**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 5807/2020**

In the matter between:

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| **DUWAYNE ESAU** | 1st Applicant |
| **NEO MKWANE** | 2nd Applicant |
| **TAMI JACKSON** | 3rd Applicant |
| **LINDO KHUZWAYO** | 4th Applicant |
| **MIKHAIL MANUEL** | 5th Applicant |
| **RIAAN SALIE** | 6th Applicant |
| **SCOTT ROBERTS** | 7th Applicant |
| **MPIYAKHE DLAMINI** | 8th Applicant |

**and**

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| **THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** | 1st Respondent |
| **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** | 2nd Respondent |
| **THE MINISTER OF TRADE, INDUSTRY AND COMPETITION** | 3rd Respondent |
| **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA IN HIS CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL** | 4th Respondent |
| **THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS IN HER CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL** | 5th Respondent |

**THE NATIONAL CORONAVIRUS COMMAND COUNCIL** 6th Respondent

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** 7th Respondent

**THE NATIONAL DISASTER MANAGEMENT CENTRE** 8th Respondent

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**JUDGMENT DELIVERED ON 26 JUNE 2020**

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**ALLIE, J:**

1. Applicants seek, *inter alia*, the following relief:

1.1. Declaring that:

1.1.1 the establishment and existence of the sixth respondent (the Command Council') is inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') and the Disaster Management Act 57 of 2002 ('the Act'), and is invalid;

1.1.2 alternatively, to the extent that the Command Council purports to duplicate and/or supplant the functions of the National Disaster Management Centre established in Chapter 3 of the Act, the Command Council acts unlawfully and in a manner that is inconsistent with the Constitution and the Act;

1.2. Declaring that any decision taken or purported to have been taken by the Command Council in relation to any matter in terms of the Act is unconstitutional and invalid.

1.3. Declaring that —

1.3.1. the Disaster Regulations issued in terms of section 27(2) of the Act published under Government Notice No. R. 480 in Government Gazette 43258 of 29 April 2020 ('the Disaster Regulations') are unconstitutional and invalid;

1.3.2. alternatively, regulations 16(1) — (4), 28(1), 28(3) and 28(4), read with Part E of Table 1, of the Disaster Regulations are unconstitutional and invalid.

1.4. Suspending the declaration of invalidity referred to in paragraph 1.3.1 above for a period of 30 calendar days from the date of this order.

1.5. Directing the first respondent to correct the constitutional defects in the Disaster Regulations within 30 calendar days of this order.

1.6. Declaring inconsistent with the Constitution and invalid, and reviewing and setting aside, the 'Directions regarding the sale of clothing, footwear and bedding during alert level 4 of the Covid-19 national state of disaster, published by the third respondent under Notice R. 523 in Government Gazette 43307 of 12 May 2020.

2. In paragraph 7 of the founding affidavit, applicants state the following:

> "S*ome aspects of the regime, though onerous, may be justified by the legitimate government purposes of limiting the spread of Covid-19, allowing the authorities the necessary time to ensure that South Africa's health infrastructure is able to cope with a spike in infections and promoting appropriate levels of general health and hygiene. Unfortunately, many other aspects of the regime cannot be justified and bear no rational link to the objective of limiting the spread and lessening the impact of Covid-19."*

3. In amplification of the relief they seek, applicants state at paragraph 10 of the founding affidavit as follows:

> "*At the outset, it is important to clarify that the applicants are not seeking to set aside the regulatory regime that the respondents have put in place to combat Covid-19 (other than a set of directions promulgated by the third respondent in respect of permissible clothing). The applicants confine the relief they seek to having the constitutional invalidities in the regulations cured the respondents…"*

**Applicants' Allegations**

4. Applicants allege the National Command Council "*has no legal validity and no decision-making powers. Yet it has seemingly managed and made decisions affecting all South Africans' rights*."

5. Applicants aver that the President and the National Executive has usurped Parliament's powers unlawfully by establishing and granting powers to the National Coronavirus Command Council( 'NCCC') that ought to vest with the National Disaster Management Centre.

6. Applicants allege that the CoGTA Minister made lockdown regulations on 25 March 2020 that provided for a national 'lockdown' from 26 March 2020 until 16 April 2020 without any public participation process.

7. Applicants allege that on 16 April 2020 the COGTA Minister amended the Lockdown Regulations and extended the lockdown until 30 April 2020, again without following a public-participation process.

8. Applicants challenge the correctness of the submission made by the CoGTA minister at her presentation to the President and Cabinet on 20 April 2020 where she referred to having considered input from sectors and industry. Applicants question whether any input could have been obtained because they are not aware of any prior public participation process inviting input.

9. Applicants seize upon the following words in a slide that the CoGTA minister presented as part of her presentation where she said: " *Levels of alert for each province and district will be determined by the National Command Council at each meeting, upon a recommendation from the Minister of Health, the Minister of Trade, Industry and Competition and the Minister of Cooperative Governance and Traditional Affairs... decide if we will use COVID-19 protocols for all funerals, or adopt a dual system."*

10. According to applicants, the emphasised portions, reflect an intention to vest the National Command Council with unlawful and impermissible decision-making powers.

11. Applicants also rely on parts of the President's public speeches to reinforce their belief that the National Command Council is vested with those powers. Extracts of a speech relied on are as follows:

> "*the National Coronavirus Command Council will determine the alert level based on an assessment of the infection rate and the capacity of our health system to provide care to those who need it… National Coronavirus Command Council met earlier today and determined that the national coronavirus alert level will be lowered from level 5 to level 4 with effect from Friday the 28th of May.* "

12. The CoGTA Minister invited truncated public participation between 25 to 27 April 2020 on 'Schedule of Services Framework for Sectors' and then published a Schedule on 29 April 2020. The Schedule does not contain the specific content of proposed regulations but rather lists sectors and sub sectors that would be allowed to open and operate.

13. On 29 April 2020, the Minister of CoGTA made the Disaster Regulations in terms of section 27(2) of the Act 4 days after publishing the Draft Schedule.

14. The Disaster Regulations repealed and replaced the Lockdown Regulations (regulation 2(1)). However, they allowed for the continued criminal prosecution of contraventions of the Lockdown Regulations and provided for directions issued under the previous regulations to remain in force until withdrawn or amended (regulation 2(2) and (3)).

15. In terms of regulation 15(1) of the Disaster Regulations, the whole of South Africa moved to 'Alert Level 4' with effect from 1 May 2020, in accordance with the Command Council's decision as communicated by the President on 23 April 2020 and confirmed by the COGTA Minister.

16. Since then, various directions have been published by members of the National Executive. One is the 'Directions regarding the sale of clothing footwear and bedding during alert level 4 of the Covid-19 national state of disaster,' published by the Trade Minister on 12 May 2020.

17. On 13 May 2020, in his address to the nation, the President said: that ‘there would be public consultation with relevant stakeholders on a proposal that by the end of May, most of the country be placed on alert level 3, but that those parts of the country with the highest rates of infection remain on level 4'. Furthermore, he said: 'in the coming days, we will also be announcing certain changes to level 4 regulations to expand permitted business activities in the retail space and e-commerce and reduce restrictions on exercise'.

18. Applicants disavow any knowledge of a public participation process in relation to a reduced level, namely level 3 and level 4 in parts of the country.

19. Applicants detail the economic harm to the country occasioned by government’s response to the Covid-19 pandemic.

20. Applicants also refer to allegations of abuse and violations of the law by members of law enforcement agencies during the lockdown.

21. Applicants allege that level 4 restrictions are very similar to the initial lockdown restrictions and they go on to allege that level 3 restrictions will be similar as well. Applicants also hold the view that parts of the country will not move to level 3 restrictions but will remain on level 4 restrictions.

22. Applicants believe that if the country or part of it is placed back onto a higher level, then the previous restrictions pertaining to that level will remain in place and become applicable, hence they assert the need for the relief they seek to have the regulations declared unconstitutional.

**Applicants' version concerning the operative legal framework**

23. Applicants hold the view that the National Disaster Management Centre hold the power to 'promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation' in terms of section 9 of the Disaster Management Act 57 of 2002 ( DMA) According to applicants, the Centre is the primary body established by the Act to manage and coordinate the government's response to national disasters.

24. Applicants allege as follows: "*Parliament clearly envisioned the need for a coordinating body, with advisory and recommendatory powers. It had a particular structure in mind, with a particular framework and composition. That structure is the Centre. However, all of the carefully calibrated provisions set out in Chapter 3 of the Act are meaningless if the National Executive and the President can create their own separate, independent and unaccountable structure*."

25. Applicants aver that the making of regulations constitute administrative action because it amounts to implementing administrative policy and the Promotion of the Administrative Justice Act, No 3 of 2000 ('PAJA') applies. Applicants argue that the regulations ought to be considered against standards of lawfulness, reasonableness and procedural fairness set out in section 33(1) of the Constitution and section 6(2) of PAJA.

**Relevant Provisions of the Disaster Management Act 57 of 2002**

26. It is important at the outset to consider the salient provisions of the Disaster Management Act (DMA) to contextualise the issues.

