IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21542/2020

In the matter between:

REYNO DAWID DE BEER	**1ST APPLICANT**
LIBERTY FIGHTERS NETWORK	**2ND APPLICANT**

And

THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**RESPONDENT**

AND

HOLA BON RENAISSANCE FOUNDATION	**AMICUS CURIAE**

FILING SHEET

DOCUMENTS: RESPONDENT'S HEADS OF ARGUMENT

ON THE ROLL: 26 AUGUST 2020

DATED AND SIGNED at PRETORIA on the 2[1ST] day AUGUST 2020.

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IN THE HIGH COURT OF SOUTH AFRICA
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CASE: 21542/2020

In the matter between:

REYNO DAWID DE BEER	First Applicant
LIBERTY FIGHTERS NETWORK	Second Applicant
and	
MINISTER OF COOPERATIVE GOVERNANCE	Respondent
HOLA BON RENAISSANCE FOUNDATION	Amicus Curiae

MINISTER'S HEADS OF ARGUMENT

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INTRODUCTION

1 This Court handed down its judgment and order in the main application on 2 June 2020.[1] It heard the Minister's application for leave to appeal on 24 June 2020, and handed down judgment granting leave to appeal (in part) on 30 June 2020.[2]

2 The applicants have now, belatedly and on extremely urgent timelines, brought two applications:

2.1 First, an application in terms of section 18(3) of the Superior Courts Act 10 of 2013 to have the 2 June 2020 order implemented pending appeal.

2.2 Second, an application for leave to cross-appeal against this Court's dismissal of certain relief the applicants sought in the main application.

3 The application in terms of section 18(3) does not begin to meet the requirements for such an order. There are no exceptional circumstances justifying an order in terms of section 18(3). The applicants have not proved either that they will suffer irreparable harm unless a section 18(3) order is granted, or that the Minister and the public will not suffer irreparable harm if

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[1] The 2 June 2020 judgment ("main judgment") is at caselines 074-1 – 074-34.

[2] The leave to appeal judgment is at caselines 074-35 – 074- 54.

such an order is granted. The application therefore fails on each leg of the test, and falls to be dismissed.

4 The application for leave to cross-appeal is similarly unfounded. It has been brought well out of time, without an acceptable explanation for the delay, and the prospective appeal bears no reasonable prospects of success. This application too should be dismissed.

BACKGROUND

5 On 2 June 2020, this Court handed down its judgment and order in the main application the applicants brought challenging, amongst others, the constitutionality of all regulations promulgated under the Disaster Management Act 57 of 2002. The court made the following order:

> *"1. The regulations promulgated by the Minister of Cooperation and Traditional Affairs ("the Minister") in terms of section 27(2) of the [Disaster Act] are declared unconstitutional and invalid.*
>
> *2. The declaration of invalidity is suspended until such time as the Minister, after consultation with the relevant cabinet minister/s, review, amend and republish the regulations mentioned above (save for regulations 36, 38, 39(2)(d) and (e) and 41 of the regulations promulgated in respect of Alert Level 3 with due consideration to the limitation each regulation has on the rights guaranteed in the Bill of Rights contained in the Constitution.*
>
> *3. The Minister is directed to comply with the process ordered in paragraph 2 above within 14 (fourteen) business days from date of this order, or such longer time as this court may, on good grounds shown, allow and to report such compliance to this court.*
>
> *4. During the period of suspension, the regulations published in Government Gazette No 43364 of 28 May 2020 as Chapter 4 of the regulations designated as: 'Alert Level 3', shall apply.*
>
> *5. The regulations pertaining to the prohibition on the sale of tobacco and related products is excluded from this order and*

is postponed sine die, pending the finalization of case no 21688/2020 in this court.

6. *The Minister is ordered to pay the costs of the first and second applicants. The amicus curiae shall pay its own costs."*[3]

6 The applicants had also sought, as their third prayer, an order declaring the declaration of a national state of disaster on 15 March 2020 to be unconstitutional, unlawful and invalid.[4] The court did not grant this prayer.

7 On 8 June 2020, the Minister filed an application for leave to appeal against the orders in paragraphs 1, 2, 3, 4 and 6.[5] In terms of section 18(1) of the Superior Courts Act, the operation and execution of those orders were suspended as from that date. As of that date, 10 of the 14 business days allowed in paragraph 3 of the order still remained.

8 The applicants did not seek leave to appeal at that stage. Nor did they give any indication whatsoever, either at the hearing of the application for leave to appeal or otherwise, that they were in any way dissatisfied with the orders made, or that they intended to appeal them.

9 On 30 June 2020, this Court handed down judgment in the Minister's application for leave to appeal.[6]

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3 Caselines 072-4 – 072-5.

4 NOM (caselines 006-2) para 3.

5 The Minister's application for leave to appeal is at caselines 073-108 – 073-121.

6 The leave to appeal judgment is at caselines 074-35 – 074- 54; the order is at caselines 072-6.

9.1 Leave to appeal was granted against the declaration of invalidity of those regulations that were not expressly identified in the judgment dated 2 June 2020.

