HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 21542/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 19 FEBRUARY 2021

SIGNATURE

In the matter between:

REYNO DAWID DE BEER	First Applicant
LIBERTY FIGHTERS NETWORK	Second Applicant
HOLA BON RENAISSANCE FOUNDATION	Amicus Curiae

and

THE MINSTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Respondent

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J U D G M E N T

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

1.1 The parties to this application have squared off against each other in this court on multiple previous occasions. The applicants are Mr Reyno De Beer and the Liberty Fighters Network. Hola Bon Renaissance Foundation appeared as an amicus curiae. The respondent is the Minster of Cooperative Governance and Traditional Affairs (The Minister).

1.2 The first round of litigation between these parties, was in an application heard on 28 May 2020. In that application, this court found on 2 June 2020 that the regulations in force at that time, being those initially published as Alert Level 3 in Government Gazette 43364 on 28 May 2020, were so irrational in their terms and extent that they failed the legality test for the exercise of executive authority. Moreover, it was found that the regulations had been promulgated without due regard to the proportionality test applicable when the exercise of power results in the limitation of Constitutional rights and the balancing between competing rights. Both these decisions and the orders made, are the subject matter of a pending appeal in the Supreme Court of Appeal.

1.3 The second and third rounds in court, involved applications for leave to appeal and counter-appeal on 24 June 2020 and 26 August 2020 respectively, resulting in to the aforementioned pending appeal.

1.4 Since then, much has changed. The world and its response to the Covid-19 pandemic has mutated from time to time. The factual, regulatory and legal landscapes have also undergone unprecedented changes.

1.5 At the time of the launch of the first application on 13 May 2020, South Africa had 12 704 coronavirus cases and 219 reported deaths resulting therefrom. At the time of the launch of the current application on 5 January 2021, the number of reported cases in South Africa has risen to 1 127 579 cases and 30 976 deaths have been reported, and the "second wave" was then still on its way. The daily death toll at the time of the launch of the first application was 17 per day and at the launch of the second application 513 per day. The maximum daily Covid-19 related deaths reported at the twin peaks of the virus waves were 584 and 839 respectively.

1.6 The deaths resultant from the pandemic, irrespective of any view any of the parties may hold, are tragic and evoke a deep sense of compassion. These deaths have insinuated themselves into every level of society and every walk of life. Those who serve the most vulnerable in society and those being most in need of care, being educators and members of all branches of the health profession, have also not been spared. As dispassionate as the judiciary must interpret and apply the law, with equal measure its members are compassionate regarding every adversity faced by subjects of the law, be it the effects of the pandemic or the effects of measures to curb it. This compassion is poignantly illustrated in Justice Sach's seminal work The Strange Alchemy of Life and Law Oxford University Press, 2011 in the chapter "The judge who cried" when proceedings before the Constitutional Court in its "early days" are described. The title of the chapter says it all.

1.7 The factual landscape in which we live, has also dramatically been affected by both the pandemic and the measures introduced as a response thereto. Movement of persons, crossing of borders and the whole way in which people and businesses conduct themselves have all become more restricted.

Economic devastation has ruined many sectors, particularly the entertainment, tourism and informal sectors and every other sector which is dependent on human interaction. Reports of losses of literally millions of jobs, revenue and income abound. Added to this mix must still be the tobacco and liquor industry debates and the criminality which followed on the heels of personal protection equipment distribution.

1.8 Even our language has evolved. Concepts such as "social distancing", "hot-spots" and "superspreader events" are now common parlance.

1.9 The change in the legal landscape came in the form of numerous legal challenges brought to the High Courts across the country, but particularly in the Western Cape (the seat of Parliament) and in Gauteng (the seat of Government). The judicial database, SAFLII, lists no less than 367 COVID-19 related judgments, many of them precedent-setting, often by way of full court decisions and no less than four by the Supreme Court of Appeal. I shall refer to some of them hereinlater.

1.10 Another change in the regulatory environment in which we find ourselves in terms of the provisions of the Disaster Management Act, 57 of 2002 (the DMA), is the "adjusted" levels of control imposed from time to time. The Alert Level 3 regulations promulgated on 29 December 2020 form the regulatory restrictions in place at the time that this application was heard. In similar fashion as with previous applications, the "moving target" of the regulations, were "adjusted" shortly after the hearing, by the lifting of some of the restrictions. This adjustment took place on 1 February 2021 by way of Government Notice R69 in Government Gazette 44130 of even date.

1.11 It is against this background that the applicants' application and their attack against the regulations must be judged. In many ways, the applicants'

application and the assertions mentioned therein, represent the voices of large sections of the community. This much is clear from the multitude of media reportage referred to by the applicants and, on one of the topics resulting from the multitude of ever- changing rules, the standing ovation received by Mr De Beer when, during oral argument, he simply exclaimed: "my Lord, we are confused!"