27. The preamble sets out the purpose of the DMA as follows:

> *"To provide for-*
> *an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters,*
> *mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation;*
> *the establishment and functioning of national, provincial and municipal disaster management centres;*
> *disaster management volunteers**; and***
> ***matters incidental thereto**."* ( my emphasisi)

28. The preamble itself has a catch-all provision that extends the parameters of the Act to ancillary and related issues to disaster management.

29. The DMA defines disaster management as follows:

> *"continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at-*
> *(a) preventing or reducing the risk of disasters;*
> *(b) mitigating the severity or consequences of disasters;*
> *(c) emergency preparedness;*
> *(d) a rapid and effective response to disasters; and*
> *(e) post-disaster recovery and rehabilitation;"*

30. The definition of disaster risk reduction is defined as follows:

> *"means either a policy goal or objective, and the strategic and instrumental measures employed for-*
> *(a) anticipating future disaster risk;*
> *(b) reducing existing exposure, hazard or vulnerability; and*
> *(c) improving resilience*;"

31. The definition of emergency preparedness extends beyond state institutions and government to the private sector, communities and individuals as follows:

> *"(a) a state of readiness which enables organs of state and other institutions involved in disaster management, the private sector, communities and individuals to mobilise, organise and provide*

*relief measures to deal with an impending or current disaster or the effects of a disaster; and*

*(b) the knowledge and capacities developed by governments, professional response and recovery organisations, communities and individuals to effectively anticipate, respond to and recover from the impacts of likely, imminent or current hazard events or conditions*;"

32. A further relevant definition in the DMA is that of risk assessment which is as follows:

> **"***means a* ***methodology*** *to determine the nature and extent of risk* ***by analysing*** *potential hazards and* ***evaluating*** *existing* ***conditions of vulnerability*** *that together could* ***potentially harm exposed people, property, services, livelihoods*** *and the environment on which they depend"* ( my emphasis)

33. The Section 1 of the DMA extends the definition of risk assessment to the objective of protecting lives and livelihoods. Section 27(3) provides that the power exercised under section 27(2) may be exercised only to the extent that it is necessary for the purpose of, *inter alia* : section 27 (3) (e) "*dealing with the destructive and other effects of the disaster*." To suggest, as applicants do, that saving livelihoods is an objective that's not permissible on a restrictive interpretation of section 27(3), is incorrect. There would be no need to evaluate the risks to livelihoods if its protection was not an objective.

34. The operation of the Act is excluded from occurrences that can be dealt with effectively in terms of other national legislation.

35. Section 4 of the DMA establishes an Intergovernmental Committee which comprises, *inter alia,* Cabinet members involved in disaster management and section 4(3) (b) and (c) provides that the Minister is accountable and must

report to Cabinet on the co-ordination of the disaster management but she must also advise and make recommendations to Cabinet.

36. Section 5 establishes a National Disaster Management Advisory Forum which includes the head of the National Disaster Management Centre (Centre), representatives of various spheres of government and civil society, labour, religious bodies as well as experts in disaster designated by the Minister that serves as a platform for disaster risk reduction.

37. Section 6 provides that before the Minister can prescribe a national disaster management *framework*, she has to take account of the Intergovernmental Committee's recommendations as well as comments submitted by the public and she must publish a proposed framework in the Gazette for public comment. Public participation is prescribed for the making of a framework not for the making of regulations.

38. In terms of section 7 the framework is meant to prescribe a comprehensive, transparent and inclusive *policy* on disaster management in general which establishes core principles.

39. Section 8 establishes the National Disaster Management Centre and section 9 states that its objective is to promote an integrated and co-ordinated system of disaster management with special emphasis on prevention and mitigation by national, provincial and municipal organs of state, statutory functionaries, other role-players and communities.

40. Section 15 sets out the general duties and functions of the Centre as follows:

*(1) The National Centre must, subject to other provisions of this Act, do all that is necessary to achieve its objective as set out in section 9, and, for this purpose-*

*(a) must specialise in issues concerning disasters and disaster management;*

*(b) must monitor whether organs of state and statutory functionaries comply with this Act and the national disaster management framework and must monitor progress with post-disaster recovery and rehabilitation;*

*(c) must act as a repository of, and conduit for, information concerning disasters, impending disasters and disaster management;*

*(d) may act as an advisory and consultative body on issues concerning disasters and disaster management to-*

*(i) organs of state and statutory functionaries;*

*(ii) the private sector and non-governmental organisations;*

*(iii) communities and individuals; and*

*(iv) other governments and institutions in southern Africa;*

*(e) must make recommendations regarding the funding of disaster management and initiate and facilitate efforts to make such funding available;*

*(f) must make recommendations to any relevant organ of state or statutory functionary-*

*(i) on draft legislation affecting this Act, the national disaster management framework or any other disaster management issue;*

*(ii) on the alignment of national, provincial or municipal legislation with this Act and the national disaster management framework; or*

*(iii) in the event of a national disaster, on whether a national state of disaster should be declared in terms of section 27;*

*(g) must promote the recruitment, training and participation of volunteers in disaster management;*

*(h) must promote disaster management capacity building, training and education throughout the Republic, including in schools, and, to the extent that it may be appropriate, in other southern African states;*

*(i) must promote research into all aspects of disaster management;*

*(j) may assist in the implementation of legislation referred to in section 2(1) (b) to the extent required by the administrator of such legislation and approved by the Minister; and*

*(k) may exercise any other powers conferred on it, and must perform any other duties assigned to it in terms of this Act.*

*(2) The National Centre may-*

*(a) engage in any lawful activity, whether alone or together with any other organisation in the Republic or elsewhere, aimed at promoting the effective exercise of its powers or the effective performance of its duties;*

*(a) in any event of a disaster, or a potential disaster, call on the South African National Defence Force, South African Police Service and any other organ of state to assist the disaster management structures;*

*(b) exchange information relevant to disaster management with institutions performing functions similar to those of the National Centre in the Republic and elsewhere.*

*(3) The National Centre must exercise its powers and perform its duties-*

*(a) within the national disaster management framework;*

*(b) subject to the directions of the Minister; and*

*(c) .....*

*(d) subject to the Public Finance Management Act, 1999*

*(4) The National Centre must liaise and co-ordinate its activities with the provincial and municipal disaster management centres.*

41. The duties of national government to set out a national disaster management plan is not restricted to the designated Minister, who currently is, the minister of CoGTA but it is a duty to mainstream a plan in each department of national government. The DMA involves Cabinet Ministers in the development of

disaster management plans with specific reference to their specific functional areas. Section 25 provides as follows:

> **"25 *Preparation of disaster management plans***
> *(1) Each national organ of state must-*
> *(a) conduct a disaster risk assessment for its functional area;*
> *(b) identify and map risks, areas, ecosystems, communities and households that are exposed or vulnerable to physical and human-induced threats;*
> *(c) prepare a disaster management plan setting out-*
> *(i) the way in which the concept and principles of disaster management are to be applied in its functional area, including expected climate change impacts and risks for the organ of state;*
> *(ii) its role and responsibilities in terms of the national or provincial disaster management framework;*
> *(iii) its role and responsibilities regarding emergency response and post-disaster recovery and rehabilitation;*
> *(iv) its capacity to fulfil its role and responsibilities;*
> *(v) particulars of its disaster management strategies;*
> *(vi) contingency strategies and emergency procedures in the event of a disaster, including measures to finance these strategies; and*
> *(vii) specific measures taken to address the needs of women, children, the elderly and persons with disabilities during the disaster management process;*
> *(d) co-ordinate and align the implementation of its plan with those of other organs of state and institutional role-players;*
> *(e) provide measures and indicate how it will invest in disaster risk reduction and climate change adaptation, including ecosystem and community-based adaptation approaches;*
> *(f) develop early warning mechanisms and procedures for risks identified in its functional area; and*
> *(g) regularly review and update its plan "*

42. The responsibilities of national government are prescribed in section 26 as follows:

> *(1) The national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27.*
>
> *(2) The national executive must deal with a national disaster-*

(a) *in terms of existing legislation and contingency arrangements, if a national state of disaster has not been declared in terms of section 27 (1); or*

(b) *in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27 (2), if a national state of disaster has been declared.*

43. Section 27(3) describes the objects of the regulations in broad terms.

44. Section 27 (2) provides that: " *If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning*, *inter alia:… the release of available resources, release of personnel, implementation of a disaster plan, evacuation of an area, regulation of traffic,* ***regulation of movement of persons and goods, control and occupancy of premises, provision, control and use of temporary emergency accommodation, suspension or limitation on sale of alcohol, dissemination of information required for the disaster, other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster****.."(my emphasis)*

45. The emphasised purposes for which regulations may be made, extend to the content of disaster regulations which applicants complain of, namely the

movement of persons which is a limitation on the Constitutional right of freedom of movement and residence; the restriction on the movement of goods and services, which is a limitation on human dignity, the restriction on control of and occupancy of premises, which is a limitation on the right of freedom of residence.

