter, this is incorrect.

20. The Disaster Regulations challenged in this application is extant and valid law.

21. Although the Disaster Regulations have been amended to include new regulations governing alert level 3, the Disaster Regulations remain valid, and the provisions as they were on 29 April 2020, now exist in Chapter 3 of the amended Disaster Regulations.

22. This is clear from regulation 2[15] of the Disaster Regulations (as amended) which contains a list of repealed regulations. The Disaster Regulations promulgated on 29 April 2020 have not been repealed. The amendment to the Disaster Regulations have not affected the content and substance of the impugned regulations.

23. As the Disaster Regulations remain valid, it is liable to be impugned.

24. The Trade Minister's clothing directions also remain valid law that may be challenged. Directive 4 of the clothing directions is titled "*commencement and duration"* and expressly states that "*these directions… shall remain in force for the duration of alert level 4".* [16]

25. Regulation 2(3) of the Disaster Regulations (as amended) governs the operation of directions.[17]

Any Cabinet member may issue and vary directions, as required, within his or her mandate, to address, prevent and combat the spread of Covid-19 and its impact on matters relevant to their portfolio, from time to time as may be required including—

(a) Disseminating information required for dealing with the national state of disaster.

[14] Trade Minister's answering affidavit paragraphs 16-22.

[15] Regulation 2 of the Disaster Regulations.

[16] Direction 4 of the Clothing Directions GNR 523 of 12 May 2020 (GG 43307)

[17] Regulation 2(3) of the Disaster Regulations reads:

2. Repeal and transitional provisions

26. It provides that the directions issued in terms of repealed regulations remain in force unless amended or repealed by the Cabinet Minister responsible for the directions.

27. Neither the Disaster Regulations nor the Clothing Directions have been repealed.

28. They remain valid[18] and will operate, by law, if the COGTA Minister, acting in terms of regulation 3(1) of the Disaster Regulations (as amended) makes the decision to place a province, metropolitan area or district on alert level 4.

29. For these reasons, it is factually incorrect for the COGTA and Trade Ministers to suggest that parts of this application are moot.

30. Secondly, the Constitution requires the adjudication of matters challenging the constitutional validity of conduct.

31. These applications cannot be considered moot, and a court may not avoid the important constitutional questions raised by applications of this kind. In *Jordaan v the City of Tshwane Metropolitan Municipality,* the Constitutional Court unanimously held:

> "*the result is that under the final Constitution, the approach Mhlungu espoused has long since been abandoned in favour of the opposite, namely that all constitutional approaches to rights determination must enjoy primary. Far from avoiding constitutional issues whenever possible, this Court has emphasised that virtually all issues… are, ultimately, constitutional. This affects how to approach them from the outset.* (emphasis underlined).

(3) Despite the repeal of the regulations referred to in sub-regulation (1) all directions issued in terms of those Regulations shall continue to apply unless, varied, amended or withdrawn by the Cabinet member responsible for such directions.

[18] The validity and operation of the Disaster Regulations arises from Regulation 2 of the Disaster Regulations (as amended).

32. In *Mohamed v President of South Africa and Others,*[19] the Constitutional Court held that even though Mr Mohamed was illegally surrendered to the United States of America by the South African government, and thus beyond the jurisdiction of South Africa, the application could not be considered moot because it concerned important questions of legality and policy. Responding to the government's submission that the application was moot, the Court held:

> "*We disagree. It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case. In the first instance, quite apart from the particular interest of the applicants in this case, there are important issues of legality and policy involved and it is necessary that we say so plainly what our conclusions as to those are. And as far as the particular interests of Mohamed are concerned we are satisfied that it is desirable that our views be appropriately conveyed to the trial Court.*[20]

33. In the context of the DMA, the Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality,*[21] held that even though an eviction had already occurred in terms of the DMA, it was not moot for the Court to consider the lawfulness of a forced eviction that took place without a Court order. The Court held:

> *"it is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a* ***live controversy regarding the lawfulness of the eviction****. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on human dignity, equality and freedom. Needless to say the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot*."[22] (emphasis underlined).

34. The issues raised in this application are important for the rule of law.

---

[19] *Mohamed v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) "*Mohamed*".
[20] *Mohamed* [70].
[21] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) "*Pheko*".
[22] *Pheko* [32] See also *Buthelezi and Another v Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA) "*[4] The application was dismissed by the court below on the grounds that there was no live controversy. That was rightly not pressed in argument before us.* ***Whether the authorities had acted lawfully was and remains a live issue****. That they would not be called upon to reconsider their conduct if they had acted unlawfully goes only to whether a decision on that question would have practical effect. In view of the appellants' intentions it cannot be said that it will not".*

35. They concern the legality of the making of regulations which affect the rights and lives of many millions of, if not all South Africans.

36. They also concern the limits of executive conduct and the separation of powers.

37. And they concern the justifications for the infringement of fundamental constitutional rights. This Court's decision will guide the conduct of the executive not only during this crisis, but also in future.

38. It will assist the executive in understanding the limits of and the constitutional constraints on their powers when a state of disaster has been declared.

39. Thirdly, even were the Court to hold that any aspect is in fact moot, this Court nevertheless has a discretion to hear this application if it is in the interests of justice to do so.[23] In *Pillay,* the Constitutional Court set out the factors relevant to the exercise of this discretion. They include:

    - The nature and extent of the practical effect that any possible order might have;
    - The importance of the issue;
    - The complexity of the issue;
    - The fulness or otherwise of the argument advanced; and
    - Resolving disputes between different courts.

40. The relief sought in these proceedings is not academic or hypothetical.

[23] *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) [32]; *Director General of Home Affairs and Another v Mukhamadiva* 2014 (3) BCLR 306 (CC) [26-32].

41. It will have a practical effect on the lives of South Africans and the manner in which the executive enacts, enforces and interprets the Disaster Regulations every day and the future.

42. The state of disaster was extended on 5 June 2020 in terms of section 27(5)(c) of the DMA, and will continue until **15 July 2020.**[24] This application is of great practical importance for many people including the applicants and South Africans in general.

43. This application raises important constitutional questions.

44. It is in summary submitted that this application is not moot; but if this Court finds that it is, this Court should exercise its discretion in favour of deciding the important constitutional questions raised.

IV. THE DISASTER REGULATIONS ARE UNLAWFUL *IN TOTO*

45. The Disaster Regulations are unlawful as a **whole**[25] for two reasons.

46. First, because the COGTA Minister promulgated the Disaster Regulations in a manner that is *ultra vires* of the DMA; and secondly, the COGTA Minister did not ensure that the Disaster Regulations were adopted in a procedurally rational manner.

[24] GN 646 of 5 June 2020 Extension of a National Disaster GG 43408.
[25] The *De Beer* judgment of N Davis J has been criticized for not going into the justification for each of the regulations struck down. But that criticism **only** has traction in the Bill of Rights (section 36) challenge, not to a rationality in process challenge. If the Regulations were made in a process that was irrational, they must be declared invalid as a whole.

A. Narrow tailoring and *Vires* Regulations

47. When the COGTA made the Disaster Regulations, she was not guided by two important principles that apply to regulation making in terms of the DMA.

48. The first principle concerns the Minister's broad approach to regulation making.

49. The second principle concerns the narrow-tailoring of regulations as required by sections 26(2)(b), 27(2) and 27(3) of the DMA.