[2] The current legal landscape

2.1 Before dealing with the relief now claimed by the applicants it is necessary to be alive to the fact that a court does not have an unfettered power to intervene in the exercise of executive authority. The exercise of a court's powers is subject to the rule of law (See: S v Mabena and Another 2007 (1) SACR 482 (SCA) at paragraph [2]) which includes the doctrine of the separation of powers. This separation of powers, provided for in the Constitution, applied to the facts of this case imply that the legislature has made the law (the DMA), the executive (the Minister) implements the law, inter alia by making regulations, and it is up to the courts to interpret the law and to determine whether the implementation thereof exceeded the bounds of the law. See: Doctors for Life International v Speaker of the Nation Assembly 2006 (SA) 416 (CC) at paras [37] and 3[8]. In the present context, this means that the implementation must be "legally" exercised, that is, within legal bounds. This "legality test", does not involve an examination by a court of the "correctness" of a decision, but a determination whether its exercise was lawful. The means to determine this lawfulness involves determination whether the actual "content" of the exercise was rationally connected to the purpose prescribed by the enabling provision. This is also referred to as the "rationality test". In explaining the rationality test, a judgment of a full court of this Division, in Fair Trade Tobacco Association v President of the RSA 2020 (6) SA 513 (GP) (the

Fita-case), held that "*the Minister only needs to show that the means chosen to achieve the intended objective were reasonably capable of achieving it*".

2.2 When the exercise of executive authority is held up to the light of the Constitution, for it to pass muster, it must therefore be related to the purpose for which the power was conferred and rationally "connected" to the object which such exercise seeks to achieve. See: DA v President of the RSA 2013 (1) SA 248 (CC) at para [27]. In Pharmaceutical Manufacturers Association of SA: In re: Ex parte President of the RSA and Others 2000 (2) SA 674 (CC) these principles have been explained as follows at para [85]:

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

2.3 In the recent judgment of the Supreme Court of Appeal, dealing with an attack on the decisions taken and regulations promulgated in terms of the DMA, Esau & Others v Minister of Cooperative Governance and Traditional Affairs (611/2020) [2021] ZASAC 9 (28 January 2021) (the Esau-case) the court said the following in its judgment in respect of an appeal which served before it on 2 November 2020, at paragraph [7] "*The point must be stressed that the function of the court is to vet the challenged*

decisions and regulations made in terms of the DMA for their regularity and not their wisdom".

2.4 The same court referred to the following cynical comment of Schreiner JA in this regard in Sinovich v Hercules Municipal Council 1946 AD 783 at 802 – 803 "*the law does not protect the subject against the foolish exercise of a discretion by an official, however much the subject suffers thereby*".

2.5 What a court is also however, further entitled and obliged to do, is to evaluate whether the "proportionality test" has been met, that is to gauge whether, in exercising executive authority, the decision-maker has properly weighed up the competing interests where Constitutionally protected rights are infringed or limited. The Supreme Court of Appeal summarized the test in this regard as follows in the Esau-case at [108]: "*The determination of the constitutionality of the impugned regulations involves a two-stage process. First, the appellants are required to establish that the regulations infringe one or more of their fundamental rights. Secondly, if they succeed in establishing this, the burden shifts to the respondent to justify the infringement or infringements in terms of section 36(1) if the Constitution*".

2.6 Where there are competing rights and the safeguarding or promotion of one of the rights, infringes or limits other rights, the Constitutional Court has expressed the position as follows in National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) at paragraphs 34 – 35: "*The balancing of different interests must still take place. On the one hand, there is the right infringed, its nature; its importance in an open and democratic society based on human dignity, equality and freedom and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation. In the*

balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose".

[3] Relief claimed

3.1 It is against this ever-mutating factual and legal backdrop imposed by the COVID-19 pandemic that the relief claimed by the applicants must be adjudicated. The relief is far and wide-ranging and, in order to properly adjudicate the various aspects thereof, it is necessary that it be quoted in full. If is the following:

> "*1. That the non-compliance to the Uniform Court Rules and Practice Directives regarding forms, service and time periods be condoned and that this application is being heard as urgent in terms of Rule 6 (12) of the Uniform Rules of the Court; and*
>
> *2. That the Respondent is held in Contempt of Court for violating the Court Order, or part thereof, granted by Judge Davis under the above-mentioned case number dated 2 June 2020; and*
>
> *3. That the Respondent is imprisoned for a period of 6 months, or for a period as determined by the Court; and/or*
>
> *4. To impose such additional or alternative penalty on the Respondent as the Court deems appropriate under the circumstances; and*
>
> *5. That the extension of the National State Disaster (hereafter referred to as the "NSD") to 15 January 2021 in terms of*

section 27(5)(c) of the Disaster Management Act, 2002 (Act No. 57 of 2000) – hereinafter referred to as the "DMA" – promulgated and gazetted in GN 1341 GG 43993 dated 11 December 2020, be declared as unconditional and invalid; and

6. *That no further or subsequent extension of the NSD are allowed which flow from the original NSD declared and gazette in GN 313 GG 43096 dated 15 March 2020; and*

7. *That the regulations issued in terms of Section 27(2) of the DMA promulgated and gazette in GN 1423 GG 44044 dated 29 December 2020 be declared as unconditional and invalid; and*