46. Section 27(2) of the DMA allows regulations to be made to address the requirement of providing necessary information for dealing with the disaster; other steps that may be necessary to prevent an escalation of the disaster; or to alleviate, contain and minimise the effects of the disaster.

47. It also expressly authorises the making of regulations to alleviate the consequences of the disaster, which is what most regulations designed to gradually reopen the economy do.

48. More pertinently, it permits dealing with the effects of the disaster which, includes what the Minister of the DTIC describes as the prevention of unfair competition and price-fixing objectives.

49. Section 27(2) authorises the Minister of the CoGTA to make regulations or issue directions or authorise the issue of directions. The Minister of the CoGTA states that she incorporates by reference the content of the Minister of the DTIC's affidavit, which she clearly reconciles with. The Minister of the DTIC states that he is authorised by Regulation 4(6) to make directions to protect consumers from excessive, unfair, unreasonable or unjust pricing and

services and to prescribe the availability of the supply of goods as well as to address, prevent and combat the spread of Covid-19.

50. The DMA keeps in place existing legislation, such as the Competitions Act, which permits the attainment of the objective of protecting consumers from being charged high prices for goods and services in circumstances where artificial shortages of supply are created to enhance inflated pricing.

51. The objective of preventing price-fixing and the concomitant unfair competition that accompanies it is authorised by regulation 4(6) but it arises now in the time of COVID 19 related regulations, as a consequence of the disaster and therefore, it is also not inconsistent with the DMA which allows the Minister of CoGTA to address in regulations, and to authorise other Ministers to make directions, to deal with **any consequence** that flow from the disaster and the management measures employed to contain it.

**Applicants Submissions on whether the NCCC is Legal and the role it plays**

52. It is common cause that no one may exercise a public power unless that power has been conferred upon that person by law.[1] This is the fundamental

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

principle of legality, applicable to the exercise of public power. That is the yardstick against which Respondents' conduct complained of, must be measured.

53. Applicants argue that because the National Coronavirus Command Council (NCCC) was vested with the power to make decisions concerning the level of restrictions that the country ought to be placed under and to make decisions concerning protocols to be adopted at funerals, the making of regulations designed to give effect to those decisions and accordingly the regulations are flawed by the NCCC's role in their conceptualisation.

54. The applicants' argument goes further to conclude that the CoGTA minister and the President fettered their discretion by abdicating their responsibilities under the Act in allowing the NCCC to dictate the policy and content of the regulations.

55. It is further submitted by applicants that the Director-General in the Presidency stated that the NCCC co-ordinates government's response to the Covid-19 pandemic and facilitates consultation among cabinet members but those functions ought to be carried out by the Disaster Management Centre.

56. Applicants argue the following:

56.1 That section 85(2)(c) of the Constitution grants Cabinet and the President the power to co-ordinate government departments and not the NCCC;

56.2 The President however stated in his public speech that the NCCC will co-ordinate government's efforts to curb the spread of Covid-19;

56.3 In answer to a question in Parliament concerning whether there is any delegation of power to the NCCC, the President said, no;

56.4 The DMA grants the Disaster Management Centre the power to co-ordinate and not a body like the NCCC

56.5 Respondents say the NCCC makes policy decisions and the NCCC decides on regulations to be made under the DMA, hence applicants says its role is unlawful;

56.6 Respondents allege that NCCC's decisions are implemented by respondents although the NCCC has no lawful authority to make those decisions.

56.7 Not only must the establishment of the NCCC be declared unconstitutional and invalid but all decisions made by it must be declared unconstitutional and invalid;

56.8 Applicants deny the Minister of CoGTA's assertion that the NCCC was set up as a structure of Cabinet and is its sub-committee because the Minister produced no document proving the allegation.

**Respondents Argument**

57. Respondent's allege that the National Coronavirus Command Council initially comprised of 19 cabinet members but soon it was expanded to include the entire Cabinet.

58. Its decisions as a council were conveyed as proposals which facilitated discussions and advised Cabinet and the President on whether to adopt them.

59. The individual ministers use the NCCC as a consultative forum of peers;

60. The individual ministers promulgate regulations and not the NCCC.

61. The reference to decision making by the NCCC is an unfortunate use of words as it is meant to convey that Cabinet members, in consultation with one another, made certain decisions.

62. Section 85 of the Constitution grants Cabinet the power to regulate its own process as it does not prescribe how Cabinet can arrange itself, meet and determine their *modus operandi*.

63. Cabinet can arrange itself as it deems fit and there is no constitutional prohibition on meeting as a cluster or council of cabinet members

64. Respondent say the NCCC was established specifically to enable Cabinet to deal exclusively with Covid-19 issues at its meeting as opposed to other general Cabinet business and meetings.

65. Respondents' counsel submitted that:

65.1 Applicant's counsel makes an elementary error when he argued that if the Constitution does not confer a power, then the power does not exists;

65.2 Applicant's counsel misconceive the Constitution by interpreting it as not allowing cabinet to establish committees such as the NCCC;

65.3 There is no need for a delegation of power, as suggested by Applicants, because Cabinet and The President did not delegate powers to the NCCC or any other structure;

66. Respondents rely on the case of **Matatiele Municipality** [2] where it was held that the power to do something includes the power to what is necessary to give effect to that power.

67. Respondents argue that they have ancillary powers to do what is necessary to fulfil their collective duty to manage the disaster. For that proposition, they rely on **Chonco's** [3] case where the Constitutional Court held at [29]

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**[2]** Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12

[3] Minister for Justice and Constitutional Development v Mqabukeni Chonco and 383 others Case CCT 42/09 [2009] ZACC 25

> "… *A function is a tasked duty to act in terms of the Constitution or legislation. A functionary will have the power necessary to fulfil its performance*."

**Analyses of Applicant's submissions on the Constitutionality of the NCCC**

68. Applicants challenge the veracity of first respondent's allegations that the NCCC is a committee of Cabinet because they say she also said that it is the Cabinet. Nowhere in the papers does the first respondent say that it is Cabinet. She explained that it is now comprised of all Cabinet members.

69. Applicants take the word "coordinate" which is a description first respondent assigns to the NCCC out of context and claim that coordinating is a function that the DMA grants the Centre. The DMA grants the Centre the power to coordinate the responses of different spheres of Government and the private sector, namely stakeholders and NGOs, but does not elevate the Centre's co-ordinating function to one to be exercised by it exclusively nor primarily.

70. Presented with counsel for 8th applicant's narrow interpretation of section 85 of the Constitution, that argument would lead to the conclusion that the President would not have the power to obtain advice before exercising the powers granted to him by the section. That would be an absurd construction to place on section 85.

71. The Constitutional structure of Cabinet and the powers and duties of its members merit repeating here.

72. It is necessary for Cabinet to have the power to assign functions to its own committees. It has been doing so in structuring itself into clusters. Prior to the establishment of the NCCC.

73. Murray and Stacey, in Chapter 18: **The President and the National Executives in the work entitled:** Constitutional Law of South Africa (CLOSA) Volume 1, 2nd edition, provide the following elucidating discussion on how the powers of Cabinet are exercised within governments with features of the Westminister system and how Cabinet functions.

74. As Murray and Stacey write at page 18-28 "*Under the Final Constitution, the choice of members, reallocation of portfolios and dismissal of members is entirely at the discretion of the President*."

75. At pages 18-29 to 18-30, Murray and Stacey go on to say that: *Modern Cabinets rely on Cabinet (ministerial) committees to enable them to handle the large volume of work that they must do, to facilitate co-ordination amongst government departments and to give ministers who must work together, but who may disagree, the opportunity to resolve their disagreements properly. In 1998, the report of the Presidential Review Commission identified poor coordination of government activities and policy as a significant problem. In response to this report, the relatively small Cabinet committees system was transformed into what is now commonly referred to as the system of 'Cabinet Clusters'. The clusters consist of six Cabinet committees that draw together related departments and parallel clusters of departmental directors-general.*

*According to the Presidency, 'Cabinet Committees meet to discuss areas of work, facilitate collaborative decision-making, and make recommendations to Cabinet'…What is clear is that proposed legislation and major policy initiatives are considered by the full Cabinet at its weekly meetings. Generally, it appears that Cabinet does not vote - although voting has occurred on occasion.*"

76. Section 85(2) of the Constitution sets out the executive powers of the President and Cabinet in 5 listed aspects, namely:

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

    (b) Developing and implementing national policy;

    (c) Co-ordinating the functions of state departments and administration;

    (d) Preparing and initiating legislation; and

    (e) Performing any other executive function provided for in the Constitution or national legislation

77. In dealing with nature of legislative powers and the delegation thereof, the Constitutional court in **Constitutionality of the Mpumalanga Petitions Bill** [4] held as follows:

> "*[19] The Premier's complaint is also directed at the delegation of the legislature's legislative or rule-making authority to the Speaker. Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purpose of implementing valid legislation. Such functionaries are usually members of the executive branch of government, but not invariably so. A legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement the primary legislation. Ordinarily the functionary will be the President or the Premier or the member of the*

[4] 2002(1) SA 447(CC) at [19]

*executive responsible for the implementation of the law. In Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others, Chaskalson P stated that:*

> *'In a modern state detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies.'*

*The factors relevant to a consideration of whether the delegation of a law-making power is appropriate are many. They include the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power*."