9.2 This Court refused leave to appeal against certain regulations specifically mentioned in the judgment: regulations 33(1)(e), 34, 35, and 39(2)(m), the exception to regulation 46(1) and 48(2) ("**the six level 3 regulations**").

9.3 For the six level 3 regulations in respect of which leave to appeal was refused, the court emphasised that the remaining 10 business days, left from the 14 days' suspension provided for in the 2 June 2020 order, would again begin to run from the date of its judgment on leave to appeal.[7]

9.4 For the remainder of the regulations, the order remained suspended.

10 On 14 July 2020, the Minister filed an application for leave to appeal to the Supreme Court of Appeal against the order regarding the six level 3 regulations, in terms of section 17(2)(b) of the Superior Courts Act.[8]

11 In terms of section 18(1) of the Superior Courts Act, the running of the 14-day period in paragraph 3 of the order was again suspended in relation to the six level 3 regulations as of this date.[9]

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7 Leave to appeal judgment (caselines 074-53), para 11.

8 AA in 18(3) application (caselines 046-133), para 8.

9 AA in 18(3) application (caselines 046-133), para 9.

12 Also on 14 July 2020, the Minister filed a notice of appeal against the declaration of invalidity of the regulations in respect of which the High Court had granted leave to appeal.[10]

13 The applicants have now brought –

13.1 an application in terms of section 18(3) of the Superior Courts Act to have the 2 June 2020 order implemented pending appeal;[11] and

13.2 an application for leave to cross-appeal against this Court's dismissal of the applicants' third prayer.[12]

14 Both applications fall to be dismissed. We address each in turn.

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[10] AA in 18(3) application (caselines 046-133), para 10.

[11] The section 18(3) application is at caselines 046-12 – 046-111.

[12] The application for leave to cross-appeal is at caselines 073-156 – 073-163.

THE SECTION 18(3) APPLICATION

15 The applicants seek an order in terms of section 18(3) of the Superior Courts Act, that this Court's order of 2 June 2020 be implemented pending appeal.[13]

16 Implementation of an order pending appeal is an extraordinary deviation from the norm, which requires an applicant to prove that its case is an exceptional one.[14] Section 18(3) places a heavy burden on an applicant.[15] We submit that the applicants have not discharged this burden. The application in terms of section 18(3) must accordingly be dismissed.

17 We deal with the following issues in turn:

17.1 The applicants' complaint has become moot in material respects.

17.2 The requirements under section 18(3).

17.3 There are no exceptional circumstances justifying an order in terms of section 18(3).

17.4 A section 18(3) order would cause irreparable harm to the Minister and the public.

17.5 The applicants will suffer no irreparable harm if such an order is not granted.

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[13] NOM in section 18(3) application, caselines 046-12 – 046-15.

[14] *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) ("*UFS*") at para 13.

[15] *UFS* at para 11; *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) ("*Ntlemeza*") at 413D.

17.6 The applicants have failed to make out a case for the further relief sought.

17.7 Conclusion on the section 18(3) application.

The applicants' complaint has become moot in material respects

18 There is a fundamental, and we submit decisive, basis upon which this application should be dismissed. Many of the restrictions that the applicants complain of in this application have been lifted in the latest revision to the Regulations on 17 August 2020 (Alert Level 2).[16]

19 For example: The ban on liquor sales has been considerably eased, the prohibition of tobacco sales has been lifted, beaches, gyms and public parks are no longer closed to the public, personal care services have been permitted to resume, tourism has resumed, restaurants have reopened, domestic travel, including air travel has resumed and a permit is no longer required to attend a funeral in a different province or metropolitan area (although the attendance limit remains 50 people).

20 The publication of the Alert Level 2 Regulations demonstrates that the Minister, and the government as a whole, is continuously evaluating the nature of the pandemic, the level of risk it poses as it spreads through the population, and the economic impact of restrictions on movement and trade.

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[16] Government Gazette No 43620, 17 August 2020, which took effect on 18 August 2020.

21 Such restrictions as remain are much fewer. This hollows out the applicants' claim that an interim execution of the court order is necessary to avert irreparable harm.

The requirements under section 18(3)

22 Section 18 of the Superior Courts Act provides in relevant part:

> *"18. Suspension of decision pending appeal.*
>
> *(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
>
> *...*
>
> *(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."*

23 In *Incubeta*,[17] the Johannesburg High Court (per Sutherland J) laid down the principles applicable to an application in terms of section 18(3). It held that there is a two-stage test for applications of this nature:

> *"It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:*
>
> - *First, whether or not 'exceptional circumstances' exist; and*
> - *Second, proof on a balance of probabilities by the applicant of –*
>
> - *the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and*

[17] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) ("*Incubeta*").

- *the absence of irreparable harm to the respondent/loser, who seeks leave to appeal."*[18]

24 The SCA endorsed the two-stage test in *UFS.*[19] It emphasised that the second stage does not entail a balancing exercise, or the weighing up of prejudice to either party. Instead, it requires the applicant to provide, on a balance of probabilities, both that it will suffer irreparable harm if the order is not made, and that the other party will not suffer irreparable harm if the order is made:

> *"It is further apparent that the requirements introduced by s 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and, where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted, and conversely that the respondent will not if the order is granted."*[20]

25 As the High Court put it in *Incubeta*:

> *"The proper meaning of [section 18(3)] is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. .... Two distinct findings of fact must now be made, rather than a weighing-up to discern a 'preponderance of equities'".*[21]

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[18] *Incubeta* at para 16

[19] *UFS* at paras 9 – 10 and *Ntlemeza* at paras 35 – 36.