50. Because the Minister failed properly to apply her mind[26] to these narrow-tailoring provisions when making the Disaster Regulations, her conduct in making the Disaster Regulations was unlawful and the Disaster Regulations are therefore invalid.

51. As a general rule of statutory interpretation, where legislation permits the infringement of rights, such legislation should be interpreted restrictively and not broadly. A century ago, Innes CJ held in *Dadoo v Krugersdorp Municipality*

> "*it is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole*".[27] (emphasis underlined).

52. More recently, and in the context of the DMA, the Constitutional Court affirmed this rule of statutory interpretation in relation to the provisions of the DMA. In *Pheko,* the Constitutional Court held:

> "*this section [section 55(2)(d)] must be interpreted narrowly. A wide construction may adversely affect rights in section 26. The language used in section 55(2)(d) is critical. The text must be interpreted in the context of*

[26] This is so based on how the COGTA Minister described the making of the Regulations in her answering affidavit.
[27] *Dadoo v Krugersdorp Municipality* 1920 AD 530 at 552. See also *Joosub Ltd v Ismail* 1953 (2) SA 461 (A) at 466; *Huyser v Die Voortrekker Pers Bpk* 1954 (3) SA 75 (W) at 78; *S v Mapeswani* 1971 (1) SA 434 (T) at 437 and *Shaboodien v Sekretaris van Binnelandse Sake* 1971 (3) SA 684 (C) at 689.

the DMA as a whole, taking into consideration whether its preamble and other relevant provisions support the envisaged construction". [28]

53. On the COGTA Minister's own version, she was not guided by a narrow interpretation of the DMA when she promulgated the Disaster Regulations. At paragraph 56 of her answering affidavit she explains that "*it appeared open to us… to adopt broad and general measures to combat any infectious outbreak".*[29]

54. This broad (and unfortunately not narrow) approach informed the making of the Disaster Regulations by the Minister. For this reason alone it is *ultra vires* the DMA, and the Regulations were made by an irrational process. In *Democratic Alliance v President of the Republic of South Africa,* the Constitutional Court held:

> *"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred".* [30]

55. Section 26(1) of the DMA provides that the national executive is primarily responsible for coordination and management of national disasters.

56. Section 26(1)(a) provides that if a national disaster has not been declared, the national executive may only deal with a national disaster in terms of existing legislation.

    Section 26(1)(a) does **not** apply as a national disaster has been declared.[31]

---

[28] *Pheko* [37].
[29] COGTA Minister's answering affidavit page 18, paragraph 56.
[30] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) [36]. (*Simelane*)
[31] Declaration dated 15 March is published in GN 313 of 2020 Declaration of a National State of Disaster GG 43096.

57. If, on the other hand , a national disaster has been declared, then the COGTA Minister on behalf the national executive must deal with the disaster in terms of existing legislation as **augmented** by regulations or directions made in terms of section 27(2) read with section 27(3) of the DMA. Section 26(2)(*b*) applies to Minister's conduct. It reads:

> *"26(2) the national executive must deal with a national disaster –*
> *(a)*
> *(b) in terms of existing legislation and contingency arrangements as* ***augmented*** *by regulations or directions made or issued in terms of section 27(2),* ***if a national disaster has been declared****."*

58. Section 26(2)(*b*) does not permit the COGTA Minister to make regulations that are in conflict with and/or to amend existing legislation.

59. She may only augment[32] the provisions of existing legislation through regulations; but she does not have the power to effectively amend existing legislation.

60. To do so would amount to a *de facto* amendment of Acts of Parliament through regulation-making by the executive. This is constitutionally impermissible.

61. The onus rests on the COGTA Minister to illustrate that she has merely *augmented* through regulation making and not *amended* statutes enacted by Parliament.

62. She has not done so in her answering affidavit, let alone tried to explain how she augmented existing legislation. On the contrary, she has taken the position that because of the declaration of a national disaster she had a blank slate to make regulations.

[32] The Oxford English Dictionary (3rd edn) defines augment as "*to make greater in number, size or degree; to add to, supplement; to increase, enlarge or extend".*

63. The COGTA Minister adopts a broad approach to regulation making and not one that is circumspect, as demanded by section 26(2)(*b*).

64. There are many examples of the COGTA Minister's failure to limit herself to *augmenting* in her regulation-making. This is so quite apart from the unfortunate fact that she did not appreciate that her powers were so constrained.

    For example, section 18(2) of the Children's Act 38 of 2005 recognises that every parent has a right to care for his or her child and to maintain contact with his or her child. However, regulation 17(2) of the Disaster Regulations provides that a parent who has not been granted a permit by a Magistrate may not exercise these rights.

65. The Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 governs evictions in South Africa, in giving effect to section 26 (3) of the Constitution. However, regulation 19 of the Disaster Regulation has the effect of partially suspending the operation of this Act as well as the Extension of Security of Tenure Act 62 of 1997.

66. It is not necessary for this Court to consider each and every instance where the COGTA Minister failed to "*augment"* as required by section 26(2)(b).

67. It is sufficient for this Court to consider whether the Minister even considered whether her power was limited to augmenting and whether she actually applied her mind to these provisions which require her to act in a constrained manner when making regulations.

68. Recently, this Court held in *Smit v Minister of Justice and Correctional Services,* that section 63 of the Drugs and Drugs Trafficking Act 140 of 1992 was unconstitutional because it permitted the Minister of Justice to amend the Drugs Act through regulation-making.[33]

69. In holding that section 63 is unconstitutional because it, *inter alia*, violates the separation of powers because it empowers the Minister of Health to perform the functions of Parliament, this Court held:

> *" South Africa is a constitutional State predicated on the separation of powers and a recognition of the functional independence of the branches of government. Simply stated, the separation of powers doctrine is to the effect that unless constitutionally mandated or incidental to the powers conferred, parliament enacts, amends and repeals laws, the executive executes and enforces laws.*
> *The power to enact original legislation and to amend and repeal statutes falls within parliament's pre-eminent domain and the legislature may not assign plenary legislative power to another body, including the power to amend the statute under which the assignment is made".* [34] (emphasis underlined)

70. In *Executive Council, Western Cape Legislature v President of the Republic of South Africa,* the Constitutional Court held:

> *"there is… a difference between delegating authority to make subordinate legislation and within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body including… the power to amend the Act under which the assignment is made".*[35]

71. The COGTA Minister therefore, had to have applied her mind to section 26(2)(*b*) of the DMA, and how it constrains her powers under section 27(2) read with section 27(3) to make Regulations.

72. Her failure to do so resulted in her failure to apply her mind properly to her task of regulation making. And as a fact she effected the amendment of numerous Acts of Parliament in contravention of the doctrine of separation of powers.

---

[33] *Smit v Minister of Justice and Correctional Services* [2019] 4 All SA 542 (WCC) [22-3] (*Smit*)
[34] *Smit* [22-3].
[35] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) [51].

73. But even if this Court finds that the COGTA Minister did as a fact *augment,* she still had to overcome two further hurdles in her approach.