78. The Minister of CoGTA in this instance, implemented national legislation when making regulations under the DMA. In so doing, she exercised delegated legislative authority granted to her by Parliament. She derives her powers to do so from the DMA, which is not the subject of a constitutional challenge in this matter.

79. Section 92 of the Constitution provides that:

(1) the Deputy President and Ministers are responsible for the powers assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and performance of their functions.

(3) Members of Cabinet must-

(a) Act in accordance with the Constitution; and

(b) Provide Parliament with full and regular reports concerning matters under their control.

80. Section 92(2) clearly affirms the principle of Cabinet's collective accountability and responsibility.

81. Neither the DMA nor the regulations infringe on the accountability duty the Ministers of CoGTA and DTIC have to Parliament.

82. The President together with Cabinet exercises overall authority to co-ordinate the functions of state departments and administrations in terms of section 85(2) (c) of the Constitution. That is not a function that they can delegate to the Centre nor does Parliament have the authority to cause them to do so through legislation such as the DMA. Applicants' contention that the DMA vests the authority to co-ordinate government functions in the Centre are diametrically opposed to the Constitution.

83. A Cabinet member may however assign his/her powers and functions to a member of a provincial Executive Council or to a Municipal Council in certain circumscribed instances set out in section 99 of the Constitution.

84. Section 101 of the Constitution sets out when the President's decisions have to be in writing, namely if it is taken in terms of legislation or if it has legal consequences.

85. Respondents state that the NCCC is a committee of Cabinet working exclusively on Covid-19 related issues. They assert their right to organise Cabinet into working committees for specific purposes and they do not rely on legislative authority to do so. They also allege that Cabinet takes collective decisions on issues discussed in the NCCC, where they are required to do so and individual Cabinet members similarly take decisions that emanate from discussions at the NCCC when they are required to do so.

86. There are no grounds on which to second-guess those allegations made by respondents because applicants have produced no evidence to gainsay those allegations. Instead, they rely on pure conjecture.

87. The affidavit of the DTIC Minister illustrates the process amply where he states that he suggested that the reopening of the economy occur over a period of three weeks with full resumption by the beginning of May but his views did not carry the consensus of his colleagues as a full reopening would have occurred when the country was not prepared to manage a high surge in infections and ultimately a risk adjusted strategy of gradual reopening was adopted and implemented.

88. Respondents have stated that there is no written authority in terms of which the NCCC has been established but applicants persist in their demand that there has to be written authority authorising the creation of the NCCC. In terms of section 101 of the Constitution, the President does not have to reduce to writing, the establishment of a committee such as the NCCC.

89. Murray and Stacey at page 18-32 writes about the three rules underpinning the principle of collective Cabinet responsibility or solidarity thus:

> "*Although the exact parameters of the doctrine are not fixed, as Marshall [5] describes, "there are three traditional branches to the collective responsibility convention: the confidence rule the unanimity rule and the confidentiality rule." The 'confidence rule, ' which requires the Cabinet to retain support (or confidence) of Parliament to remain in power is constitutionalised in South Africa in the provision concerning a vote of no confidence. The 'unanimity rule' is implied in the F[inal] C[onstitution] ss 85(2) and 92: in the references to Cabinet acting 'together' and in its collective accountability to Parliament. The 'confidentiality rule' which protects the confidentiality of discussions in Cabinet, is not specified in the Final Constitution but is applied in practice.*
>
> *The convention was developed in Britain as politicians sought to assert greater control of government."*

90. Confidentiality of Cabinet discussions are protected by section 12 (a) of the Promotion of Access to Information Act 2 of 2000 which excludes Cabinet and its committees from having to grant access to information required for the exercise or protection of rights.

91. In SARFU III,[6] the Constitutional Court recognised the significance of the confidentiality rule at [243]:

> "*We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected,* ***that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed.*** *Careful consideration must therefore be given to a decision compelling the President to give evidence and such*

[5] G Marshall: *Constitutional Conventions: The Rules and Forms of Political Accountability* 1989 (55)
[6] State President of the RSA v SARFU 2000(1) SA 1(CC) at [243]

*an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice*. (my emphasis*)*

92. In *casu*, the President established the NCCC which according to the Minister of CoGTA, comprised some Cabinet members and later all the Cabinet members were added.

93. When the Minister asserts that minutes of Cabinet meetings as well as those of its committees including the NCCC are confidential, there is nothing sinister or un-transparent about it.

94. Confidentiality is the mechanism by which Cabinet protects the integrity of its discussions.

95. The Minister of CoGTA says the following about the functioning of the NCCC:

95.1 It is a body of Cabinet established to address the pandemic, which continues to change rapidly, in a swift and effective manner;

95.2 It was necessary for the President and Cabinet to meet more frequently than they ordinarily would and deal with Covid-19 related issues only on the agenda;

95.3 It is a structure of Cabinet comprising only Cabinet members;

95.4 It received inputs and reports from the National Joint Intelligence and Operational Structure (NAT JOINTS) in the form of technical

assistance. NAT JOINTS has many workstreams including health workstreams;

95.5 It acts as a forum for discussion and debate on Covid-19 related issues;

95.6 Cabinet members are able to consult one another through the NCCC and outside of it as well on difficulties and concerns encountered with the measures taken to address Covid-19;

95.7 The President established the NCCC in terms of the powers vested in him as the head of the executive authority, which he exercises with Cabinet;

95.8 The Constitution does not prescribe to the President and Cabinet how to structure themselves internally and Cabinet determines its own internal rules, practices and committees;

95.9 Parliament has a number of committees that are focussed on specific issues, usually referred to as clusters and the NCCC was established as a committee of Cabinet designed to deal specifically with Covid-19 related issues;

95.10 The Minister of CoGTA readily concedes that the language she and the President used in referring to decisions of Cabinet concerning government's response to Covid-19 reflected the NCCC as the decision-making body and not Cabinet. She attributes this to the fact that the entire Cabinet also constituted the entire NCCC and that resulted in the loose use of language and those statements on the NCCC could have caused applicants to be misled.

95.11 The NCCC enables swifter and more focussed discussion between the Minister of CoGTA and other Cabinet members, it coordinates, facilitates and implements the government's response to the Covid-19 pandemic.

95.12 The NCCC meets approximately three times per week and the format of its meetings include a report by the Minister of Health on statistics with regard to infections and deaths; NAT JOINTS would report for example, on the procurement of Personal Protective Equipment (PPE), social relief schemes and challenges experienced under the regulations; various Ministers would make requests or presentations; discussions ensue and conclusions are reached which are then taken forward by the relevant Ministers authorised to make final decisions;

95.13 Debates at the NCCC are at a high level of principle and concerns raised, but the relevant Minister is still individually responsible for preparing his/her own regulations.

96. Hence the President's decision to establish the NCCC is neither a decision made in terms of legislation nor are the decisions of the NCCC capable of having legal consequences because they are subject to acceptance, rejection or modification by Cabinet and where applicable, individual Cabinet members.

97. There is no legislative imperative for the Minister to consult with the entire Cabinet. Therefore, if the NCCC initially comprised of only some Cabinet members and the Minister consulted with the NCCC prior to making

regulations or issuing directions, then she can't be found wanting in that regard.

98. The decision to make the regulations, was, as both ministers are at pains to point out, part of a deliberative and consultative process. They consulted their fellow cabinet members, various role players, NATJOINTS, the Health advisory council, the Centre and various organs of state. The ultimate decision as to the formulation of disaster management regulations were made by the minister concerned, alone.

99. There is nothing extraordinary about that. The Act provides that the relevant minister make that decision alone.

100. It is artificial to sever the minister's final decision-making process from the deliberative process that preceded it, as the applicants do, and then to argue that since she made the decision alone, it is administrative action but had it been a deliberative process, it would have been executive action.

**NCCC's alleged unlawful usurpation of the functions of the Centre**

101. The Centre facilitates consultations between various organs of state, departments spheres of government and other stakeholders but it is not meant to take over the functions of Cabinet in the event of a national disaster.

102. The National Disaster Management Centre is established within the public service and its head is appointed as a public service employee; The objective

of the Centre is to promote an integrated and co-ordinated disaster management system with emphasis on prevention and mitigation, i.e. its section 9 objectives.

103. Section 15 (1) of the DMA prescribes how the Centre's must achieve its section 9 objective. The National Disaster Management Centre and section 15(1) (d) states that the Centre **may** act as an advisory and consultative body to statutory functionaries; private sector; non-governmental organisations; communities; individuals; other governments and institutions in southern Africa. The role of the Centre to fulfil advisory and consultative functions is not peremptory but discretionary.

104. The role of the Centre in section 15 (1) (j) is that the Centre **may** assist in the implementation of legislation subject to the words:" *to the extent required by the administrator of such legislation and approved by the Minister".* The role of the Centre in assisting in implementation of legislation is not mandatory but optional and the Minister is vested with the discretion to define the assistance, if any, required by the Centre.