8. *That the regulations issued in terms of Section 27(2) of the DMA promulgated and gazette in GN 1346 GG 43997 dated 15 December 2020, GN 1370 GG 44009 dated 17 December 2020 and GN 1421 GG 44042 dated 24 December 2020 declared as unconstitutional and invalid; and*

9. *That the Respondent is barred form promulgated any further regulations on terms of either Section 27(2) or Section 59 of the DMA pending the final outcome of the appeal before the Supreme Court of Appeal in the matter between the Respondent (as the Appellant therein) and the Applicants (as the Respondent therein) under case number 538/2020; and*

10. *That the compulsory wearing of a mask or other facial covering by a member of the public, other than for reasonable*

safety purposes by any healthcare or emergency worker, be declared as unconstitutional and invalid; and

11. *That the compulsory closure of churches, mosques, synagogues and other faith or religious based institutions be declared as unconstitutional and invalid; and*

12. *That the declarations of unconditionally and invalidity contained herein refers to the content of the regulations, and not only the number of the regulation, and apply to any other further regulations considered or promulgated by the Respondent in terms of the DMA or by any other member of Cabinet in any form of substituted regulations; and*

13. *That any application for leave to appeal, or appeal process, will not automatically suspend the execution and operation of the Court Order: provided that any interested party may approach this Court on application, after proper service on all parties herein, for an order to determine otherwise in the Court's sole discretion which deems fit;*

14. *That the Respondent published the Court Order in the Government Gazette on the first business day following the day on which the order was granted, as well as within three (3) business days after granting of the order in at least 5 other national printed newspapers; and*

15. *In the event of the Respondent's violation of paragraphs 9, 12 and 14 supra, the National Commissioner of the South African Police Services, or his duly authorized representative, be*

authorized to arrest the Respondent and keep her in a police custody until the first business day when she must be brought before this Court to provide reasons why she should not be held in, or further, Contempt of Court and for the Court to make any order or direction at such hearing how to further deal with such a matter in its sole discretion as it deems fit; and

16. The Respondents to pay the costs of this application on a scale as between attorneys and client".

3.2 Adv Trengove SC, who appeared for the Minister, in written heads of argument, thematically arranged the relief claimed under the following headings (which Mr De Beer readily accepted as a practical manner in which to deal with the application):

- The contempt relief.
- The national state of disaster relief.
- The regulations relief.
- The mask relief.
- The places of worship relief.
- The further relief.
- The issue of costs

[4] <u>The contempt relief</u>

4.1 In the judgment in respect of the application referred to in paragraph 1.2 above, on 2 June 2020, this court ordered the Minister to "*review, amend*

and republish" the Alert Level 3 regulations then in force, after consultation with the relevant other cabinet ministers "... *with due consideration to the limitations each regulation has on the rights guaranteed in the Bill of Rights contained in the Constitution*".

4.2 The above order was part of a suspension order of this court's declaration of Constitutional invalidity of the regulations then published by the Minister. The Minster had 14 days to comply with the order.

4.3 Before the 14 days had elapsed, the Minister applied for leave to appeal. This suspended the operation of the order in terms of section 18 (1) of the Superior Courts Act, 10 of 2013.

4.4 Leave to appeal was granted in respect of the "blanket" declaration of unconstitutionality of the regulations, but was refused in respect of the remainder, the "specified" regulations. This was on 30 June 2020.

4.5 The abovementioned refusal meant that the unexpired period of the 14 days mentioned in the initial order was no longer suspended and continued running. The Minister, however, applied to the Supreme Court of Appeal for the requisite leave to also appeal the declaration of invalidity in respect of the "specified" regulations. This application again suspended and interrupted the running of the remainder of the 14 day period. The Supreme Court of Appeal granted the requisite leave to appeal on 11 September 2020. The result was that the whole of this court's order became suspended pending the appeal.

4.6 After leave to appeal has been granted, an appealing party must prosecute such an appeal by lodging a formal notice of appeal at the court to which the appeal lies, in this case, the Supreme Court of Appeal. Such a notice

of appeal has to be delivered within strict time-frames. This, the Minister has done in respect of the portion of this court's order in respect of which itself has granted leave to appeal. The Minister has, however, failed to timeously deliver a notice of appeal in respect of the portion of this court's order pertaining to the declaration of invalidity of the "specified" regulations (in respect of which leave to appeal had been granted by the Supreme Court of Appeal). This lastmentioned notice had to have been delivered on 12 October 2020. This was only done 23 December 2020.

4.7 The late filing of a notice to appeal has the result that such an appeal lapses. It can only be revived by way of a successful condonation application. In the meantime, the suspension brought about by the initial appeal processes also lapses with the appeal. See: Panayiotou v Shoprite Checkers (Pty) Ltd and Others 2016 (3) SA 110 (GJ) per Sutherland J and Schmidt v Theron and Another 1991 (3) SA 126 (C) at 129 H – 130 G.