[20] *UFS* at para 10.

[21] *Incubeta* at para 24; referred to with approval by the SCA in *UFS* at para 11.

26 Section 18(3) thus places a heavy onus on an applicant.[22] It does so in recognition of the fact that the rationale for the default position is to prevent avoidable harm to litigants: "*finality must await the last court's decision in case the last court decides differently — the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place.*"[23]

27 Therefore, in order to obtain an order for immediate implementation of a decision pending appeal under section 18(3), the applicants must show –

27.1 that there are exceptional circumstances that warrant such an order; and

27.2 on a balance of probabilities, that the Minister will not suffer irreparable harm if the court makes an order in terms of section 18(3); and

27.3 on a balance of probabilities, that the applicants will suffer irreparable harm if the court does not make an order in terms of section 18(3).

28 The applicants must meet all three of these requirements. The application meets none of them.

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[22] *UFS* at para 11; *Ntlemeza* at 413D.

[23] *Incubeta* at para 21.

No exceptional circumstances

29 Whether exceptional circumstances exist is a question of fact rather than discretion,[24] and is fact-specific.[25] The circumstances which are said to be exceptional must be "*derived from the actual predicaments in which the given litigants find themselves*".[26]

30 As to the meaning of "exceptional", Thring J's summary in *MV Ais Mamas*[27] (addressing the phrase "exceptional circumstances" in section 5(5)(a)(iv) of the Admiralty Jurisdiction Regulation Act 105 of 1983) is of assistance:

> *"What does emerge from an examination of the authorities, however, seems to me to be the following:*
>
> 1. *What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".*
> 2. *To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
> 3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*
> 4. *Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
> 5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning*

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[24] *Incubeta* at para 18.

[25] *UFS* at para 13.

[26] *Incubeta* at para 22; referred to with approval by the SCA in *UFS* at para 13.

[27] MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another 2002 (6) SA 150 (C) ("*MV Ais Mamas*").

to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."[28]

31 The SCA has held that, in evaluating the circumstances on which an applicant relies, the court should "*bear in mind that what is sought is an extraordinary deviation from the norm, which requires the existence of truly exceptional circumstances to justify the deviation.*" [29]

32 None of the circumstances on which the applicants rely constitute exceptional circumstances, justifying an extraordinary deviation from the norm.

33 First, the applicants contend that there are exceptional circumstances because they say the Minister "*abuses court processes to appeal*".[30] This allegation is entirely unfounded.

33.1 The Minister is patently not abusing court process. The applicants appear to take the view that the very fact that the Minister has sought leave to appeal constitutes exceptional circumstances warranting an implementation order under section 18(3).

33.2 This is, of course, not correct. If it were, there would be exceptional circumstances in every matter where leave to appeal is sought, and thus no need for section 18(3).

33.3 As this Court explained in its judgment on leave to appeal, the Minister is entitled to elect not to review the impugned regulations pursuant to

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[28] *MV Mamas* 156H-157C, referred to in *Incubeta* at para 19.

[29] *UFS* at para 13.

[30] FA in section 18(3) application (caselines 046-23), para 5.3.

the 2 June 2020 order immediately, and instead to apply for leave to appeal.[31] This is especially so since one of the Minister's grounds for appeal is that the order, requiring the review, is itself vague.

33.4 The exercise of this right does not constitute an abuse of court process.

34 Second, the applicants argue that the regulations published under the Disaster Act violate their constitutional rights.[32]

34.1 Even if this were the case (which it is not), it would not give rise to exceptional circumstances that merit the implementation of the order pending appeal.

34.2 Laws and conduct are, with relative frequency, declared unconstitutional by the courts, either because they are held to limit rights unjustifiably, or because they are held to be otherwise unconstitutional.

34.3 However, if leave to appeal is sought, the general rule in section 18(1) of the Superior Courts Act applies in these cases: the declaration of constitutional invalidity does not take effect pending appeal.

34.4 "Exceptional circumstances" connote something out of the ordinary or of an unusual nature.[33] There is, with respect, nothing unusual about

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[31] Main judgment (caselines 074-36), para 1.2

[32] FA in section 18(3) application (caselines 046-23), para 5.2.

[33] *MV Mamas* 156H-157C, referred to in *Incubeta* at para 19.

the applicants' application. It is similar to every other matter in which regulations are declared unconstitutional, and the state seeks leave to appeal.

34.5 The applicants have not established that this matter is in any way different from these matters, such that it constitutes the exception to the rule.

35 Third, the applicants argue that the regulations are becoming "*even more unconstitutional*".[34]

35.1 The applicants refer to new provisions that have been promulgated since the 2 June 2020 order, such as the compulsory wearing of masks and the taxi-loading regulations. They argue that these regulations show that the Minister "*now more than ever*" has "*no idea*" what she is doing.[35] They argue that this gives rise to exceptional circumstances.