105. Section 15(1) (k) provides that the Centre **may** exercise any other power conferred on it and must perform all other duties assigned to it by the Act.

106. Section 20 provides that the Centre, *to the extent that it has the capacity*, must give guidance to organs of state; the private sector; non-governmental organisations; communities and individuals to reduce the risk of disasters including, *inter alia*, ways and means of determining risk. From the papers it is

clear that the Centre fulfils this function to the extent that it can and reliance is also placed on Health Ministry's Medical Advisory Council who clearly has more capacity than the Centre to determine how the risk of the spread of the virus should be reduced. That advice is of course, subject to the Minister and the rest of Cabinet taking collective decisions which impact on functional areas of other Cabinet members in the final analyses.

107. Section 24 provides for the Centre to report to the minister annually.

108. The provisions of the Act do not place the Centre as the authority vested with the power to manage disasters exclusively, solely or primarily. The Act prescribes a role for the Centre which is supplementary to that of the National Executive and the Minister in particular. That role includes advising, facilitating, recommending, co-ordinating and collating a data base. But nowhere in the Act does it stipulate that those functions are exclusively to be carried out by the Centre. In fact, the hierarchy of the Act makes it clear that the Centre is subordinate to the Minister and the National Executive.

109. Section 26(2) mandates the national executive to deal with a national disaster not the Centre.

110. In my view, Cabinet members are obliged to consult with one another on a coordinated response to Covid-19. The Minister of CoGTA is obliged, in terms of the DMA, to consult with relevant Cabinet members before making disaster management regulations. Since Cabinet functions on a consensus building

basis, with few reasons to vote, as outlined in the work by Murray and Stacy, discussed above, it is not out of character with Cabinet's prevailing practice to seek consensus and cooperation from all its members in an informed manner given the nature and extent of the global pandemic that they are mandated to respond to. Cabinet's consensus building mechanism, in this instance, the NCCC, does not detract from its obligation to consult with the Centre.

111. From Dr Tau's affidavit, the head of the Centre, one gleans that he and the Centre are integrally involved in consultations with Cabinet as well as with other organs of state, spheres of government and other role-players in promoting the integration of disaster management.

112. I find no basis for the conclusion pressed for by applicants, namely, that the NCCC unlawfully usurped the powers of the Centre.

**Grounds for Review**

113. Section 1 of Promotion of Just Administration Act of 2000 (PAJA) defines administrative action as follows:

> *"… means any decision taken, or any failure to take a decision, by – (a) an organ of state, when –*
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation; "*

114. Section 1 excludes expressly and thereby determines which conduct of the national executive can not be construed as administrative action and lists in paragraph (aa) " the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4),

84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;".

115. Notably it does not exclude section 85(2)(a) of the Constitution, namely implementing national legalisation except where the Constitution or Legislation provides otherwise.

116. Section 3 (2) of PAJA prescribes the criteria for fair administrative action:

> "(*2) (a) A fair administrative procedure depends on the circumstances of each case. (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) – (i) adequate notice of the nature and purpose of the proposed administrative action;*
> *(ii) a reasonable opportunity to make representations;*
> *(iii) a clear statement of the administrative action;*
> *(iv) adequate notice of any right of review or internal appeal, where applicable; and*
> *(v) adequate notice of the right to request reasons in terms of section 5*."

117. Section 3(4) provides for a departure from the process prescribed in subsection 2:

> *"(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).*
> *(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –*
> *(i) the objects of the empowering provision;*
> *(ii) the nature and purpose of, and the need to take, the administrative action; (iii) the likely effect of the administrative action;*
> *(iv) the urgency of taking the administrative action or the urgency of the matter; and*
> *(v) the need to promote an efficient administration and good governance."*

118. Section 4(1) (a) to (e) sets out a list of criteria to consider in determining a procedurally fair process :

> "*Administrative action affecting public (1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –*
>
> *(a) to hold a public inquiry in terms of subsection (2);*
> *(b) to follow a notice and comment procedure in terms of subsection (3);*
> *(c) to follow the procedures in both subsections (2) and (3);*
> *(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
> *(e) to follow another appropriate procedure which gives effect to section 3."*

119. However, section 4(4)(a) provides as follows:

> *"(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and* (3).
> *(b)In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –*
> *(i) the objects of the empowering provision;*
> *(ii)* ***the nature and purpose of, and the need to take, the administrative action;***
> *(iii) the likely effect of the administrative action;*
> *(iv)* ***the urgency of taking the administrative action or the urgency of the matter; and***
> *(v) the need to promote an efficient administration and good governance "* (my emphasis)

120. Applicants say in the replying affidavit that the debate about the legality review in terms of the Constitution and the reasonableness review in terms of PAJA is of limited assistance in these proceedings. Applicants take the debate no further.

121. In **Minister of Health and Another v New Clicks SA (Pty) Ltd and Others** [7] the Court held:

> " If *sections 85(2)(a) and 125(2)(a), (b) and (c) had not been omitted from the list of exclusions, the core of administrative action would have been excluded from PAJA, and the Act mandated by the Constitution to give effect to sections 33(1) and (2) would not have served its intended purpose. The omission of sections 85(2)(a) and 125(2)(a), (b) and (c) from the list of exclusions was clearly deliberate. To have excluded the implementation of legislation from PAJA would have been inconsistent with the Constitution. The implementation of legislation, which includes the making of regulations in terms of an empowering provision, is therefore not excluded from the definition of administrative action*."

122. In **New Clicks** at para 145, the Constitutional Court said that reasonableness and procedural are context specific

123. At paragraph 147, relying on **Bato Star**, [8] the Court said that context is relevant to both procedural fairness and reasonableness and that Courts should approach the review of administrative action in that instance with deference or sensitivity to the special role of the executive in making regulations.

124. The minister has to embark on a process of creating regulations that give expression to the implementation of a legal framework that addresses the competing needs of various sectors and interests, all while still upholding primary Constitutional imperatives of saving lives and preserving dignity. It is this balancing of competing interests that must align the minister's role in regulation making for disaster management with the exercise of reasonable

[7] 2006 (2) SA 311 (CC) at [126]
[8] Bato Star Fishing Ltd v Minister of Environmental Affairs & Tourism & Others 2004(4) SA 490 (CC)

and procedurally fair and just administrative action in the context of a national disaster that is also a global one.

**Mootness**

125. Respondents submit that the regulations sought to be impugned apply too alert levels that are no longer in existence and were the country to move back to those alert levels, new regulations would have to be published. Therefore, they argue that the determination of the rationality and legality of those regulations is moot.

126. Applicants submit that there is nothing prohibiting the enforcement of the regulations were the country to be placed back onto an alert level applicable to the regulations.

127. Clearly, neither the DMA nor the regulations themselves stipulate that the regulations cannot be utilised should the country be placed back onto an applicable alert level.

128. Save for the Winter Clothing Directions, which the Minister of the DTIC withdrew on 11 June 2020 and hence are of no force and effect, a consideration of the remaining regulations are not moot.

**The Public Participation Process**

129. The procedural fairness argument advanced on behalf of the applicants is that no or an inadequate public participation process was followed.

130. Applicants' counsel relied on the following arguments:

130.1 In the **Simelane case**,[9] the Constitutional Court held:

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

130.2 In **Albutt v Centre for the Study of Violence and Reconciliation**,[10] the Constitutional Court found that it was procedurally irrational for the President not to hear from the victims of political crimes before making a decision to issue presidential pardons for politically motivated crimes, on the grounds that it would further reconciliation.

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

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

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

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7.Democratic Alliance v President of the RSA 2013(1) SA 248 (CC) at [39]

[10] 2010(3) SA 293 (CC) AT [69]

130.6 A transparent and open process promotes the legitimacy and acceptance of the regulations. This, in turn, assists the government with enforcement of the law.

131. In reply, applicants challenge the veracity of the COGTA Minister's allegation that teams were employed to collate and summarise the public comments by alleging that she does not specify how many teams there were or how many people worked on the various teams.

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

133. Applicants allege that the report on public participation was only compiled on 28 April 2020, and the COGTA Minister did not say that she read and considered the Report.

134. Applicants believe that it is simply not possible that the COGTA Minister could give due and proper regard to the public's submissions contained in the Report on 28 April 2020, and make regulations reflecting the public's views the following day on 29 April 2020.

135. The report on submissions from the public also include responses from various government departments. The report concludes with the following

comment from the processing team: "*While the COGTA DOC focussed primarily on public comments, a team from Trade, Industry and Competition processed inputs from sectors and will share the key finding with their Ministry.*" Although the Minister doesn't allege it, when regard is had to the Report, it is conceivable that there would have been considerable overlap and duplication in sentiments and suggestions expressed by the public and those expressed by sectors and not every single one of those 70 000 submissions would be different to one another. Hence the report draws together both public and sector comments in Table1.