4.8 Mr De Beer argued that, since the date of the lapsing of the appeal and the expiry of whatever portion of the initial 14 days period may have been left, the Minister was, and remained in non-compliance with an order of court. This, so the applicants aver in their papers, amounts to contempt of court. The subsequent re-instatement of Alert Level 3 by way of promulgation of "new" regulations, which the applicants say, amounts to a circumvention of the Court's order constituting a separate perpetration of contempt of court. The Minister is being accused of attempting to "regulate herself out of a court order". There is also a huge debate on the papers as to whether the lapsing of the appeal was a mere oversight in the offices of the State Attorney or not, as Mr De Beer had by letter alerted the Minister of this "oversight" without it being addressed or remedied. This, yet again, is branded as contemptuous conduct.

4.9 Contempt of court is a serious matter. It offends the need to preserve the rule of law and to protect the moral authority of the Judiciary. See: S v Mamabolo (etv and others intervening) 2001 (1) SACR 686 (CC) per Kriegler J at [19]. It is an offence which carries as its sanction the risk of incarceration for a period determined by the court. It is for this reason, in many instances, analogous to a criminal trial. See: Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) and Matjabeng Local Municipality v Eskom holdings Ltd 2018 (1) SA 1 (CC).

4.10 The current application was launched on 5 January 2021, requiring the Minister to deliver her answering affidavits by 7 January 2021, that is within less than two full days.

4.11 The rules and practice directives applicable to urgent applications whereby the customary time-periods prescribed for delivery of notices of intention to oppose (5 court days) and delivery of answering affidavits (15 court days) can be curtailed, are both trite and strict. These have been explained in various practice directives and in Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 728A – G and Luna Meubel-vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufactures) 1977 (4) SA 135 (W) at 136 C – 137G. In the lastmentioned matter, the court set out important aspects of urgency which may allow a party to depart from the normal time-periods or curtail them: "*The question is whether there must be a departure at all from the times prescribed ... practitioners should carefully analyse the facts of each case to determine, for purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should*

not be more than the exigency of the case demands. It must be commensurate therewith".

4.12 It almost beggars belief that anyone can seriously contend that a person accused of an offence which carries a possible jail term must be ready to defend herself or himself within 48 hours (despite any prior knowledge of all or some of the relevant facts). Whilst there may be a sense of urgency experienced by the applicants and the persons they represent in attacking the regulations and the consequences brought about thereby and whilst a great many of the COVID-19 related litigation have been conducted in urgent courts, the same cannot be said for the "contempt relief". While it may be true that oftentimes a sentence imposed in contempt proceedings is suspended on certain coersive conditions, those possible conditions cannot by themselves dictate the urgency of such a matter. The extremely abbreviated time periods afforded the Minister as an accused person, are not justified in this case. The perceived perception of the applicants that, should they on an urgent basis have the Minister declared to be in contempt of court, this would result in the regulations being amended or uplifted overnight, is not a justifiable perception.

4.13 Having found that the truncated time-periods afforded the Minster by the applicants in respect of the contempt of court relief are unjustifiably short, then prayer 1 of the applicant's notice of motion cannot succeed in respect of the relief claimed in prayers 2 - 4 of the said notice.

4.14 When a court reaches a decision as aforesaid, the customary order is that the matter will be struck off the urgent court's roll. This means that the applicants, should they seek to pursue the relief, will have to set the matter

down on the ordinary opposed motion court roll. I will make an appropriate order in this regard at the conclusion of this judgment.

[5] The national state of disaster relief

5.1 The Minister criticized the applicants for launching their urgent applications only on 5 January 2021 whilst the extension of the state of disaster has already been announced on 11 December 2020 and would expire on 15 January 2021. In my view this criticism is misplaced: after the expiry of the first three month period contemplated in Section 27 of the DMA, the Minister may (and has) extended the declaration of the national state of disaster from time to time on a monthly basis. Any attack on such an extension by way of a court application will of necessity be made shortly after the commencement of any such extension and less than a month before its expiry. These consequences would occur in any such application and would not be of any applicants' doing. However, having regard to the nature of the subject matter of the remainder of the application, being the restrictions placed on various aspects of people's lives, I find, in similar fashion as the numerous other judgments, sufficient urgency to hear the matter.

5.2 As to the merits of the declaration of the national state of disaster itself, this court has already, in the initial judgment, and following on the classification of the pandemic as a national disaster by Dr Tau in his capacity as the head of the National Disaster Management Centre on 15 March 2020, determined that the subsequent declaration by the Minster was rational. That determination still stands and is not a subject matter in the pending appeals.

5.3 Similar conclusions have since been reached in the Fita-case (above) and by the Supreme Court of Appeal in the Esau-case (also above). In One South Africa Movement and Another v President of the RSA 2020 (5) SA 576 (GP), the applicants therein contended (in the context of schooling) that the lifting of restrictions and a move from Alert Level 4 to Alert Level 3, should have been prevented, inter alia, as being unconstitutional. In the consideration of that relief, the full court of this Division without any demur accepted the declaration of a national disaster as a fact and a valid exercise of executive authority.