74. These are the provisions of sections 27(2) and 27(3) of the DMA.

75. Section 27(2) provides the listed grounds on which the COGTA Minister may make regulations.

76. This, however, is subject to section 27(3) which requires the Minister to make regulations only if it is **necessary**[36] for:

> "*27(3)—*
> *a. Assisting and protecting the public;*
> *b. Providing relief to the public;*
> *c. Protecting property;*
> *d. Preventing or combatting disruption; or*
> *e. Dealing with the destructive and other effects of the disaster".*

77. It is clear that many of the regulations are not tailored to section 27(3), and are not **necessary**, at least in respect of the five criteria set out in section 27(3).

78. The COGTA Minister, on her own version, failed to have regard to the constraints required by the DMA. And because she failed to have regard to these provisions when making the Disaster Regulations, they regulations are *ultra vires* of the DMA and invalid.

B. Procedural Rationality and Public Participation.

79. The principle of legality is an incidence of the rule of law.[37] [38]

---

[36] The *Oxford English Dictionary* defines "necessary" as "indispensable vital, essential; requisite. In *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 Sachs J deals the meaning of the word necessary in the context of the limitation's clause of the Interim Constitution at [55-76]

[37] *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC) "*Affordable Medinces"* [48-9].

[38] The rule of law is entrenched as a founding value of the Constitution. Section 1(c) of the Constitution provides that "*the Republic of South Africa is one sovereign, democratic state, founded on the … supremacy of the Constitution and the rule of law".* In

80. Conduct or decisions inconsistent with the principle of legality are inconsistent with the rule of law and therefore unconstitutional and invalid.[39]

81. The principle of legality requires the conduct or decisions of the executive to be rational.[40]

82. Rationality consists of **both** a substantive and procedural component.

83. Substantive rationality requires a rational relationship between the scheme which is adopted and the achievement of a legitimate purpose.[41]

84. Procedural rationality requires that during the decision-making process all material relevant to achieving that purpose is considered.

In *the Simelane case ,*[42] the Constitutional Court held:

> *If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.*[43]

85. Similarly, in *Albutt v Centre for the Study of Violence and Reconciliation,* the Constitutional Court found that it was procedurally irrational for the President not to hear from the victims of political crimes before making a decision to issue presidential pardons for politically motivated crimes, on the

---

Justice Alliance of South Africa v President of the Republic of South Africa 2011 (5) SA 388 (CC) [30] the Constitutional Court said *"The significance of the rule of law and its close relationship with the ideal of a constitutional democracy cannot be over-emphasised."*
[39] *Masetlha v President of the Republic of South Africa and another* 2008 (1) SA 566 (CC) [174].
[40] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 [148-9]. (*SARFU)*
[41] *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) [55]; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) [35].
[42] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) "*Simelane".*
[43] *Simelane judgment* [39].

grounds that it would further reconciliation. Furthering reconciliation, the Court held, required hearing from the victims of those crimes.[44]

86. The COGTA Minister argues that public participation is not a requirement for the promulgation of regulations.[45] This is incorrect.

87. Public participation is required for law making irrespective of whether the law is an "Act of Parliament, a "regulation" or a "direction".

88. What matters is the substance of the provision, and its impact on the lives of South Africans.

89. Most regulations form the nuts-and-bolts of enacted legislation and simply give effect to the empowering statute.

90. Other regulations are more demanding and intrusive and impose standards and rules that demand particular kinds of conduct from members of society. Where this occurs, the public deserves be involved in the decision-making process by being heard.

91. Public participation minimises the space for irrational and arbitrary regulations.

92. And a transparent and open process promotes the legitimacy and acceptance of the regulations. This, in turn, assists the government with enforcement of the law.[46]

---

[44] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) [69].
[45] COGTA Minister's answering affidavit page 69, paragraph 171.
[46] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) [205-8] "*public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law- making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy and thus the acceptance of legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances democracy.*
...
Under our Constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process".

93. The COGTA Minister seemingly recognised the importance of public participation because on her version on Saturday 25 April 2020, she announced a public participation process necessary before the promulgation of the Disaster Regulations.[47]

94. The public were required to send their comments by 12h00 on Monday 27 April 2020.[48]

95. The COGTA Minister states that teams were established to collate, read and summarise the comments received.[49] More than 70 000 comments were received on 27 April 2020.[50]

96. The COGTA Minister does not specify how many teams there were or how many people worked on the various teams.[51]

97. It is implausible that the COGTA Minister could have and did properly consider 70 000 submissions in less than two days between 12h00 27 April 2020, and 29 April 2020, when the Disaster Regulations were published.

98. The report on public participation ("*PP Report*")[52] was only compiled on 28 April 2020, and the COGTA Minister does not allege that she read and considered the PP Report.

99. It is simply not possible that the COGTA Minister could give due and proper regard to the "public participation submissions" contained in the PP Report on 28 April 2020, and make regulations reflecting the public's "so - called participation," the following day on 29 April 2020.

[47] COGTA Minister's answering affidavit, page 36, paragraph 89.
[48] COGTA Minister's answering affidavit, page 39, paragraph 93.
[49] COGTA Minister's answering affidavit page 39, paragraph 94
[50] COGTA Minister's answering affidavit, annexure NZ12.
[51] Esau replying affidavit, page 33 paragraph 141.
[52] COGTA Minister's answering affidavit, annexure NZ12.

100. Not only was the period for public participation inadequate, it is also impossible for the COGTA Minister to have properly applied her mind to comments received by the public before making the Disaster Regulations.

101. In *Minister of Home Affairs v Scalabrini Centre,* the Supreme Court of Appeal held even though the Director-General of the Department of Home Affairs was not required in law to conduct public participation in respect of a decision to close the refugee reception office, the fact that he announced that public participation would take place, but later failed to ensure that he did, meant that his ultimate decision was for that reason procedurally irrational and unlawful.[53]

102. In *Earthlife Africa,* this Court held that:

> *"a rational and fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence…"*[54]

103. It is clear that the COGTA Minister appreciated, correctly it is submitted, that public participation was constitutionally necessary before making the Disaster Regulations.

104. But the process she adopted was inadequate.

105. The 48 hour deadline (beginning with an announcement some time on a Saturday and ending at 12h00 on a Monday) was exclusionary and meant that many South Africans were not able to address their concerns about the proposed Disaster Regulations.

106. But more than that, it was impossible for the Minister to adequately consider and apply her mind properly, or at all, to the submissions received in less than 24 hours between the time the PP Report was prepared and the Disaster Regulations published.

---

[53] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) [72].
[54] *Earthlife Africa, Johannesburg and Another v Minister of Energy and Others* [2017] 3 All SA 187 (WCC) [45].

107. For these reasons there was no procedural rationality in the promulgation of the Disaster Regulations. Accordingly, the Disaster Regulations are unlawful and invalid as a whole for this reason alone.[55]

V. UNLAWFUL REGULATIONS AND THE CLOTHING DIRECTIONS

108. Regulations 16(1)-(4), 28(1), 28(3) and 28(4)are unlawful and invalid.

109. The COGTA Minister disputes the standard of review applicable to impugning the Disaster Management Regulations.

110. The correct standard of review is reasonableness under PAJA.

111. But, in any event, even on the standard of rationality under the principle of legality, the Disaster Management Regulations is unlawful and invalid.

112. **Part V** deals with:

A. the correct standard of review;

B. the challenge to Regulations 16(1)-(4), 28(1), 28(3) and 28(4); and

C. the challenge to the Trade Minister's Clothing Directions.

A. The Correct Standard of Review.

113. The COGTA Minister's making of the Disaster Regulations constitute administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000.