136. Applicants' challenge to the Minister of CoGTA's allegation that she considered all the public comments, represent a dispute of fact raised in reply. Their allegation is that it is not possible for the Minister to have considered all the public submissions because she didn't disclose the size of the teams that read and processed those submissions. The expectation that the Minister make disclosures on the size of the teams arises for the first time in reply and is nothing more than a fishing expedition in a futile attempt to establish that the Minister's consideration of the submissions were not properly made in circumstances where clearly there was, in addition to teams employed by the CoGTA department, also a team employed by the DTIC which considered and collated information. The tenor of both ministers' answering affidavits is that they concede that the process resulted in an imperfect solution but where solutions were proposed from sectors or the public, they took account of them and readily amended the regulations as they went along.

137. In my view the dispute of fact is not *bona fide* in that the challenge is based on pure conjecture as applicants offer no support for the bald allegation that the Minister's version is false other than speculative suspicion.

138. *Plascon-Evans' Rule* [11] therefore applies and the facts fall to be determined on those alleged by respondents together with those facts either accepted by applicants or those that cannot be denied by applicants.

139. That the number of public comments were 70 000 doesn't detract from the allegation that they were indeed considered and collated by teams of personnel culminating in a report which the Minister of CoGTA considered.

140. Applicants rely on **Minister of Home Affairs and Others v Scalabrini Centre and Others** [12] and **Earthlife Africa, Johannesburg and Another v Minister of Energy and Others** [13] for the proposition that the lack of adequate time given to the public caused the regulations to be procedurally unfair and irrational in circumstances where a public participation process was established . In **Earthlife** it was held that: "*a rational and fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence…*"

[11] Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 643G-635D
[12] 2013(6) SA 421 (SCA) at [72]
[13] [2017] 3 All SA 187 (WCC) [45].

141. The Minister of CoGTA's answering affidavit contain the following concerning this aspect:

142. The decision to implement a lockdown had to be made quickly and decisively and there was simply not enough time and opportunity to have a public participation process prior to making that decision.

143. After the lockdown regulations were published, there was widespread feedback from the President, Cabinet, the public and other stakeholders on problems identified with the wording of the lockdown regulations.

144. The Minister then proceeded to publish amendments to the lockdown regulations.

145. On 17 April 2020, the President chaired a National Economic Development and Labour Council (NEDLAC) meeting to discuss the lockdown.

146. On 18 April 2020 the President convened a PCC meeting where the President, the Minister of CoGTA, the Minister of Health & NAT JOINTS gave input. Mayors, premiers and representatives of provinces were also present.

147. To address the concerns caused by people milling in places where hot food was sold, after consultation with relevant Cabinet members, the Minister of CoGTA published further amendments to the lockdown regulations.

148. The Minister of CoGTA noted that the public participation process in relation to the Disaster Management Regulations must be viewed in the broader context of the ongoing representations, submissions, comments, criticisms, support, confirmation that her department, the Cabinet and the President received.

149. The Minister of CoGTA alleges that her call for public participation on 25 April 2020 was part of an ongoing process that had commenced taking place once the first lockdown regulations were published.

150. A public participation process was embarked upon on 25 April 2020 with comments having to be submitted by 27 April 2020. That was indeed a truncated public participation process.

151. Procedural fairness would ordinarily require a longer participation process if the exigencies didn't demand swift and decisive action.

152. The first respondent's reason for acting speedily and within a limited time frame for public participation is that it was necessary to contain the spread of Covid-19.

153. Third respondent added that the respondents had to make difficult decisions to manage the consequences that flowed from the lockdown in a manner which resulted in striking a balance between saving lives and saving livelihoods.

154. First Respondent refers to evolving knowledge at the time on how the virus spreads and what measures should be introduced to contain it.

155. The respondents' expert, Professor Abdool Karim, states that:

155.1 the global understanding and knowledge on Covid-19 changes rapidly;

155.2 the virus is thought to be airborne but there isn't scientific consensus on that;

155.3 154.3 the virus is transmitted through proximity to people and contact with surfaces;

155.4 the risk of transmission is higher when an infected person has a high viral load and that could be when people are pre-symptomatic; asymptomatic or symptomatic;

155.5 it is important to adopt measures based on the presumption that anyone is a potential carrier;

155.6 there is consequently a need to eliminate infected people coming into contact with other people and with surfaces;

155.7 He lists the toolbox of known practices used to prevent infections, namely:

155.7.1 increased hygiene, washing, sanitising and avoid touching mucous membranes;

155.7.2 respiratory respiratory hygiene with the use of masks and coughing or sneezing into one's arm;

155.7.3 frequent cleaning and disinfecting of surfaces.

155.8 He also lists a series of health tools which are screening; testing; self-isolating; quarantining and providing PPE to health care workers.

155.9 He explains the objective of a lockdown as necessary to flatten the curve by reducing infections and obtaining time for the health care services to cope and avoid a total collapse of the health care system;

155.10 He believes that the most effective and immediate way to regulate public behaviour is with a lockdown as there would then be fewer opportunity for infections;

155.11 South Africa is one of 86 countries that imposed a lockdown;

155.12 He says that there is a need for government to regulate so that it could mitigate the effect of Covid-19 and so that people could receive reliable information on how to change their behaviour and take preventative measures;

155.13 The consequences of flattening the curve meant that:

155.13.1. community transmission of the virus slowed;

155.13.2. healthcare capacity was able to expand and field hospitals were opened;

155.13.3 health care facilities were able to prepare and acquire more PPE;

155.13.4 testing programmes were scaled up.

156. The court is cognisant of the objective facts, namely that, Covid-19 is a global pandemic for which there is no cure, no adequate treatment, no guaranteed prevention and the most vulnerable people are those with pre- existing conditions.

157. It is a global disaster which humanity has not encountered before. Hence first and third respondents' acceptance that they have made mistakes in the measures they adopted and as a consequence of feedback and new information on the science, they amended regulations and directions, is well made.

158. Section 6 of the Act does indeed make it mandatory for the Minister to prescribe a national disaster management framework only after taking account of the Intergovernmental Committee's recommendations as well as public comment and the Minister is compelled by section 6(2) to publish particulars of the proposed framework.

159. However, the regulations sought to be impugned do not encompass the establishment of a disaster management framework.

160. Despite the argument advanced on behalf of the respondent's that the DMA does not provide for a public participation process, the Minister did engage with other organs of state, spheres of government, the Centre, NAT JOINTS, stakeholders and she was responsive to complaints and suggestions brought to her attention. Those consultations and feedback sessions form part of a public participation process.

161. The DMA does not provide for a public participation process before making disaster management regulations but only provides that the Minister should consult relevant Cabinet members. The nature of the public participation process that the Minister embarked on is therefore not prescribed by the DMA.

162. The minister did not recognise the need for public participation only when she called for it on 25 April 2020. Her *modus operandi* was to consult with colleagues, NAT JOINTS, the centre, the advisory council, other spheres of government and organs of state and she had regard to inputs from the public that she had access to. To caste her conduct as authoritarian is misleading and patently inappropriate as that assertion is not borne out by objectively determinable facts alleged by her and supported by annexures to her affidavit, that contains schedules to media interviews and briefings held by the Minister of CoGTA and other Ministers .

163. On two occasions in her answering affidavit, the Minister appears to have the dates of consultation incorrect as they are subsequent to the date of publication of regulations. That does not lead to the inference that she made those regulations without any public participation in circumstances where she and/ or her Cabinet colleagues had engaged with sectors, labour unions and NGOs.

164. Even if she did make regulations without public participation, the exigencies of the crisis that she sought to regulate is of such a nature, that where the DMA does not prescribe public participation, the public's check and balance on

abuse of power still resides with Parliament to who the Minister is accountable for the exercise of delegated power to make subordinate law. There is no claim that she is in fact not accountable to Parliament.

165. Additionally, section 59(4) of the DMA requires the Minister to make the regulations available to the National Council of Provinces (NCOP) for adoption. That is also a public participation process that can serve as a check on any abuse of power that manifests in the regulations.

166. Applicants argue that members of the public may have wanted to provide more relevant material or that they did indeed provide relevant material which the minister failed to consider because of the truncated public participation process. That argument is speculative and fails to appreciate the urgency and exigency in which the pandemic has to be managed by government.

167. The Centre liaises with the public through civil society structures, spheres of governance and the media. Therefore, suggestions on less restrictive means of achieving the primary objective of saving lives and livelihoods could be channelled through any of those platforms and the Centre as well. Despite Applicants belief that the Centre should be coordinating the entire disaster management program primarily, they have not alleged that they directed a request for greater public participation to the centre or to the CoGTA.

168. That is not to say, that a public participation process should not be employed. Given the architecture of the DMA, its purpose and its use to mitigate the fatal consequences of a pandemic driven by a virus for which there is no cure and

treatment, a truncated public participation process is capable of being attenuated through the NCOP or National Assembly.

169. Respondents also rely on the **Albutt's** case but they rely on the emphasized portion of paragraph 51 which reads as follows:

> "*Courts may not interfere with the means selected [to achieve the executive's constitutionally permissible objectives] simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved* "

170. The primary and ancillary objectives of the regulations as set out in the DMA and utilised for the mitigation of an unprecedented human tragedy caused by Covid-19, make it radically different to the circumstances that prevailed in cases such as **Scalabrini** and **Earthlife**. Even applicants' counsel submitted that a truncated public participation process was necessary but he simply added: "*not this truncated*."