35.2 It does not. That new regulations have been published since 2 June 2020 should, in the context of a rapidly evolving pandemic situation, not be surprising. As we point out above the Alert Level 2 Regulations have eased rather than tightened the restrictions that were necessary to combat the pandemic.

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[34] FA in section 18(3) application (caselines 046-24), para 5.7.

[35] FA in section 18(3) application (caselines 046-25), para 5.10

35.3 In any event, the fact that the applicants take issue with new regulations does not give rise to exceptional circumstances justifying the implementation of an order declaring invalid completely different regulations. Implementing the 2 June 2020 order pending appeal would not solve the applicants' complaints about the new regulations as this would have no effect on those new regulations.

36 Therefore, the applicants have failed to establish truly exceptional circumstances justifying an order in terms of section 18(3). The application should therefore be dismissed.

Irreparable harm to government and the public

Separation of powers harm

37 Even if the applicants had established exceptional circumstances, their application must fail on the second leg of the test. This is because, if the 2 June 2020 order is implemented pending appeal, this will cause irreparable harm both to the government and to the public.[36]

38 At the outset, we emphasise that the fundamental principle of separation of powers requires courts to exercise restraint in interfering with executive functions that are carried out under statutory and constitutional obligations.[37]

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[36] AA in 18(3) application (caselines 046-141 – 046-146), paras 29-40.

[37] National Treasury and Others v Opposition To Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) ("*OUTA*") at para 44.

38.1 The Constitutional Court in *OUTA* held that, where a litigant seeks an interim interdict, restraining an organ of state from performing a statutory function pending review, this has a "*a direct and immediate impact on separation of powers.*"[38] This separation of powers harm must be considered when assessing the balance of convenience.[39] A court will grant such a restraining order only in the "*clearest of cases*".[40]

38.2 In *ITAC,*[41] the Constitutional Court characterised the nature of the separation of powers harm as follows:

> *"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."* [42]

38.3 Though the present case does not concern an interim interdict, we submit that the Constitutional Court's reasoning applies equally here. If an order is granted in terms of section 18(3), the effect would be to interfere with the Minister's performance of her executive functions, pending the final determination of her appeal. This means that the relief the applicants seek inevitably trenches on the constitutional

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[38] *OUTA* at para 27.

[39] *OUTA* at paras 47 and 65-66.

[40] *OUTA* at para 47.

[41] International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) ("*ITAC*").

[42] *ITAC* at para 95. See also *OUTA* at paras 63 – 69.

separation of powers. What is more, it does so in circumstances where the court has already recognised that the Minister has reasonable prospects of success on appeal.

38.4 Therefore, we submit that, when considering the harm to the Minister, the court must consider the impact its order will have for the separation of powers.

39 The Minister stands to suffer irreparable harm whether the effect of implementing the 2 June 2020 order pending appeal is that all of the regulations are invalid immediately, or if the Minister is required to review, amend and re-publish the regulations within 14 days.

40 The Minister detailed this harm in her answering affidavit.[43] The applicants have not placed those facts in issue. They are therefore common cause. However, for the sake of completeness, we briefly address the harm the Minister stands to suffer below.

Immediate invalidity of the regulations

41 On one interpretation, the 14-day suspension period, provided for in paragraph 3 of the 2 June 2020 order, has already elapsed. If that is the case, then the effect of an implementation order under section 18(3) would be that all regulations published under the Disaster Act up until 2 June 2020 would become invalid immediately. This appears to be the view the applicants take,

[43] AA in 18(3) application (caselines 046-141 – 046-146), paras 29-40.

as their argument is that they will suffer harm if the regulations "*are still in force*".[44] It is presumably on the basis that implementation would result in the regulations being set aside with immediate effect that they seek an implementation order.

42 This would unquestionably be harmful. It would leave a regulatory void at a time when the country needs to remain vigilant to prevent infections.

42.1 It is currently critical that we remain cautious and vigilant, and continue to follow strict prevention measures.[45] Suddenly removing the regulations that make prevention measures mandatory, in an effort to preserve life, would be catastrophic.[46]

42.2 This Court recognised the potential calamity that would arise from immediate invalidity in its judgment of 2 June 2020. It held that "*[o]ne must also be mindful of the fact that the COVID 19 danger is still with us and to create a regulatory void might lead to unmitigated disaster and chaos.*"[47]

43 It is government's utmost priority to do everything possible to minimise the loss of life whilst at the same time limiting the harm to the economy.[48] If the

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[44] FA in 18(3) application (caselines 046-29), para 5.2.

[45] AA in 18(3) application (caselines 046-142), para 32.3.

[46] AA in 18(3) application (caselines 046-142), para 32.3.

[47] Main judgment (caselines 074-30) para 9.6.

[48] AA in 18(3) application (caselines 046-143), para 33.

regulations are invalidated pending appeal, this objective is seriously undermined, if not negated entirely.[49]

Review and amendment of the regulations within 14 days

44 Another interpretation is that the regulations would remain in effect, pending the review of the regulations within the 14 days provided for in paragraph 3 of the order. On this interpretation, the effect of an implementation order would be that the Minister would be required to review, amend and re-publish all the regulations within 14 days.