[55] In *Simelane*, the President's decision to appoint Mr Simelane as the NDPP was set aside by the Constitutional Court on the basis of procedural irrationality without consideration of the merits of his appointment.

114. Determining whether a decision amounts to administrative action or executive action requires an assessment of the manner in which the power was exercised, and the empowering provision authorising the exercise of power.

115. Where a decision was taken by a decision-maker alone without the influence of a deliberative body, this will general amount to administrative action. Where the decision was informed by the outcome of a deliberative body, such as a decision of Cabinet, it amounts to executive action.[56] Executive action concerns the formulation of policy in the broad sense; administrative action concerns the formulation of policy (if at all) in the narrow sense.[57]

116. In In *Fedsure Life Assurance v Greater Johannesburg* 1991 (1) SA 374 at [27], Chaskalson P held that:

> *"Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be "legislation", the process by which the legislation is made is in substance "administrative". The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described."*

117. And in *New Clicks,* Chaskalson CJ held that

> "*the implementation of legislation, which includes the making of regulations in terms of an empowering provision is therefore not excluded from the definition of administrative action*".[58]

118. On the COGTA Minister's explanation, her conduct amounts to administrative action.

---

[56] A Konstant 'Administrative Action, the Principle of Legality and Deference – The case of *Minister of Defence and Military Veterans v Motau* 4 *Constitutional Court Review* 2018 68 at79.
[57] Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College 2001 (2) SA 1 (CC) [12]. See also C Hoexter *Administrative Law in South Africa* 2012 at 177-7 and 235.
[58] *Minister of Health and Others v New Clicks and Others* 2006 (2) SA 311 (CC) [126].

119. At paragraph 118 of the COGTA Minister's answering affidavit, she explains that where legislation empowers Minister's to make regulations or directions, those regulations or directions are the product of the individual Minister's decision-making.[59]

120. At paragraph 127 of the COGTA Minister's answering affidavit she confirms that although there is deliberation amongst Cabinet Ministers and Cabinet generally, the decision-making for purposes of making regulations, lies ultimately with the individual Minister empowered to make regulations.[60]

121. In giving effect to section 27(2) of the DMA by making regulations, the Minister makes a "decision" as contemplated in section 1 of PAJA.

122. But importantly, this case does not turn on whether the COGTA Minister's making of the Disaster Regulations constitutes administrative action for the purposes of PAJA.

123. The making of regulations is certainly an exercise of public power, and the exercise of all public power must conform to the principle of legality.[61]

124. In *Pharmaceutical Manufacturers Association of SA,* the Constitutional Court held:

> *"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action*".[62]

---

[59] COGTA Minister's answering affidavit, page 48, paragraph 118.
[60] COGTA Minister's answering affidavit, page 51, paragraph 127.
[61] *SARFU* [148-9].
[62] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 [85].

125. As already demonstrated, the Disaster Regulations are procedurally irrational.

126. If the procedural irrationality submissions are not accepted, in the alternative, we demonstrate that parts of the Disaster Regulations are substantively irrational.

B. The Restrictions on Movement and Economic Activity Are Unconstitutional

127. Regulations 16(1) – (4), 28(1), 28(3) and 28(4), read with Part E of Table 1, of the Disaster Regulations ("*the impugned restrictions"*) are unconstitutional and invalid.

128. Regulation 16(1) confines every person to his or her home. That is a blunt instrument constituting a violation of rights. This Court must grapple whether this blunt instrument was properly balanced with constitutional rights?

129. Regulation 16(2) sets out the closed list of exceptions that allow someone to leave his home: rendering or acquiring one of the '*essential or permitted services*' listed in the annexures to the regulations; purchasing the '*permitted goods*' set out in Table 1, Part E; moving children from one parent or caregiver to another, subject to the extensive provisions of regulation 17; and walking, running or cycling between 06h00 and 09h00.

130. Regulation 16(3) imposes a daily curfew between 20h00 and 05h00.

131. Regulation 16(4) prohibits a person from moving outside of his district, metropolitan area or province unless to it is to perform an essential or permitted service (if in possession of a permit); attend a funeral (if in possession of a permit); transport mortal remains; or commute to school or a higher education institution.

132. It is a criminal offence for a person to leave his home for a reason other than one of those listed in regulation 16(2), to contravene the curfew or to leave his province or municipal area for a reason other than one of those listed in regulation 16(4).[63]

133. In terms of regulation 28(1), businesses may only sell the goods and render the services set in Table 1 (an appendix to the Disaster Regulations). Anyone who wishes to render a permitted or essential service in accordance with Table 1 may only do so if he has a permit.[64]

134. Part E of Table 1, which sets out the permissible goods that may be retailed to consumers, is duplicated in paragraph 102 of the founding affidavit.[65] For example business may sell –

134.1. '*food products*' (including cold prepared meals), but may not sell '*hot cooked food*' unless it is for delivery;

134.2. '*textiles required to produce… personal protective equipment and winter clothing*', but not textiles to produce summer clothing or bedding, or textiles to be used for recreational purposes;

134.3. '*winter clothing*' and '*children's clothing*', but not adult clothing for any other season; and

134.4. '*educational books*' but not other books.

135. It is a criminal offence for a retail store to sell both permitted goods and prohibited goods.[66]

<u>The right to human dignity</u>

[63] Regulation 31(2) of the Disaster Regulations.
[64] Regulation 28(3) of the Disaster Regulations.
[65] Esau founding affidavit Page 37.
[66] Regulation 31(2) read with regulation 28(3) of the Disaster Regulations.

136. Human dignity is a foundational value and a fundamental right.[67]

137. The right to life and dignity are the foundations of other rights.[68]

138. Even in a State of Emergency in terms of section 37 of the Constitution, the state may not infringe the rights to life and dignity.

139. A critical component of human dignity is freedom and personal autonomy. Thus, '*[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.*'[69] Further, '*dignity recognises the inherent worth of all individuals… as members of our society, as well as the value of the choices that they make.*'[70]

140. The Impugned Restrictions limit, and insert government regulations into, almost every aspect of daily living.

141. Going to work requires a permit; walking outside the home may only take place between 06h00 and 09h00; purchasing new clothes depends on whether it is a permitted clothing item; and purchasing a roast chicken or hot pie because you are unable to cook because of a disability or your age, is permitted only if it is delivered to your home, but not bought with your groceries.

---

[67] Sections 1(a) and 10 of the Constitution. See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) ('*Dawood*') [35].

[68] Id at para 144. The President quoted this dictum in his address to the nation of 4 May 2020. See annexure SA10 to the Dlamini Supplementary Affidavit, page 339.

[69] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [57]. In *Minister of Home Affairs v Watchenuka and Others* [2004] 1 All SA 21 (SCA) the Supreme Court of Appeal held [27]"*the freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful*"

[70] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) ('*Teddy Bear*') [52].

142. When the seventh applicant travelled from his parents' residence in Durban to Cape Town, the journey was so harrowing in part because, for the simple act of returning home to his life partner, he was treated as a criminal suspect.[71]

143. The eighth applicant explains, the Impugned Restrictions have adversely affected every aspect of his life – his '*emotionality*', '*psychology*' and '*physicality*'.[72]

144. Fabricius J echoed the experiences of the eighth applicant in the *Khosa* judgment:

> *It is no exaggeration to say that the national psyche has thus been negatively affected by the lock-down Regulations. How this will ever be rectified nobody knows, and the public is not told.*[73]

145. The Impugned Restrictions are organised around the idea of state control rather than individual autonomy.

146. They permit narrowly itemised types movements and commercial activity and prohibit everything else.

147. That '*everything else*' is sweeping and undefined but remains prohibited irrespective of its relationship to the Covid-19 pandemic.