171. It is not for the Courts to prescribe to the National Executive precisely how truncated a public participation process it should follow because each situation would have to be determined on its own set of unique and relevant circumstances.

172. In the absence of evidence of the existence of alleged less restrictive means of achieving the objective of reducing the spread of Covid-19 and ameliorating

the consequences that flow from a full/partial lockdown of the economy, this court has no basis in interfering with the Minster of CoGTA's exercise of her discretion in setting the truncated period for public participation.

173. To accept this conclusion applicants would have to confront the fallacious nature of the comparison they make between the regulations they seek to impugn and the incorrect premise that their argument on which the purpose of the regulations rests.

**The object of the regulations in terms of the DMA**

174. Section 27(2) of the DMA provides once a national state of disaster has been declared, the Minister may, subject to exercising her section 27(3) powers for assisting and protecting the public; providing relief to the public; protecting property; preventing or combatting disruption or dealing with the destructive and other effect of a disaster, make regulations and directions concerning:

(a) The release of any available resources of national government, including stores, equipment, vehicles and facilities;

(b) The release of personnel of a national organ of state for the rendering of emergency services;

(c) The implementation of all or any of the provisions of a national disaster management plan that are applicable to the disaster in the circumstances;

(d) The evacuation to temporary shelters of all or part the population from disaster-stricken or threatened area if such action is necessary for the preservation of life;

(e) The regulation of traffic to, from or within the disaster-stricken or threatened area;

(f) The regulation of movement of persons and goods to, from or within the disaster-stricken or threatened area;

(g) The control or occupancy of premises in the disaster-stricken or threatened area;

(h) The provision, control or use of temporary emergency accommodation;

(i) The suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(j) The maintenance or installation of temporary lines of communications, to, from or within the disaster area;

(k) The dissemination of information required for dealing with the disaster;

(l) Emergency procurement procedures;

(m) The facilitation of response and post-disaster recovery and rehabilitation;

(n) Other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or

(o) Steps to facilitate international assistance;

175. Section 27(2) notionally is broad enough to intrude upon existing legislation but it does so only in a disaster situation, in which the DMA builds in checks, balances and limitations.

176. The Minister of CoGTA spells out the rationale for the disaster management regulations, namely to keep the rate of transmission of SARS Cov-2 low, as follows:

> "*194 Permitting all activities that arguably affect or give full effect to various rights in the Bill of Rights would collapse the lockdown. Regrettably, it is impossible to craft Regulations that reduce the risk of transmission at any given point in time to acceptable levels without permitting some public activities and refusing other activities that may appear similarly important. As such, lines that may appear arbitrary between one activity and another activity must be drawn to achieve an acceptably low level of transmission."*

177. The Minister of DTIC, explained that the objectives of the disaster management regulations were to save lives and livelihoods in a manner that reduced foot traffic and limited the opportunity for people to spend undue time inside stores.

178. According to respondents, the primary objective of the lockdown and disaster regulation was to carry out their Constitutional obligation as expressed in **Makwanyane** [14] thus: "*The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.*"

179. In support of its contention that it has a paramount Constitutional duty to save lives, Respondents rely on the following in **Soobramoney** [15]: "*The State undoubtedly has a strong interest in protecting and preserving the life and*

11. S v Makwanyane 1995 (3) SA 391 (CC) at [144]

[15] Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) at [39]

*health of its citizens and to that end must do all in its power to protect and preserve life."*

180. Aside from Professor Abdool Karim's explanation about the strengthening of health care capacity during the lockdown, the Minister of the DTIC set out in detail what efforts were made to procure PPE and ventilators and to ensure that life saving medication were made available.

181. On respondents' behalf, it is argued that the test in section 36 of the Constitution that a limitation on a right in the Bill of Rights must be reasonable and justifiable in an open and democratic society and the DMA's requirement to act with necessity entail making difficult and unpalatable decisions that require a trade-off and which do not address immediately all Constitutional rights contemplated.

**Applicants' submissions on Impugning Regulations**

182. Applicants consider regulations 16(1) to (4); 28(1), 28(3) and 28(4), read with Part E of Table 1, of the Disaster Regulations as 'the Impugned Restrictions' as they are alleged to be substantively unconstitutional, unlawful and invalid.

183. The basis for the assertion that the said regulations are unlawful are set out as follows:

183.1 They commence from the premise that certain listed activities are permitted and everything else is banned instead of listing the banned activities and permitting everything else;

183.2 The regulations restrict people to their homes and consequently deprive people of their autonomy to move freely. They allow people to leave their homes only if they are performing an allowed service or acquiring a permissible category of goods and services; are moving a child from one parent to another or if they wish to exercise between the hours of 06h00 to 09h00;

183.3 They do not allow people the freedom to enjoy other aspects of the right to human dignity, such as family life: they allow parents to move children between them and allow selected relations to attend funerals, but do not allow geographically separated family members to visit each other, even in times of difficulty;

183.4 Regulation 28 restrictions infringe human dignity, insofar as they undermine a person's autonomy to make her own consumption decisions by allowing people to only purchase cold prepared food from grocers, but not hot cooked food, and by restricting them to the purchase of 'winter clothing' when they should have the freedom to choose whatever season of attire they wish. The regulation also unduly limits people's right to trade freely and to practice a profession of their choice;

183.5 Regulation 16 restricts people's movement through a curfew and limitation on hours of exercise an it is an impermissible limitation on people's freedom of movement;

183.6 Applicants assert that the regulations go beyond their stated purpose, namely, combat the Covid-19 pandemic as they may go no further than what is stated in section 27 (3) of the Act, which is to provide relief, protect property, prevent disruption or address the destructive effects of the pandemic;

183.7 Applicants allege that allowing retail stores to operate and sell certain goods, but not to sell other goods, does not limit the spread of Covid-19: consumers are already in the stores, purchasing what they are allowed to purchase they, are already using the retail facilities in question and the risk of human contact is already present. That risk is addressed through the mandatory health protocols, social-distancing, rules and provisions for adequate spacing. Addressing the risk through such controls, rather than by banning retail activity, is in line with WHO policy, Simply put: consumers are already in stores. It makes no sense to ban what they may or may not purchase, unless those sale items themselves increase the likelihood of virus transmission;

183.8 Applicants question why movement between provinces, metropolitan areas and districts are permitted for funerals and transporting mortal remains but not for family emergencies such as relatives being on their death beds (in which case both the healthy and the dying person can benefit from the movement);

183.9 Regulation 16(2) does not permit movement for purposes of visiting a prison or a hospital. However, regulation 25 permits individuals to visit 'Correctional Centres' and 'Health establishments' in certain circumstances. It is irrational for the Disaster Regulations to permit certain movement in one breath and then criminalise that movement in the next.

183.10 Applicants assert that there are less restrictive means to achieve the objective of limiting the spread of the virus. Applicants argue that if movement is permissible during certain times or for certain reasons, provided that there are controls such as health protocols and social distancing in place, it ought to be permissible during all times and for all reasons (subject to the same protocols and social-distancing rules), unless there is a particular time or a particular reason that is likely to exacerbate the pandemic;

183.11 Applicants state that if the respondents are reasonably concerned that particular forms of movement risk exacerbating the disaster, those particular forms of movement should be restricted, rather than all movement, all of the time;

183.12 The means of limiting the spread of the virus that are less restrictive on movement are already set out in the Disaster Regulations i.e. strict health protocols, mandatory use of hand sanitiser, social distancing etc. Similarly, the means of limiting the spread of the virus that are less restrictive on

economic and consumer activity are already set out in the Disaster Regulations i.e. the obligation on retail facilities provide employees with face masks, ensure adequate space, regulate queues, provide hand sanitiser etc;

183.13 Applicants take issue in particular with the directions dealing with the itemisation of winter clothing, shoes and apparel; the regulations that limit exercise is public to 3 morning hours; the regulation that imposes a curfew and the regulation which prohibit the sale of cooked food under level 5 of the lockdown; the regulations that prohibit people from leaving home unless they are performing an essential service or are engaging in permissible activities and the regulations that limit inter provincial travelling;

183.14 Applicants submit that the regulations being challenged are unlawful because they are not necessary to achieve a curb in the spread of the pandemic because section 27(3) of the Act requires that the regulations be necessary to (i) assist, protect and relieve the public; (ii) protect property and prevent disruption; or (iii) deal with the disaster's effects;

183.15 Applicants allege that inclusive and structurally fair economic and fair competition objectives are not permissible objectives for national disaster regulations and the Ministers of the DTIC and CoGTA cannot advance those objectives through the regulations being challenged.

183.16 Applicants allege that the Clothing Directions, especially those that list the items of clothing that may be purchased, are unlawful because they were published in terms of regulation 4(10)(a), which regulation allows for the exercise of power to prevent the spread of Covid-19 and its impact "*by disseminating information required for dealing with the national state of disaster*."