45 This too would be extremely prejudicial.[50]

45.1 There are some 48 individual numbered regulations, with many comprising a number of sub-sections, in addition to a number of annexures and tables. [51] Implementation of the order pending appeal would require the Minister to review each individual regulation, including each sub-section and each annexure and table in the regulations; to amend each provision; and to re-publish them, all within 14 days.

45.2 This is no easy feat. The review, amendment and re-publishing process is enormously time-consuming, requiring both the Minister's time, and the resources of the department. Moreover, it will require

[49] AA in 18(3) application (caselines 046-143), para 33.

[50] AA in 18(3) application (caselines 046-143 – 046-146), paras 34-38.

[51] AA in 18(3) application (caselines 046-143), para 35.1.

consultation with Ministers of other departments that are centrally involved in the COVID-19 response.[52]

45.3 To require the Minister to complete this process pending appeal within 14 days would cause significant prejudice to the work of government and to the public interest.[53]

45.4 As the designated Minister in terms of the Disaster Act, the Minister is tasked with making regulations to contain the effects of COVID-19, and ensuring that it does not overwhelm our public health system. The demands on government to respond effectively are ever-increasing as the pandemic progresses.[54]

45.5 In addition, a large number of the regulations that would otherwise have been subject to the 2 June 2020 order have since been revised and amended or repealed. Implementing the 2 June 2020 order pending appeal would therefore require the Minister, as a first step, to conduct an audit of all of the regulations, to establish which have already been reviewed and amended and therefore do not require further review and amendment in terms of the 2 June 2020 order. This process would in itself be hugely time-consuming, at a time when the Minister's full attention needs to be devoted to urgent tasks relating to managing the pandemic.[55]

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[52] AA in 18(3) application (caselines 046-144), para 35.2.

[53] AA in 18(3) application (caselines 046-144), para 35.3.

[54] AA in 18(3) application (caselines 046-144), para 35.4.

[55] AA in 18(3) application (caselines 046-145), para 35.5.

46 This Court held that, as at 30 June 2020 when it handed down judgment on leave to appeal, there remained only ten of the 14 days of the suspension period.[56]

46.1 If this is the case, and four of the 14 days have already elapsed, the effect of implementing the 2 June 2020 order pending appeal is that the Minister would be required to complete the entire review and amendment process in an even shorter period: ten days, instead of 14.

46.2 This would exacerbate the harms we have explained above.[57]

47 In its judgment on leave to appeal on 30 June 2020, this Court held that the 14-day suspension period would, as of 30 June 2020, re-commence running for the six level 3 regulations in respect of which leave to appeal was not granted by the High Court.[58]

47.1 If this is the case, then the 14-day suspension period has since expired in respect of those six regulations.

47.2 The effect of an order implementing the 2 June 2020 order pending appeal would thus be that those six regulations would be invalid immediately, creating a regulatory vacuum that is in itself harmful for the reasons we have explained above.

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[56] Leave to appeal judgment (caselines 074-53), para 11.

[57] AA in 18(3) application (caselines 046-145), para 36.

[58] Leave to appeal judgment (caselines 074-53), para 11.

Harm to the Minister's fair trial rights

48 Implementing the 2 June 2020 order pending appeal would also cause irreparable harm to the Minister's fair trial rights.

49 As this Court affirmed, it is the Minister's right to seek leave to appeal, rather than implement this Court's order immediately.[59]

50 The effect of implementing the 2 June 2020 order immediately would be to nullify that right.

50.1 By the time any appeal decision is handed down, the Minister would already have been required to implement this court's order fully.

50.2 Once the regulations have been reviewed, amended, and republished, an appeal would no longer have any real effect: for instance, if the Minister were to succeed on appeal and obtain an order that the review was not required, this would be of no assistance.

50.3 The review would, by then, have already been completed, and will not be able to be undone.

51 This would render any order on appeal of no utility. This must be avoided. As the court held in *Incubeta*, it is undesirable for relief granted by a court to

[59] Main judgment (caselines 074-36), para 1.2.

become "a *vacuous gesture*", as this undermines the role of the courts in the ordering of social relations.[60]

52 Therefore, we submit that, if an order in terms of section 18(3) is granted, there will be irreparable harm by impeding the government's management of the pandemic and, as a result, irreparable harm to public health. This harm arises whether the effect of implementing the 2 June 2020 order pending appeal is that all of the regulations are invalid immediately, or if the Minister is required to review, amend and re-publish the regulations within 14 days.

53 We reiterate that the applicants have not placed any of these facts in issue. It is therefore common cause that the Minister will suffer irreparable harm if an order in terms of section 18(3) is granted. On this basis alone, the application must be dismissed.

No irreparable harm if a section 18(3) order is refused

54 The applicants have also failed to show that they will suffer irreparable harm if the 2 June 2020 order is not implemented pending appeal.

55 The applicants set out a long list of what they allege to be irreparable harm.[61] However, much of it is not harm at all, and is certainly not irreparable. For instance, the fact that the applicant must wear a mask in public,[62] cannot

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[60] *Incubeta* at para 28.