148. This approach to regulation-making is diametrically opposed to freedom, personal autonomy and human dignity.

149. The criminalisation of conduct entails an unavoidable infringement of human dignity:

---

[71] Roberts supporting affidavit, para 12; pp 226 – 227.
[72] Dlamini supporting affidavit para 12; p 246.
[73] *Khosa* [19].

> '*An individual's human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her. When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her.*'[74] (emphasis underlined).

150. The infringement of human dignity is pervasive because the Impugned Restrictions have rendered ordinary and harmless (even during the pandemic) conduct a criminal act.

151. A grocer who sells raw chicken breasts does not commit a crime but a grocer who sells roast chicken commits a crime.[75]

152. A retailer who sells summer shorts for adults commits a crime;[76] a person who surfs or hikes rather than walking or cycling commits a crime;[77] a parent who takes his or her child for a lunchtime walk commits a crime[78] and, an individual who leaves their house to visit a relative that is ailing but not yet dead commits a crime.[79]

153. In *Nandutu*, the Constitutional Court recognised that '*the right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it.*'[80]

154. In *Dawood* the Constitutional Court explained the importance of family life:

> *The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children… The importance of the family unit for society is recognised in… international*

---

[74] *Teddy Bear* [56]. The Constitutional Court acknowledged the stigmatisation inherent in the criminalisation of conduct, which runs contrary to human dignity (paras 56 and 57) See also *Makwanyane* [142]: '*Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system necessarily involves the power to encroach upon a prisoner's dignity.*'

[75] Regulation 31(2) read with regulation 28(3) and Table 1, Part E of the Disaster Regulations.

[76] Id.

[77] Id regulation 31(2) read with regulation 16(2)(f).

[78] Id.

[79] Id regulation 31(2) read with regulation 16(2), on the assumption that, even though the attendance of a funeral is not mentioned in regulation 16(2), one may attend a funeral without criminal sanction in terms of regulation 16(4) and/or regulation 18.

[80] *Nandutu and Others v Minister of Home Affairs and Others* 2019 (5) SA 325 (CC) ('*Nandutu*') [1].

> *human rights instruments… when they state that the family is the "natural" and "fundamental" unit of our society.*[81]

155. In *Dawood* the Constitutional Court invalidated legislative provisions that separated family members on the basis that they unconstitutionally infringed the right to human dignity.[82] Imposing onerous burdens on, and practical and physical barriers between, families that, due to poverty or other circumstances, could result in the separation of family members was constitutionally impermissible.[83]

156. Similarly, in *Nandutu* the Court invalidated legislation that separated spouses from each other and parents from their children.[84]

157. The effects of the Impugned Restrictions on the seventh and eighth applicants' rights to family life is evident from their supporting affidavits.[85]

Freedom of trade, occupation and profession

158. Section 22 of the Constitution guarantees '*[e]very citizen… the right to choose their trade, occupation or profession freely*'.

159. The Constitutional Court explained the importance of the right as follows:[86]

---

[81] *Dawood* [31].

[82] Id at paras 39, 51, 58 and 70. O'Regan J said the following [51]:

> *Enforced separation places strain on any relationship. That strain may be particularly grave where spouses are indigent and not in a position to afford international travel, or where there are children born of the marriage. Indeed, it may well be that the enforced separation of the couple could destroy the marriage relationship altogether. Although these provisions do not deprive spouses entirely of the rights to marry and form a family, they nevertheless constitute a significant limitation of the right.*

[83] See the discussion in *Nandutu* [38].

[84] Id at paras 57 – 60, 79 and 95.

[85] Roberts supporting affidavit at page 223; Dlamini supporting affidavit at 241.

[86] *Affordable Medicines* [59]

> *What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. "It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence".*

160. Section 22 provides that '*[t]he practice of a trade, occupation or profession may be regulated by law.*'

161. Many professions are regulated by law and protect the free exercise of a chosen profession. These include, for example, the Legal Practice Act 28 of 2014 and the architectural profession by the Architectural Profession Act 44 of 2000.

162. The Preamble to the Legal Practice Act 28 of 2014 (*"LPA"*), for example, recognises that the Act seeks to give effect to the right to freedom of trade, occupation and profession protected by section 22 of the Constitution.

163. In many instances the Impugned Restrictions seek to regulate professions despite the fact that specific legislation is enacted for that purpose.[87]

164. For example, the LPA recognises the right of legal practitioners to practice the law.[88] However, the Disaster Regulations do not entitle all legal practitioners to practice the law, only those who perform *"services related to the essential functioning of the Courts"* may practice their profession.[89]

165. Regulation 28 of the Disaster Regulations is unconstitutional because it suspends the operation of law enacted by Parliament in manner that infringes upon the separation of powers. It also

[87] *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC) at paras 68 – 69 (*South African Diamond Producers)*
[88] Sections 24 and 25 of the Legal Practice Act 28 of 2014
[89] Disaster Regulations, Annexure D.

regulates the profession in a manner not permitted by the LPA by requiring a permit to perform services related to the essential function of the Courts.[90]

166. But more than that, the prohibition on certain "*non-essential services"* such as legal practitioners whose services are not related to the essential functioning of the Courts, are prohibited from practicing their profession.

167. The Disaster Regulations are unconstitutional because:

167.1. It seeks to regulate professions in a manner that is *ultra vires* of enacted law regulating professions;

167.2. It prohibits many South Africans from freely practicing their chosen profession or trade.

<u>The infringements are unreasonable and unjustifiable</u>

168. A law may not limit any right in the Bill of Rights other than in accordance with section 36(1) of the Constitution,[91] which reads:

> *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*
> *(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose.*

[90] Regulation 28(4) of the Disaster Regulations.
[91] Section 36(2) of the Constitution.

169. The nature of the constitutional rights in question, and the nature and extent of the limitation, have been addressed above.

170. The Constitutional Court has established various principles for evaluating whether a law passes constitutional muster under section 36. They are discussed below.

171. First, where an organ of state mounts a defence on the basis that the impugned law regulates and diminishes certain risks, it must '*demonstrate… that the existence and enforcement of the impugned provisions can reasonably be expected to control the aforementioned risks.*'[92]

172. All the parties to this litigation accept that combating the Covid-19 pandemic is an important governmental objective.

173. However, the government respondents have not demonstrated by way of any evidence that the Impugned Restrictions bear any rational relationship to controlling these risks.

174. According to the WHO, Covid-19 is spread when a Coronavirus-carrier coughs or sneezes, and the resultant respiratory droplets (which travel for up to one metre) make contact with another person.[93] This is accepted by the respondents.[94]

175. Covid-19 is not spread by the forms of movement prohibited by regulation 16(1) – (4).[95] For example, it is not spread by the act of an individual leaving his residence; the movement of persons

---

[92] *Teddy Bear* [87].
[93] Esau Founding Affidavit, page 19, paragraph 40.
[94] Esau founding Affidavit annexure FA4, page 108: the President explained to the nation that '*[t]he coronavirus is passed from person to person in small droplets from the nose and mouth that can be transmitted by direct contact, on surfaces we touch or when an infected person coughs or sneezes when they are close to another person.*'
[95] Esau founding Affidavit, page 49-50, paragraph 142.

outside; the movement of persons before 06h00 or after 09h00; the movement of persons between 20h00 and 05h00; or leaving the house to purchase adult summer clothing.