5.4 At one stage during the argument of the present matter, the applicants appeared to deny the existence of the pandemic. Adv Trengove SC responded that the rest of the world disagreed. From the statistics quoted at the inception of this judgment, there appears to be a lack of a factual foundation sufficiently supporting this contention of Mr De Beer.

5.5 Mr De Beer's argument that there are alternative solutions to the declaration of a state of national disaster, is not only *res iudicata* as between the existing parties, but has already been laid to rest in yet another full court decision of this court in Freedom Front Plus v President of the RSA [2020] 3 All SA 762 (GP). This court is not only bound by that decision, but respectfully agrees with the findings made therein. There is no evidence upon which to find that the same would not apply to the maintenance of the declaration and the extension thereof on a month to month basis, at last until there are no more "waves" on the horizon or until the threat posed by the pandemic has been contained or eradicated.

5.6 It follows that the relief claimed in prayer 5 of the applicants' Notice of Motion cannot be granted.

5.7 In prayer 6 of the Notice of Motion, the applicants seek an order that "no further or subsequent extensions of the National State of Disaster are allowed". In addition to the decisions referred to above and the conclusion reached in paragraph 5.5, the insurmountable hurdle which the relief sought in this prayer faces, it that it requires the court to peer into the future and accurately predict the path of the pandemic as well as its lifetime. Clearly this is impossible. Furthermore, the exercise of executive authority in response to the pandemic is "*pre-eminently polycentric and policy-laden*" and is a "*multi-faceted decision*" (One South African Movement-case (above) at paragraph [87]). There is, in this context, no basis upon which a court can prevent the exercise of executive authority. A court's powers can only extend as far as "vetting" such exercise, once it has occurred. This relief can therefore also not be granted.

[6] The regulations relief

6.1 The applicants, in their founding affidavit, allege that the failure to furnish information or reasons for the Minister's decisions, renders them irrational. They also aver that this failure implies the absence of a proper constitutional analysis regarding the infringement of constitutional rights occasioned by the regulations. They further voice their frustration in this regard thus: "*these latest regulations are tainted with exactly the same confusions as those considered ... before. It simply does not make any sense, for example, that one may not attend a place of worship with friends (church, synagogue, mosque or temple) but the same friends may walk around the church (to) go inside a restaurant. More absurd, a minibus taxi may be filled to 100% capacity with funeral goers but at the funeral, the very funeral goers who have spent two hours directly next to each other may not comfort one another at the funeral but must keep social distancing between them*". A further aspect of the applicants' "confusion" related to

the closure of beaches. After having identified these aspects of perceived irrationality, the applicants proceeded to ask for a finding that "*all of the regulations are irrational in their entirety*".

6.2 The Minister's response to the claim for a "blanket" finding of irrationality is to stress that the correct approach is to assess each impugned regulation against its purpose and to determine whether there was a rational link between that regulation and the stated purpose of curbing the spread of COVID-19, so as to save lives. The Minister further equates the applicant's claims in this regard with the "blanket" declaration of invalidity contained in this court's order of 2 June 2020. What distinguishes that application from the present, however, is that in that application the Minister had declined to depose to an affidavit. The affidavit relied on by the Minister in that application and deposed to on her behalf, failed to address the disputes regarding the decision-making process and the purposes of the regulations in any meaningful manner. The regulations therefore appeared to be irrational and, in some instances clearly arbitrary. As that issue is currently the subject-matter of a pending appeal, it need not be discussed any further, save to note that in subsequent litigation, such as in the Fita-case (above) the Minister has furnished extensive detail about the decision-making processes, the composition and working of the National Coronavirus Command Council and the stated purposes of the various regulations and alert levels. Apart from the changed circumstances set out at the inception of this judgment, the evidentiary material available are no longer the same as in the initial application. In addition hereto, save for the identified instances of "confusion", the regulations have become more nuanced and focused than before. The claim for a "blanket" declaration can therefore not be approached as before.

6.3 One of the aspects raised by the applicants, being the closure of beaches, elicited a strange response from the Minister. While there can be little argument against the rationality of closure of congested beaches or beach areas, particularly at the height of the festive season over the December holidays and for those periods only, the closure of long empty stretches of beaches or the closure and policing of scarcely populated areas appear to have no rational connection to the stated purpose of preventing the spread of infection. The absurdity or arbitrariness of such blanket closures were illustrated by the extreme measures taken in enforcing compliance. The South African National Defence Force was deployed in some areas, even arriving on virtually deserted beaches with machine guns and rocket launchers. Stun-grenades were utilized in dispersing solitary surfers or in assisting in their arrest.

6.4 To continue with the Minister's curious response, apparently the closure of the beaches was not directed at the happenings at individual beaches themselves. The reasoning was as follows:

> "*67.7.1 Beachgoers do not usually attend beaches alone, it is often a group activity.*
>
> *67.7.2 Some beachgoers may travel in their own vehicles, whilst most people may have to utilize public or communal transport. An increased usage of public or communal transport for non-essential purposes increases the risk of infection.*
>
> *67.7.3 Being at the beach does or necessarily entail swimming and sunbathing, it also entails increased foot-traffic in*

surrounding areas which again increases the rate of infections.