[61] FA in 18(3) application (caselines 046-28 – 046-32), paras 5.1-5.6.

[62] FA in 18(3) application (caselines 046-30), para 5.2.4.

attend the gym,[63] and cannot attend church under the precise conditions he would prefer,[64] though inconvenient, does not amount to irreparable harm.

56 In any event, the applicants have not proved that the implementation of the 2 June 2020 would avert any of the harm they say they will suffer if the order is not implemented.

56.1 The applicants make generalised claims of prejudice and do not point to the specific regulations that they allege give rise to a specific harm.

56.2 There is therefore no basis laid on which one may conclude that implementing the 2 June 2020 order would undo or avert any of the harm that the applicants say they will suffer.

57 The applicants also allege that they suffer irreparable harm by virtue of new regulations that have come into force since the 2 June 2020 order.[65]

57.1 For instance, they contend that Mr De Beer suffers irreparable harm because he is forced to wear a mask in public on pain of criminal prosecution,[66] and that irreparable harm arises from the ban on liquor sales.[67]

57.2 However, the measures complained about are measures that were introduced on 12 July 2020, long after this Court's order, setting aside

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63 FA in 18(3) application (caselines 046-31), para 5.2.8.

64 FA in 18(3) application (caselines 046-30), para 5.2.7.

65 FA in 18(3) application (caselines 046-28 – 046-32), paras 5.1-5.6.

66 FA in 18(3) application (caselines 046-30), para 5.2.4.

67 FA in 18(3) application (caselines 046-31), para 5.4.

the regulations then in force, was made.[68] It is certainly not open to the applicants to make out a new case in an application under section 18(3).

57.3 An order that the 2 June 2020 order be implemented pending appeal would not result in the new regulations being set aside, and would therefore not avert the harm the applicants claim to suffer.

57.4 In any event the restrictions complained of have been overtaken by the latest easing of restrictions on 17 August 2020.

58 Therefore, the applicants have failed to prove that they will suffer irreparable harm unless the 2 June 2020 order is implemented pending appeal. On this basis too, the application must be dismissed.

The further relief sought

59 In addition to an order in terms of section 18(3), the applicants seek various additional orders.

60 First, the applicants seek an order "amending" paragraph 3 of the 2 June 2020 order "by scrapping it".[69]

60.1 This prayer is incompetent.

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[68] AA in 18(3) application (caselines 046-148), para 44.

[69] NOM in section 18(3) application (caselines 046-13), prayer 4.

60.2 The proper approach would have been for the applicants to seek leave to appeal against this order. An application cannot simply be made to the same court that made the order, seeking that it be set aside.

60.3 The applicants cannot seek what is, in effect, appeal relief, though an application in terms of section 18(3). Prayer 4 can, therefore, not be granted.

61 Second, the applicants seek orders compelling the Minister to make the orders made in this application public in a number of onerous ways – including by announcing the order on five national broadcasting media in five official languages;[70] circulating a press release to "*all known printed media*";[71] and publishing a proclamation in the government gazette.[72]

61.1 The applicants allege that, because the Minister has sought leave to appeal the 2 June 2020 order, she has "*failed to show any respect*"[73] for the court and its orders, and appear to have no intention of doing so if an order is granted pursuant to the section 18(3) application. This makes it necessary, they argue, for the court to provide for a mechanism to enforce its order.[74]

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[70] NOM in section 18(3) application (caselines 046-13), prayer 5.

[71] NOM in section 18(3) application (caselines 046-13), prayer 6.

[72] NOM in section 18(3) application (caselines 046-14), prayer 7.

[73] FA in 18(3) application (caselines 046-21), para 3.3.

[74] FA in 18(3) application (caselines 046-34), para 7.5.

61.2 These are serious allegations, which are entirely unfounded.[75] It is regrettable that the applicants would make them on oath in court proceedings. The Minister has the right to seek leave to appeal. This does not evince an intention not to be bound by the court order if the appeal ultimately fails, or any lack of respect for court process.

61.3 Accordingly, there is no basis for the relief sought in prayers 5, 6 and 7. These prayers should not be granted.

62 Third, the applicants seek an order authorising the police to arrest the Minister for contempt if she violates any of the other orders sought. No basis is laid for this relief in the affidavit whatsoever. This order is not even mentioned in the affidavit, let alone justified. There is plainly no justification for such an order to be granted.

Conclusion

63 We submit that the application in terms of section 18(3) fails both legs of the section 18(3) enquiry:

63.1 First, the applicants have failed to establish exceptional circumstances justifying such an order.

63.2 Second, the applications have failed to prove, on a balance of probabilities, that –

[75] AA in 18(3) application (caselines 046-150), para 48.2.

63.2.1 the Minister will not suffer irreparable harm if the court makes an order in terms of section 18(3); and

63.2.2 that the applicants will suffer irreparable harm if the court does not make an order in terms of section 18(3).