176. In a similar vein, the act of selling hot cooked food, certain categories of textiles and recreational reading matter will not spread the Coronavirus.[96]

177. It is substantively irrational to combat the pandemic by prohibiting these categories of movement and economic activity.

178. It appears that the government respondents' concern is that, when individuals move or engage in retail activity, they will transmit Covid-18.[97] This is only possible if such individuals cough or sneeze freely, and if they are in close proximity to one another.[98]

179. The risk is therefore not the movement or the retail activity itself, but what people do while moving or shopping.

180. As the President of South Africa's Medical Research Council explained, fighting the pandemic does not require the reduction of movement *per se*, but reducing movement where it is accompanied by activity or circumstances that are likely to transmit the Coronavirus such as congestion.[99]

181. In order to constitute a rational response to the pandemic, the COGTA Minister may on the evidence adduced therefore regulate how individuals behave when they move and shop.

---

[96] Esau founding affidavit, page 49, paragraph 142.2

[97] Esau founding affidavit, annexure **FA4**; pages 109-13. The President said to the nation: '*From the moment we declared the coronavirus pandemic to be a national disaster… our objective was to delay the spread of the virus… Our approach has been based on the principles of social distancing, restriction of movement and stringent basic hygiene practices… It is therefore essential that we do everything in our means to restrict the movement of people and – although it runs counter to our very nature – to reduce the contact that each of us has with each other.*'

[98] Esau founding affidavit, annexure **FA4**, page 108.

[99] Roberts supporting affidavit, page 230, paragraph 20.6.

182. Many such measures are already in place. Face masks are mandatory when in public;[100] retailers and other businesses must ensure adequate space in their facilities to accommodate social distancing, provide hand sanitisers to customers and employees and appoint a compliance official;[101] and businesses and organs of state must develop and implement Covid-19-related workplace plans and adhere to health and hygiene protocols.[102]

183. If these measures are sufficient to mitigate the transmission risk when customers are buying their ordinary goods and groceries, there is no rational basis for thinking that they will not be sufficient or effective merely because the customer also purchases hot prepared food or summer clothes for adults.

184. Similarly, if the health protocols and social-distancing rules put in place are sufficient to mitigate the risk of transmission while exercising outside between 06h00 and 09h00 and when moving around outside of the curfew hours, they must also be sufficient for general movement during daylight hours and mobility at night. There is no increased risk of transmitting or picking up the Coronavirus in moving around between 09h01 each day and 05h59 the next day.

185. Thus, the risk about which the respondents are concerned (i.e. the transmission of the Coronavirus) cannot reasonably be expected to be controlled by regulations 16(1) – (4) or 28 read with Table 1, Part E of the Disaster Regulations. There is no rational connection between the Impugned Restrictions and the respondents' policy objectives.

[100] Regulation 5(1) of the Disaster Regulations.
[101] Id regulation 5(4).
[102] Id regulation 16(6) (the first subsection (6)).

186. Secondly, a law that introduces arbitrary, unintended and irrational consequences, or that has the opposite of its intended effect, cannot be reasonable and justifiable.[103]

187. Regulation 16(1) – (4) contains many arbitrary distinctions that yield irrational consequences. The COGTA Minister accepts this in her answering affidavit.[104]

188. The Impugned Restrictions allow an individual to depart his municipality or province in order to attend a funeral (subject to various restrictions).[105] However, they do not allow an individual to undertake similar travel in order to attend to a relative during his dying days.

189. Both attending the funeral and visiting the dying relative would involve the same journey and could be subject to the same restrictions e.g. strict health protocols and social-distancing rules. Attending the funeral could only benefit the surviving relative, whereas allowing family visitations would benefit both the healthy and the unwell.

190. Regulation 16(2)(f) actively undermines the fight against the pandemic.

191. By forcing everyone who wishes to be outside to do so for a three-hour period each morning (which is effectively only 80 – 90 minutes because of the late-rising sun), the regulation encourages and exacerbates congestion, which undermines social distancing.

192. As the seventh applicant explains, in areas of high residential density it is not possible to observe both the three-hour limit and the social-distancing requirements and, given people's desperation for a brief respite, it is the social-distancing requirements that are contravened.[106] This exacerbates the risk of transmission.

---

[103] *Dawood* above [58]; *Teddy Bear* [92 and 94].
[104] COGTA Minister's answering affidavit, page 78, paragraph 201.
[105] Regulation 18 of the Disaster Regulations.
[106] Roberts supporting affidavit pages 227-8, paragraphs 13-5.

193. These examples of irrationality could be readily and easily remedied by insisting on strict hygiene protocols and social-distancing rules and limiting restrictions to those forms of movement that carry a demonstrable and undesirable risk of transmitting the coronavirus.

194. Similarly, regulation 28 read with Table 1, Part E is irrational.

195. It is not rational to prohibit someone who observes strict health protocols from buying a roast chicken with their grocery shopping; but allow them to order a roast chicken for home delivery.

196. In *Khosa,* Fabricius J remarked:

> *Rationality is part of the rule of law requirement. It is viewed objectively, and it is irrelevant that a decision was made mistakenly or in good faith… A seemingly irrational Regulations seems to be that one can purchase only certain items at a super-market, whilst not others. It makes no sense and it affects economic progress that must go hand-in-hand with the concerted effort by all, including the citizenry, to contain the virus.*[107]

197. Third, a law that limits constitutional rights must, among other things, be **proportional** in the circumstances because the Constitution '***does not permit a sledgehammer to be used to crack a nut***'. Any such law must be '*appropriately tailored and narrowly focused;*' if its purpose is achievable by less restrictive means, it is disproportionate.[108]

198. The Impugned Restrictions are entirely disproportionate.

---

[107] *Khosa* [5 – 6].
[108] *Teddy Bear* [95].

199. The less restrictive means that the COGTA Minister could have relied on the observance of strict health protocols and social distancing to achieve the legitimate government purposes.

200. Furthermore, those categories of movement and economic activity where it would be difficult to observe the necessary health protocols or social-distancing rules are either closely regulated or prohibited e.g. funerals,[109] flea markets[110] and night clubs.[111]

201. If the COGTA Minister is concerned about additional categories of movement or economic activity that increase the risk of spreading the Coronavirus, she can augment through regulation-making legislation governing these prohibited places or premises.

202. By focusing on forms of movement and activity that are known to facilitate the transmission of the Coronavirus, or that may reasonably be expected to facilitate transmission, the COGTA Minister would be able to ensure that the regulatory response to the pandemic is sufficiently tailored and focused so as not to infringe constitutional rights unnecessarily.

203. However, by prohibiting all forms of movement and economic activity other than a closed list of permissible options, the COGTA Minister's response has been overbroad and disproportionate as she has included many activities that are entirely anodyne in her sweeping prohibitions.