67.7.4 *Being at the beach by its nature, is a social activity that increases human interaction, which in turn increases the possibility of transmission.*

67.7.5 *Various popular beach area had already been declared hotspots.*

67.7.6 *Not only do people often gather in large groups at beaches over me holiday season (making requirements such as much wearing and social distancing difficult to enforce) but they also travel from around the country to do so. These increased numbers potentially place strain on the already constrained public health resources in the relevant areas.*

67.8 *Closing the beaches temporarily thus served not only to reduce the potential of unsafe interactions on the beaches themselves but also to decrease the strain on hospitals in the affected areas*".

6.5 If the stated objective had been to reduce "unsafe interactions", there can be no justification for criminalizing safe or individual use of open stretches of a beach. There can also not be a rational connection between the prohibiting of a family group who live in close proximity with each other all year from being in the same (or probably less proximity) on a beach. No justification or "rational connection" was displayed for prohibiting local residents (which already live at the coast and therefore pose no

increase in travel or additional burden on health resources) from venturing onto a beach. No attempt had been made to make any distinction between populated or popular beach areas and "hotspots" and any other stretch of beach.

6.6 I also questioned Adv Trengove SC why no express mention had been made by the Minister in her answering affidavit of the balancing exercise to be performed between competing constitutional rights as referred to above. The response was that that was not the case the Minister had been called upon to meet, in this application she simply had to deal with a rationality attack on the regulations and not a proportionality attack. Be that as it may, in view of the fact that the "beach ban" has since been lifted and the issue having become moot, no order of this court is needed on an urgent basis in this regard.

6.7 Regarding the other two "confusions" cited by the applicants referred to in paragraph 6.1 above, the Minister responded as follows:

> "*They cite two examples: one cannot attend a place of worship but can attend a restaurant with church friends; and funeral-goers may travel in a full taxi but must distance once they arrive at the funeral.*
>
> *69.1 The applicants'' approach-comparing individual regulations to one another-is not the proper approach to a rationality assessment.*
>
> *69.2 The question is whether each regulation is nationally connected to its purpose. The question is answered by comparing the regulation to its purpose-not by comparing it to another regulation.*

69.3 The restrictions to which the applicants refer plainly have a national basis. Covid-19 thrives on the physical connection between people and contamination of surfaces. The only way to limit the devastating impact of the virus is to restrict the congregation of people, whether at funerals, religious gatherings, sporting or recreational gatherings ..."

6.8 While the Minister's response may justify the imposed restrictions, it certainly does not remove the confusion: if the stated object is to limit the spread by limiting social contact, why then limit it in a place of worship and not in a restaurant?

6.9 This unanswered anomaly has, yet again, been overtaken by events as on 1 February 2021, by way of the "adjusted" Alert Level 3 regulations referred to in paragraph 1.9 above, gatherings at faith-based institutions were again permitted, with certain restrictions and protocols prescribed. The issue has therefore again become moot.

6.10 In respect of the other two examples referred to by the applicants, it is useful to refer to the following dicta in the Esau-case (above) by the Supreme Court of Appeal (although pronounced after the date of the applicants' affidavits): *"[125] Ultimately, the decision to permit some activities and not permit others involved what the COGTA Minister described as unavoidable trade-offs between reducing the infection rate on the one hand, and the obligations of the State to respect, protect and promote and fulfill fundamental rights on the other. These trade-offs, she said, were inherently polycentric and "required making value judgments in which there is room for reasonable disagreement"* and *[132] At its most basic, the purpose of the limitation of the fundamental right to freedom of*

movement, and of trade and profession was the protection of the health and lives of the entire populace in the face of the pandemic that has cost thousands of lives and had infected hundreds of thousands of people. In a sense, there has been something akin to a trade-off: the rights of freedom of movement, to dignity and to pursue a livelihood were limited to prevent the spread of Covid-19 and that, in turn, protected the right to life of many thousands of people, who would have died had the disease had the opportunity to run unchecked through the country".

6.11 Again, this issue has become moot by way of the "adjusted" Alert Level 3 regulations of 1 February 2021 as the "confusion" appear to have been cleared by the Minister by the removal of the two cited anomalous restrictions. An order of this court is therefore no longer required as has been in respect of the declarations pertaining to the "exercise regulation" and the "hot food regulation" previously contained in regulations 16(2)(f) and items 1 and 2 of Part E of Table 1 read with regulation 28(3) of the Alert Level 4 regulations, respectively, which have been made in the Esau-case.

6.12 In similar fashion as with the relief claimed against future extensions of the state of disaster, prayer 9 envisages the barring of the Minister from issuing further regulations in future. This relief loses sight of the ever-changing nature of the threat posed by the pandemic and the response thereto. It also loses sight of the fact that "... *as soon as regulations no longer served a legitimate purpose, they had to be repealed or amended as quickly as reasonable*" (Esau-case at [98]). A blanket barring or restriction of the Minister's powers to promulgate under the DMA, may therefore limit her ability to adjust or ameliorate the extent of limitations of rights brought

about by existing regulations. For all these reasons, this relief can also not be granted.