64 The applicants have also failed to make out a case in support of the further relief they seek.

65 The application under section 18(3) must therefore be dismissed.

THE APPLICATION FOR LEAVE TO CROSS-APPEAL

Introduction

66 The applicants seek leave to cross-appeal against this Court's dismissal of their third prayer: that is, the prayer seeking that the declaration of a national state of disaster on 15 March 2020 be declared to be unconstitutional, unlawful and invalid.[76]

67 The application for leave to cross-appeal suffers from at least two fatal flaws:

67.1 The application has been brought well out of time, without an acceptable explanation for the delay.

67.2 The application does not meet the test under section 17(1) of the Superior Courts Act.

Condonation

68 The judgment and order, against which the applicants seek leave to cross-appeal, were handed down on 2 June 2020. The application for leave to cross-appeal is dated 20 July 2020.

69 The application for leave to cross-appeal has been brought well out of time.

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[76] NOM in the main application (caselines 006-2) para 3.

69.1 The rules applicable to appeals also apply to cross-appeals.[77] A cross appeal is "*simply an appeal which is conveniently tacked on to another appeal*".[78]

69.2 This means that the applicants required leave in order to cross-appeal (regardless of the fact that the Minister has been granted leave to appeal). In bringing their application, they were bound to comply with the time periods applicable to appeals.

69.3 In terms of Rule 49(1)(b), the application for leave to cross-appeal ought to have been filed within fifteen days from the date on which the order was made: that is 24 June 2020.[79]

69.4 The application is a month late. The extent of the delay is excessive.

69.5 Though it is within the court's discretion to condone non-compliance with the rules of court on good cause shown,[80] we submit the extent of non-compliance here does not permit condonation. The applicants do not simply seek condonation for failure to comply with the timing required by the Rules. They have brought their application so late that the application for leave to appeal – onto which the application for leave to cross appeal ought to have been "*conveniently tacked*" – has long been decided.

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[77] *Gentiruco AG v Firestone SA* (Pty) Ltd 1972 (1) SA 589 (A) ("*Gentiruco*") at 607. See also Uniform Rule 49(3).

[78] *Goodrich v Botha and Others* 1954 (2) SA 540 (A) at 544.

[79] Uniform Rule 49(1)(b), read with rule 49(3).

[80] Uniform Rule 27.

69.6 The Minister's application for leave to appeal was heard on 24 June 2020, and judgment on leave to appeal was handed down on 30 June 2020. The matter is now before the Supreme Court of Appeal. The applicants gave no indication whatsoever, prior to the filing of their application for leave to cross-appeal, that they were in any way dissatisfied with the orders made, or that they intended to appeal them.

69.7 For the applicants to seek leave to cross-appeal at this late stage is, we submit, not competent. Any application for leave to cross-appeal ought to have been brought and decided contemporaneously with the Minister's application for leave to appeal. The extent of the applicants' delay is such that it cannot be condoned.

70 Nor have the applicants furnished a satisfactory explanation for their excessive delay.

70.1 The applicants' explanation is that they were advised to wait for the court's judgment on the Minister's application for leave to appeal, and for the decision in a separate application brought by the Freedom Front Plus, before deciding whether to bring an application for leave to cross-appeal.[81] This explanation is wholly inadequate.

70.2 The Minister's application for leave to appeal could never have affected the applicants' decision whether to seek leave to appeal. The Minister's application was limited to appealing specific orders. It was

[81] FA in the condonation application (caselines 046-122), paras 5.2-5.3.

therefore clear from the outset that the Minister was not seeking leave to appeal against the dismissal of the applicants' third prayer and that, if the applicants wished to appeal that dismissal, they would need to seek leave to appeal themselves. The outcome of the Minister's application is therefore entirely irrelevant to the applicants' decision on whether to seek leave to appeal.

70.3 The Freedom Front's application is also irrelevant. The outcome of a different case cannot inform the applicants' decision as to whether or not they are dissatisfied with an order made in their own application.

70.4 In any event, even if the applicants were justified in awaiting the outcome of these decisions before bringing their application for leave to cross-appeal (which they were not), this does not justify the length of the delay. This Court handed down judgment in the Minister's application for leave to appeal on 30 June 2020. Judgment in the Freedom Front Plus matter was handed down on 6 July 2020.[82] Yet the applicants brought their application for leave to cross-appeal only much later, on 20 July 2020. This delay is not explained.

70.5 The applicants also contend that their delay is justified because they "*hoped*" that the Minister would "*utilise the 14 business days*" to "*rectify*" the regulations.[83] In the light of the fact that the Minister's application for leave to appeal was heard on 24 June 2020, this is clearly unsustainable.

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[82] *Freedom Front Plus v President of the Republic of South Africa and Others* [2020] ZAGPPHC 266.

[83] FA in the condonation application p12 (caselines 046-123), para 5.4.

71 Therefore, the applicants have delayed excessively, and have not provided an acceptable explanation for their delay. We submit that condonation for the late filing of the application for leave to appeal should be dismissed.