204. Regulations 16(1) – (4) and 28(3), read with regulation 31(2), impose criminal liability for harmless, everyday conduct such as afternoon exercise or selling entertaining works of fiction alongside '*educational books*'.[112]

[109] Regulation 18 of the Disaster Regulations.
[110] Id regulation 24(2)(b).
[111] Id regulation 24(2)(d).
[112] Item 17 of Table 1, Part E of the Disaster Regulations.

205. These are entirely new offences: they are not foreshadowed in the Act or any other legislation passed by Parliament. However, it is unlawful for members of the National Executive, such as the COGTA Minister, to create new criminal offences through regulations.

206. According to Professors Burchell and Milton "*penal laws should be made by the democratically chosen representatives of the people and not by autocratic or appointed officials"*.[113]

207. South African Courts have considered executive-created offences unlawful.

208. In *Rex v Magano and Madumo,* Kruse J held, in relation to the executive creation of criminal penalties, that "*the exercise of legislative functions by the State President is contrary to the spirit, scope and objects of Law 4 of 1885".*[114] And in *Rex v De Beer,* the Court held that:

> *"the power to create new offences, in conflict with the common law, must be expressed in clear terms or must be a necessary and irresistible inference from the words of the enabling statute. Furthermore, a power to frame rules and regulations for certain purposes does not... include the right of the framer to punish by means of fine or imprisonment a non-observance of such rules*".[115]

209. Had the COGTA Minister wished to establish coercive authority to enforce the Disaster Regulations, she could have imposed a regime of administrative penalties that would have achieved her objective without impermissibly trespassing on the Legislature's preeminent domain.

210. The imposition of criminal liability, including the possibility of incarceration, is too severe and disproportionate in the circumstances.

---

[113] Burchell and Milton *Principles of Criminal Law* 2005 at 97
[114] *Rex v Magano and Madumo* 1924 TPD at 97
[115] *Rex v De Beer* 1930 TPD 329 at 332.

211. Fourth, where a justification analysis rests on factual or policy considerations, the organ of state responsible for administering the impugned law must put the necessary evidentiary material before the court.[116]

212. The expert affidavit of Professor Salim Safurdeen Abdool Karim, emphasises the importance of government regulation during the Covid-19 pandemic. However, this affidavit does not comment on whether the government measures adopted are *necessary* or likely to reduce the spread of Covid-19.

213. For these reasons, the extent to which the Impugned Restrictions infringe the constitutional rights to human dignity, freedom of the person, freedom of movement and freedom of occupation is unreasonable, unjustifiable and therefore impermissible under section 36 of the Constitution.

214. The Impugned Restrictions therefore infringe the principle of legality, alternatively are unconstitutional and unlawful within the meaning of section 6(2)(i) of the PAJA.

C. The Trade Minister's Clothing Directions are unlawful.

215. The Trade Minister's Clothing Directions issued on 12 May 2020, is unlawful for three reasons:

215.1. First, it is *ultra vires* of the Disaster Regulations;

215.2. Second, it is *ultra vires* of the DMA; and

215.3. Thirdly, it is irrational.

[116] *Teddy Bear* above [84].

216. First, the Trade Minister issued the clothing directions in terms of regulation 4(10(a) of the Disaster Regulations. This regulation provides:

> *"4(10) Any Cabinet member may issue and vary directions, as required, within his or her mandate, to address, prevent and combat the spread of COVID19, and its impact on matters relevant to their portfolio, from time to time, as may be required, including*
>
> *(a)* ***disseminating information required for dealing with the national state of disaster****".*

217. The Trade Minister did not act in terms of regulation 4(6) which empowers him specifically as the Minister of Trade, Industry and Competition, to issue directions.

218. On its ordinary meaning, the Clothing Directions cannot and do not constitute "*information required for dealing with a national disaster".*

219. The information contemplated in this section ordinarily concerns information about the Covid-19 pandemic such as its virology and the mechanisms to prevent contracting it.

220. It does not include clothing directions.

221. This Court is required to interpret regulation 4(10) in light of its context and purpose.[117]

[117] Natal Joint Municipal Pension Fund v Endumeni 2012 (4) SA 593 (*Endumeni)*

222. A sensible reading of regulation 4(10), rather than one that strains the ordinary meaning must be preferred.[118] And a meaning that better and best promotes the objects and purposes of the Bill of Rights should be preferred over an interpretation that does not.[119]

223. The context of regulation 4 shows that it was impermissible for the Trade Minister to make any directions, let alone the Clothing Directions in terms of regulation 4(10)(a).

224. There would be no need regulation 4(6), if the Trade Minister could use regulation 4(10)(a) as a catch-all provision for the making of directions.

225. In light of all the specific empowering provisions contained in regulation 4 dealing with the directions that various Minister's may make, regulation 4(10) should not be interpreted broadly. It must be given its sensible and narrowly tailored meaning.[120]

226. Accordingly, the Trade Minister was not empowered to issue clothing directions in terms of regulation 4(10)(a).[121] The clothing directions are therefore *ultra vires*.

227. Secondly, the clothing directions are *ultra vires* of the DMA.

228. In the Trade Minister's answering affidavit, he does not attempt to or indeed justify the **necessity** of the clothing directions in terms of section 27(3) of the DMA.

---

[118] *Endumeni* [18]; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) [24]. See also K Perumalsamy dealing with the notion of a reasonable reading of statutes in 'The Life and Times of Textualism' *PELJ* 2019 (22) at 16-19.
[119] *Wary Holdings v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) [45].
[120] This is in line with the interpretation required of the DMA as discussed above in *Pheko* [37].
[121] *Minister of Education v Harris* 2001 (4) SA 1297 (CC) [17-8].

229. He expressly states in paragraph 75 of his answering affidavit that the clothing directions were necessary because it sought to "*limit any disputes between retailers themselves*".[122]

230. This reason cannot be considered a necessary reason in terms of section 27(3) of the DMA.

231. In *Affordable Medicines,* the Constitutional Court held it is not permissible to make regulations for purposes not aligned with an empowering provision. The Constitutional Court held:

> *The purpose of subregulation 18(5)(a), (c), (d) and (e) is manifestly to protect pharmacies against competition from medical practitioners and nurses. This purpose is not discernible from the Medicines Act. Nothing in the Medicines Act empowers the Minister to develop such a policy through the Regulations. It follows therefore that the provisions of sub-regulation 18(5)(a), (c), (d) and (e) that develop the policy of denying a licence where there are pharmacies in the neighbourhood are ultra vires the empowering statute.*[123] (emphasis underlined).

232. In *Rustenburg Platinum Mines v CCMA*, Cameron JA held:

> *"Given that the commissioner took four bad reasons into account in reinstating the employee, but that* ***other legitimate reasons existed that were capable of sustaining the outcome,*** *can it be said that the employee's reinstatement was 'rationally connected' to the information before the commissioner, or the reasons given for it ? In my view, it cannot."*[124]

233. In *Westinghouse,* the Supreme Court of Appeal[125] held:

> ***"It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated."***

234. Accordingly, because the Trade Minister made the clothing directions for reasons not necessary in section 27(3), the clothing directions are unlawful.

---

[122] Trade Minister's answering affidavit paragraph 75.
[123] *Affordable Medicines* [119].
[124] *Rustenburg Platinum Mines v CCMA* 2007 (1) SA 576 (SCA) [34].
[125] *Westinghouse Electric Belguim Societe Anonyme v Eskom Holdings (Soc) Ltd* 2016 (3) SA 1 (SCA) [45]. The Constitutional Court overturned the SCA decision on appeal, but not on this point.