[7] The mask relief

7.1 The applicants object to the wearing of masks as prescribed by the regulations. They aver that it is their right to choose to wear a mask or not. They further rely on a public survey conducted by them on social media groups over three days which indicated that 98,6% of the participants were against the wearing of masks and did so only because of the criminal sanction attached to non-compliance. The applicants further referred to research documentation attached to their previous application in terms of section 18 (3) of the Superior Courts Act whereby they had sought execution of the orders which are currently the subject of the pending appeal in the Supreme Court of Appeal (the section 18 (3) application had been refused on 23 October 2020). They lastly aver that the requirement for the wearing of masks had not been "thought through" and offended against the October 2005 Unesco Universal Declaration on Bioethics and Human Rights.

7.2 Without have been called upon to expressly decide this issue, the Supreme Court of Appeal has in the Esau-case (above) at [126] accepted measures such as the wearing of masks, social distancing and the observance of health protocols, such as hand-sanitizing, as the minimum or basic measures to combat the spread of the coronavirus whereafter the court proceeded to concern itself with the imposition of regulations in addition to those whereby these basic measures have been introduced.

7.3 In oral argument, Mr De Beer also questioned why South Africa follows the stance of the World Health Organisation (WHO) on the wearing of masks.

7.4 Firstly, without sufficient evidence of the statistical norms and standards regarding representivity and methodology applied, the private social media survey conducted by the applicants cannot be accepted as reliable evidence on which a court should rely for deciding an issue as important and far-reaching as the efficacy of a possible measure to prevent the spread of the disease.

7.5 Secondly, the Unesco declaration, not only pre-dates the current pandemic, but does not appear to have contemplated the current threat that the world (and signatories to the declaration) faces, or, at least, not the extent thereof. Insofar as the applicants (and the amicus curiae) relied on selected pronouncements made on the measures imposed in certain foreign jurisdictions, those are firstly country-specific, both with regard to the applicable law and the specific regulations and secondly, are not representative. I find that little weight can be attached thereto. At the conclusion of the urgent court roll for the week during which this application had been heard, a well-known journalist, in summing up instances like these pointed out that it is not a uniquely South African phenomenon. Under the heading "Endlessly bloviating while people suffer" he wrote: "*We are not the only country battling this monster [Covid-19] and everywhere the virus makes fools of politicians and scientists as governments lock down and ease up and lock down again in a never-ending cycle of panic, negligence and incompetence*" (The Sunday Times, 17 January 2021 page 16).

7.6 Thirdly, the WHO had repeatedly given guidance to a number countries on presentative measures to combat the spread of the virus. These include the wearing of masks. The Minister also referred to a recent WHO guidance document on mask use published on 1 December 2020 which relies on considerable underlying scientific evidence for its stance in favour of wearing masks.

7.7 Fourthly, the "right to choose" has not been formulated by the applicants with reference to a specific right in the Bill of Rights. The applicants' arguments also do not address the right of the remainder of the mask-wearing public to an environment which is not harmful to their health or well-being as enshrined in Section 24(a) of the Constitution. It is all very well for the applicants to want to choose not to wear masks, but they do not have the right to exercise their choice if they thereby increase the risk of the spread of the droplet-borne virus to others, particularly those who choose to take steps to prevent such spread. One needs also only to contemplate the increased risk imposed by this choice on health-care workers who may have to treat or come into contact with non-mask wears, to appreciate that this is not a right which a court should sanction. The exercise of such right clearly has the potential to harm others. I agree with the Minister's position that "*wearing a mask is not about one's personal choice or one's own appetite for risk, it is about protecting others*".

7.8 I therefore find no basis to declare the compulsory wearing of masks unconstitutional or invalid.

[8] <u>The places of worship relief</u>

This issue has already been dealt with above in paragraph 6.9 above.

[9] The further relief

9.1 In the remainder of the applicant's notice of motion they claim:

9.1.1 In prayer 12 that "any further" regulations should be declared unconstitutional and invalid. Insofar as the claim for this relief may be based on an erroneous perception that this court has, by the order of 2 June 2020, declared it as a general proposition, that the promulgation of regulations in terms of the DMA by the Minister, is unconstitutional, it is misplaced, as already explained earlier. In each promulgation of regulations, the rationality and proportionality of individual regulations would have to be considered. This must also be done against the factual backdrop then in existence. It is impossible to predict these permutations and this relief aimed at future circumstances and whatever regulations may then be in force is, at best, premature and cannot be granted in this application.