The test for leave to appeal

72 Even if condonation is granted, we submit that the applicants have not met the requirements for leave to appeal.

73 Section 17(1)(a) of the Superior Courts Act 10 of 2013 sets out the two bases on which leave to appeal may be granted:

> *"(1) Leave to appeal my only be given where the judge or judges concerned are of the opinion that -*
>
> *(a) (i) The appeal would have a reasonable prospect of success; or*
>
> *(ii) There Is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

74 The word "may" have a reasonable prospect of success in the previous section 20(4) of the Supreme Court Act 59 of 1959 has now changed to the word "would" have a reasonable prospect of success. The courts have held that this has introduced a stricter test. As the Full Court explained in *Acting NDPP v DA –*

> *"The Superior Courts Act has raised the bar for granting leave to appeal in The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others, Bertelsmann J held as [follows]:*
>
> > *'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright*

& Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."[84] *(our emphasis)*

75 Therefore, to obtain leave to appeal, the applicants must establish that there are reasonable prospects that an appeal court would overturn the order that this Court made.

76 The applicants have not met the bar of showing a reasonable prospect that a court on appeal would alter this Court's order. They raise three arguments:

76.1 First, they contend that the decision to declare a national state of disaster was "*based on incorrect advice and/or reaction to unconfirmed and/or otherwise unreliable international and national medical and health results; not taking our country's unique socio-economic conditions into consideration.*"[85]

76.2 Second, they argue that the decision to use the Disaster Act to manage the crisis was unlawful, because the International Health Regulations Act 28 of 1974 ought to have been used.

76.3 Third, they argue that the proper approach would have been for Parliament to declare a national state of emergency.

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[84] Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others [2016] ZAGPPHC 489 ("*Acting NDPP v DA*") para 25; Notshokovu v S (157/15) [2016] ZASCA 112 (7 September 2016) at para 2

[85] Application for leave to cross-appeal (caselines 073-158), para 2.

77 These are the same arguments the applicants made in the main application which this Court, with respect quite correctly, dismissed. There is no reasonable prospect that an appeal court would find differently.

78 First, regarding the evidence on which the Minister decided to declare a national state of disaster:

78.1 The high-water mark of the applicants' argument in this regard is that the World Health Organisation had not, by 15 March 2020, allocated a specific ICD-10 code to COVID-19.

78.2 This is immaterial. By 15 March 2020, the WHO had declared COVID-19 to be a pandemic.[86] Countries around the world had seen their healthcare systems overwhelmed, and the death toll had risen significantly.[87] The first COVID-19 case had been confirmed in South Africa, and, given South Africa's unique challenges relating to the provision of public healthcare, the government had to be proactive in putting plans in motion to manage the COVID-19 outbreak as soon as possible.[88]

78.3 After seeking expert advice, the decision was taken that it was necessary to declare a national state of disaster in terms of section 27(1) of the Disaster Act, in order to take effective measures to manage the pandemic.[89]

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[86] AA (caselines 011-16), para 30.

[87] AA (caselines 011-16), para 31.

[88] AA (caselines 011-16), para 32.

[89] AA (caselines 011-18), para 37.

78.4 In the circumstances, this Court was, with respect, quite correct to hold that there was no basis on which to conclude that the decision to declare a state of national disaster was irrational.[90]

79 Second, regarding the International Health Regulations Act:

79.1 The existence of this Act does not render the decision to declare a state of disaster unlawful. In terms of section 27(1) of the Disaster Act, the Minister may declare a state of disaster either where existing legislation is insufficient to provide adequately for the disaster; or other special circumstances warrant the declaration of a national state of disaster. The declaration of a state of national disaster accordingly cannot be unlawful purely on the basis that the International Health Regulations Act exists.

79.2 In any event it is not open to this Court to find that the International Health Regulations Act should have been employed by the Minister because the full court in *Freedom Front Plus* has already rejected this ground of attack on the Disaster Regulations. The International Health Regulations Act is intended to control the spread of infectious disease between countries. It provides for specific measures to prevent the spread of health risks through international travel and cargo. It provides no assistance in combating diseases that are transmitted within a country's borders.[91]

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[90] Main judgment (caselines 074-12), para 4.12.

[91] Freedom Front Plus, para 79.

80 Third, regarding the applicants' preference for a state of emergency:

80.1 This too has been decided by the full court in *Freedom Front Plus*. In concluding its reasoning that the declaration of a state of emergency in order to deal with Covid-19 would be wholly inappropriate, the Court stated:

> *"a state of emergency has particular jurisdictional requirements limiting the circumstances in which the power may be exercised. There is no suggestion on the papers, nor was there in argument by the applicant, that the life of the nation is under threat from Covid-19, or that peace and security need to be restored. This being the case, if the second respondent had indeed declared a state of emergency, rather than a state of disaster, she would have found herself in court probably far more quickly. It would have been an obviously irrational and illegal act for her to have done so."* [92]

80.2 This Court is bound by the decision in *Freedom Front Plus*. This puts an end to this ground of attack.

81 We point out that the judgment in *Freedom Front Plus* has not been appealed.

82 The applicants' intended cross-appeal therefore lacks any prospect of success. There is no other compelling reason that the cross-appeal should be heard. We submit that the application for leave to cross-appeal should be dismissed.

CONCLUSION

83 For all of these reasons, we submit that –

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[92] Freedom Front Plus, para 75.

83.1 the application for leave to cross-appeal should be dismissed; and

83.2 the application in terms of section 18(3) of the Superior Courts Act should be dismissed.

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21 August 2020

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