235. Thirdly, the clothing directions are arbitrary and irrational.

236. Many of the clothing directions are simply unenforceable.

237. For example, direction 3.7.13 provides that **crop bottoms[126] may be sold if it is worn with leggings and boots**.[127] T-shirts may be sold where they are advertised as undergarments for warmth.[128]

238. It is impossible for a retailer of clothing to know whether a t-shirt purchased will be worn as an undergarment for warmth. It is also impossible for a retailer to know whether a crop bottom will be worn with boots and leggings.

239. The clothing directions do not pursue legitimate aims.

240. The clothing regulations do not reduce the likelihood of the Covid-19 virus spreading. A person who wears a mask and purchases open-toe heels[129] (prohibited by the clothing directions) is no more likely to catch or transmit the Covid-19 virus than someone who purchases food from a supermarket.

241. For these three separate and independent reasons, this Court ought to find the clothing directions unlawful and invalid.

[126] We are unfortunately not entirely sure what "crop bottoms" are.
[127] Clothing directions 7.7.13.
[128] Clothing directions 3.7.11.
[129] In terms of direction 3.6.3 only close-toe heels are permitted for sale.

VI. CONCLUSION AND RELIEF

242. In considering this application, it is submitted that this Court is to engage in a balancing exercise based on that which the government respondents contend are the reasons for the grave violations of constitutional rights.

243. In conducting the balancing exercise in this case, the respondents must fail.

244. They have used a blunt instrument to violate rights without providing a satisfactory and rational response to the challenges in this application.

245. These written submissions do not deal with the prayers contained in paragraphs 2 and 3 of the notice of motion. These prayers are addressed in the written submissions of the eighth applicant.

246. The first to seventh applicants, however, align themselves with the prayers sought in paragraphs 2 and 3 of the notice of motion.

247. The applicants seek orders declaring:

247.1. The conduct of the COGTA Minister unlawful and invalid in making the Disaster Regulations on 29 April 2020;

247.2. The conduct of the Trade Minister unlawful and invalid in making the Clothing Directions on 12 May 2020.

248. Section 172(1)(a) provides that a Court deciding a constitutional matter must declare law or conduct inconsistent with the Constitution invalid.[130]

249. The applicants also seek orders:

249.1. Reviewing and setting aside the Disaster Regulations made in terms of section 27(2) of the DMA and published on 29 April 2020;

249.2. Suspending the declaration of invalidity in respect of the Disaster Regulations for 30 calendar days from the date of the judgment of this Court;

249.3. Reviewing and setting aside the clothing directions of the Trade Minister made in terms of regulation 4(10)(a) of the Disaster Regulations and published on 12 May 2020.

249.4. Directing that the declaration of invalidity in respect of the clothing directions shall apply from the date of the judgment of this Court.

250. The applicants appreciate that the just and equitable remedy[131] is to suspend the declaration of invalidity for 30 calendar days so that the COGTA Minister may correct the constitutional defects in the Disaster Regulations, and apply her mind in accordance with the provisions of the DMA.

251. The COGTA Minister agrees that a period of 30 days for the suspension of invalidity in respect of the Disaster Regulations, is appropriate and sufficient.[132]

---

[130] Section 172(1)(a) of the Constitution. In *Dawood,* the Constitutional Court held [60] *"the Court, as section 172(1) requires, must, if it concludes that the provision is inconsistent with the Constitution, declare the provision invalid and then the Court may make any further order that is just and equitable"*

[131] Section 172(1)(b) of the Constitution recognises that a Court may make any order that is just and equitable including the suspension of a declaration of invalidity.

[132] COGTA Minister's answering affidavit, page 102, paragraph 306.

252. Finally, the first to seventh applicants seek an order directing the first and third respondents to pay the costs of this application, which costs shall include the costs of two counsel, where so employed.

ANTON KATZ SC

KESSLER PERUMALSAMY

ASHLEY PILLAY (pupil advocate)

First to Seventh applicants' counsel

Chambers, Cape Town

10 June 2020.

VII. AUTHORITIES

Cases

1. *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC)
2. *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)
3. *Barkhuizen v Napier* 2007 (5) SA 323 (CC)
4. *Buthelezi and Another v Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA)
5. *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC)
6. *Dadoo v Krugersdorp Municipality* 1920 AD 530 (AD)
7. *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)
8. *De Beer v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) ZAGPPHC 184
9. *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC)
10. *Director General of Home Affairs and Another v Mukhamadiva* 2014 (3) BCLR 306 (CC)
11. *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC)
12. *Earthlife Africa, Johannesburg and Another v Minister of Energy and Others* [2017] 3 All SA 187 (WCC)
13. *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)
14. *Huyser v Die Voortrekker Pers Bpk* 1954 (3) SA 75 (W)
15. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC)
16. *Joosub Ltd v Ismail* 1953 (2) SA 461 (A)
17. *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC)
18. *Khosa and Others v the Minister of Defence and Military Veterans and Others* (21512/2020) ZAGPPHC 147 (15 May 2020)

19. *Masetlha v President of the Republic of South Africa and another* 2008 (1) SA 566 (CC)
20. *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC)
21. *Minister of Health and Others v New Clicks and Others* 2006 (2) SA 311 (CC)
22. *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA)
23. *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC)
24. *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC)
25. *Mohamed v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC)
26. *Moise v Greater Germiston Transitional Council* 2001 (4) SA 491 (CC)
27. *Nandutu and Others v Minister of Home Affairs and Others* 2019 (5) SA 325 (CC).
28. *Natal Joint Municipal Pension Fund v Endumeni* 2012 (4) SA 593
29. *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College* 2001 (2) SA 1 (CC)
30. *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)
31. *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC)
32. *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC)
33. *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC)
34. *Rex v De Beer* 1930 TPD 329
35. *Rex v Magano and Madumo* 1924 TPD
36. *S v Mapeswani* 1971 (1) SA 434 (T)
37. *Shaboodien v Sekretaris van Binnelandse Sake* 1971 (3) SA 684 (C)
38. *Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

39. *Smit v Minister of Justice and Correctional Services* [2019] 4 All SA 542 (WCC)

40. *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC)

41. *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC).

42. *Wary Holdings v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC)

43. *Whiteman t/a JW Construction v Headfour Pty Ltd* 2008 (3) SA 371 (SCA)

Books

1. Burchell and Milton *Principles of Criminal Law* (Juta Publishers Cape Town 2005).
2. C Hoexter *Administrative Law in South Africa* (Juta Publishers Cape Town 2012)
3. The Oxford English Dictionary (3rd edition, Oxford University Press)

Journal Articles

1. A Konstant 'Administrative Action, the Principle of Legality and Deference – The case of *Minister of Defence and Military Veterans v Motau* 4 *Constitutional Court Review* 2018 68.
2. E Mureinik 'A Bridge to Where- introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.
3. K Perumalsamy dealing with the notion of a reasonable reading of statutes in 'The Life and Times of Textualism' *PELJ* 2019 (22).

Legislation

1. Architectural Profession Act 44 of 2000.
2. Children's Act 38 of 2005
3. Disaster Management Act 57 of 2002
4. Extension of Security of Tenure Act 62 of 1997
5. Legal Practice Act 28of 2014
6. Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998