9.1.2 In prayer 13 an order is claimed declaring that any application for leave to appeal or appeal process will not automatically suspend the execution and operation of any order granted. This relief is equally incompetent: Section 18(1) of the Superior Court Act prescribes that, upon the lodging of appeal processes, execution of the order appealed against is suspended. Section 18 (3) provides for the mechanisms and considerations to apply should a party wish to have an order implemented despite pending appeal processes. The claim for the relief sought in this prayer amounts to relief similar to that envisaged in said section 18 (3) but without having addressed the issues prescribed in that section. Furthermore, the jurisdictional

requirement, namely an existing appeal process, has not yet been initiated. Again, this relief is, at best, premature.

9.1.3 In prayer 14 a direction is sought that this court's order be published in the Government Gazette. I find no need for this extraordinary relief. Court orders are generally only published in the Government Gazette when required in terms of statutory provisions, such as in insolvency and status matters, but not as a general matter of course.

9.1.4 In prayer 15 the immediate arrest of the Minister is sought upon contravention of prayers 9, 12 and 14. Not only is this relief moot in circumstances where no relief is to be ordered in terms of these prayers, but non-compliance with a court order in a civil matter generally results in contempt of court proceedings, not in summary arrest. There is no legal basis for an order in the terms claimed.

9.1.5 In prayer 16, costs are claimed on punitive scale. I shall deal with this aspect separately later.

[10] <u>The amicus curiae</u>

10.1 In similar fashion as in the previous applications and, having regard to the nature of the subject matter of these applications, the amicus curiae had been allowed to address the court.

10.2 The amicus had filed written heads of agreement. These were, however, not strictly speaking, argument but rather an attempted introduction of evidence by way of argument. Statistical data relating to natural and non-natural causes of death released by Stats SA were referred to, supported by an example of a certain named individual.

10.3 What I gleaned from the amicus' very spirited and emotive argument was that it highlighted the burden and exposure of the poorest of our society and how the pandemic and the restrictions imposed have in a great many instances, exacerbated their plight. This argument is further illustrated by a list of general complaints, identified as "key challenges" by the National Planning Commission in a document dated as long ago as 2012 to which the amicus has referred as follows:

> "*1.# Too few people work;*
>
> *2.# The quality of school education for black people is poor;*
>
> *3.# Infrastructure is poorly located, inadequate and under-Maintained;*
>
> *4.# Spatial divides hobble inclusive development;*
>
> *5.# The economy is unsustainably resource intensive;*
>
> *6.# The public health system cannot meet demand or sustain quality;*
>
> *7.# Public services are uneven and often of poor quality;*
>
> *8.# Corruption levels are high; and*
>
> *9.# South Africa remains a divided country*".

10.4 The amicus made the point that, despite the passage of time since the Planning Commission's report, there challenges "have become the norm".

10.5 The submissions of the amicus, although they may voice the plight of those in the grip of the pandemic and under the burden of the regulations, despite benefitting from the preventative health benefits stemming therefrom, do not advance the legal arguments much further save to

highlight the practicalities associated with the evaluation of the issues of rational connectivity and, in particular, proportionality.

[11] Costs

11.1 The general rule is that cost should follow the event and that the successful party should be entitled to recover its costs from the unsuccessful party or parties.

11.2 The further rule of general application is that formulated in the decision in Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC) (the Biowatch-principle) namely that in constitutional litigation, unsuccessful litigants in proceedings against the State generally ought not to be ordered to pay the State's costs.

11.3 The third and overarching rule is that the award of costs is intrinsically linked to the exercise of the court's discretion and is a matter of ensuring fairness to both sides. See: Erasmus, Superior Court Practice at D5-6 and the cases listed in footnote 1.

11.4 In respect of the contempt relief, although the applicants have brought their claim for this relief on an impermissibly short notice, there was already the preceding default by the Minister in the lapsing of a part of the appeal. This lapse prompted the claim for the relief. Both sets of parties were therefore at fault.

11.5 Having regard to the remainder of the relief, although the applicants were unsuccessful, they were in part either acting in person or indigent. Their applications voice frustrations experienced by common folk, lay persons and those "confused" by a multitude of restrictions which are both novel and invasive. In part, at least, they also sought to rely on or invoke

constitutional issues. In view hereof, I am not prepared to find that their application was an abuse of process as argued on behalf of the Minister.

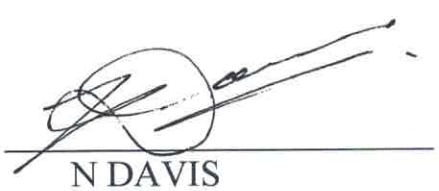
11.6 In my view and, in the exercise of my discretion, there should be no order as to costs, resulting in each party bearing its own costs.

[12] Order:

1. The claims for the relief sought in prayers 2-4 of the Notice of Motion (the contempt relief) are struck from the urgent roll.

2. The remainder of the relief claimed in other prayers are refused.

3. No order is made as to costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 January 2021

Judgment delivered: 19 February 2021

APPEARANCES:

For the First Applicant:	In person
For the Second Applicant:	Mr De Beer, with leave of the court
For the Amicus Curiae:	Mr B P Mothopeng
For the Respondent:	Adv W Trengove SC together with Adv A Hassim and Adv I S Cloete
Attorney for Respondent:	The State Attorney, Pretoria