184. Both the Ministers of CoGTA and the DTIC refer to the importance of making regulations that were sufficiently clear to people expected to comply with them and to law enforcement agencies who are tasked with enforcing them. That is the objective behind Regulation 4(10)(a) which applicants allege cannot be used for the clothing directions published by the Minister of the DTIC.

185. Section 27(2)(k) of the DMA provides that the Minister may make regulations for: "*the dissemination of information required for dealing with the disaster"*

186. Applicants argue that the Minister of CoGTA may only make those regulations not the Minister of the DTIC, hence the latter acted *ultra vires* in making the clothing directions.

**Respondents' Averments to the Regulations challenge**

187. Respondent has set out the following factors that it took into consideration in ensuring that the objectives of the regulations were achieved:

187.1 There was an urgent need to stop the movement of people to slow the spread of the virus sufficiently to put in place improved public health care facilities; to provide health care workers with adequate personal protective equipment (PPE); to bring the seriousness of the epidemic to the attention of the country's population, including those in far flung areas quickly so that they will implement the required prevention protocols and to have a set of legal measures in place that law enforcement agencies could use as a guideline for what conduct was permissible and what was prohibited;

187.2 There was consultation and engagement with stakeholders and role players in relevant sectors prior to the disaster management regulations being published;

187.3 Some of the regulations were formulated as a direct response to sectors' submissions and requests for clarity and parity;

187.4 The winter clothing direction was not meant to prescribe to people what they could wear but to limit the employment of too many employees in stores and manufacturing and to limit the time shoppers spent in stores. People were at liberty to wear clothing they already possessed. The limitation was on the categories of merchandise that could be sold and bought; The applicants misconceive the purpose of the Direction;

187.5 There is also a legislative imperative to ensure that unfair competition does not arise *as a consequence* of the disaster management regulations, hence the ban on the sale of cooked food had to apply to

stores that sold essential goods as well as cooked food and stores that sold only cooked food;

187.6 The initial hard lockdown was necessary to contain the rapid spread of the virus and to achieve that end, it was necessary to limit the movement of people to certain hours and for specified purposes to avoid misuse of the permissible movement and to provide enforcement agencies with clearly defined parameters as they could not enforce limitations on movement effectively during all hours of the day and night and movement for multiple purposes and therefore they required limited periods and purposes for effective policing and controlling.

**New Averments in Reply**

188. Although applicants raise new matter in reply, given the urgency of the matter and the need for a holistic approach to all the issues raised, we have considered the new matter while mindful of the respondents' inability to depose to affidavits in response thereto given the short time frames in which papers were filed.

189. For the first time in reply, Applicants shift the goalposts as it were, by making new averments requiring respondents to, *inter alia* discharge an *onus*.

190. The Minister of the DTIC is alleged to have acted *ultra vires* in publishing Winter Clothing Directions. It is alleged that the Clothing Directions are *ultra vires* the Regulations, the DMA and they are irrational.

191. Regulation 4(6) empowers the Minister of the DTIC specifically to make directions: ”*to protect consumers from excessive, unfair, unreasonable or unjust pricing of goods and services during the national state of disaster; to maintain security and availability of the supply of goods and services and to address the spread of Covid-19 in matters falling within his mandate*.” Whereas Regulation 4(10)(a) on which the Minister of the DTIC rely for the exercise of power to make the clothing directions, provides that it includes: “***disseminating information required for dealing with the national state of disaster;*** *implementing emergency procurement measures; taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimise the effects of the national state of disaster.*”

192. The emphasised portion of the regulation echoes section 27(2) (k) of the DMA in which the Minister of CoGTA may authorise the issue of Directions, hence her delegation to the Minister of the DTIC is in terms of the power to authorise the issue of Directions.

193. The Minister of the DTIC sketches the context, the raison d’etre for the clothing directions and the rationality of the decision to make the directions as follows: “ *Further the global infection rate was also rising and many countries around the world like the United States, Brazil and Italy were releasing*

*statements and images of over-flowing and under-staffed healthcare facilities. Reasonable and rational fears still persist about whether South Africa's healthcare system could cope with such levels of hospitalisation. We had a constitutional obligation to err on the side of caution…I provide the court with the detailed considerations, not to argue that the decisions taken were perfect and not beyond criticism, or that other options may not have been possible, but to show that the decisions were rational, flowing from extensive processes during which careful consideration was given to the proposed measures and that the factors considered were rationally connected to the objectives of the state of disaster, taking full account of all of the information about the various risks to the public that were available to us at the time. These were not decisions made in a cavalier fashion, nor attempts by Ministers to micro-manage decisions best taken by businesses, but on the contrary a response to a request by stakeholders for greater clarity and certainty… Given that the virus spreads most easily through close contact with others, the purpose of restricting the number of items which could be sold in retail stores served to limit the spread of the virus, through limiting close proximity of people to each other and limiting the amount of time that people spent in stores, especially indoors( both at the stores concerned and the public transport that many people rely on to get to shopping malls and shops). Our rationale has been that limiting the number of goods, would reduce the number of people and time spent in stores at any given time. "*

194. Third respondent accordingly states that he made the directions with the objective of limiting the spread of Covid-19 by limiting the lines of goods

available for purchase and sale. He did so in response to a request by the clothing sector for information and clarity on specific items that they were authorised to sell. He made the winter clothing directions in consultation with and on the recommendation of the sector. Hence third respondent states that he made the directions in order to disseminate information to manufacturers, retailers, consumers and law enforcement agencies.

195. That the directions could also fall into Regulation 4(6)'s objective doesn't detract from the fact that the clothing sector required clarity, recommended the nature of the clarity they sought and were provided with the necessary information.

196. Regulation 4(6) provides the delegated authority granted to the DTIC Minister but Regulation 4(10)(a) is the specific purpose for which the minister made the regulation. It is not possible to separate entirely the purpose of curbing the spread of the national disaster from the purpose of providing information for clarity as they are interrelated and both purposes address the government's response to the national state of disaster, that is Covid-19.

197. The clothing directions arose as a consequence of the national state of disaster and the DMA empowers the Minister to address the disaster and its effects and consequences, as discussed earlier. The dissemination of information concerning winter clothing is within the powers of the Minister and accordingly cannot be *ultra vires* the DMA.

198. In the event, the clothing directions were withdrawn on 11 June 2020 and are of no force and effect.

199. The Minister's approach to making regulations is criticised as falling foul of a "*narrow tailoring approach*" contemplated by sections 26(2)(b) and 27(2) and (3) of the Act. However section 26 (2) (b) merely states that national executive must deal with a national disaster in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2).

200. Section 26(2) (b) does not provide that the Minister may only make regulations that augment existing legislation, as argued on applicants' behalf.

201. To augment means to widen and give more value to. In the context of existing legislation, it effectively means to provide more emphasis and support to the provisions and objects of existing legislation.

202. Section 26(2) in my view, provides that the national executive must act within the confines of the provisions contained in existing legislation as well as in accordance with contingency measures to the extent both existing legislation and contingency measures are augmented by regulations made in terms of section 27(2). Section 27 (2) is subject to the objects and purpose defined in section 27(3) and those are the objects against which the rationality of the regulations must be considered.

203. More specifically, section 27(2) (n) of the DMA provides for dealing with the effects of the disaster which is what the regulations and directions address,

i.e. effects and consequences flowing from necessary measures employed to curb the spread of the disaster.

204. Section 59(2)(a)(ii) of the Act provides that the Minister may make regulations necessary for the effective carrying out of the objects of the Act. That grants the Minister the power to make regulations which will allow for the implementation of those objects by any means not inconsistent with the Act.

205. Applicants cannot for the first time in their reply throw down the gauntlet to the respondents and say they have the *onus* of showing that the regulations do not amend existing legislation, when nowhere in their founding papers do they suggest that the regulations purport to amend legislation.

206. It is trite that an applicant in motion proceedings must make out its case in its founding papers. The application was issued on 20 May 2020 and applicants had ample time to supplement or vary their founding affidavit.

207. For the sake of completeness, I turn to applicants' challenge to the regulations on the ground that they amend existing legislation

208. Applicants raise in their reply that parental rights in terms of section 18(2) of the Children's Act are amended by regulation 17(2) which prohibit movement of a child from one parent's home to another during the lockdown because the regulation requires that parents/caregivers obtain a Magistrate's permission to move the child.

209. The requirement of a Magistrate's permission is merely an additional regulatory function because once a parent can persuade a Magistrate that the child is being moved lawfully, there is no violation on a parent's right of contact with his/her child. What was added by the regulation was a monitoring mechanism to ensure the safety of the movement of children in circumstances where movement of persons *per se* present a danger to people. The regulation does not attempt to amend the Children's Act as the parent would still have to be in possession of a parenting agreement or court order authorising him/her to have the child in his//her care in terms of the Children's Act.

210. Applicants raise for the first time in their reply that regulation 19 suspended evictions in terms of the Prevention of Illegal Eviction from Land ('PIE') Act 19 of 1998 and in terms of the Extension of Security of Tenure ('ESTA') Act 62 of 1997 and therefore regulation 19 was not augmenting existing legislation but varying it.

211. Clearly it was not varying existing legislation but merely suspending the operation of court orders in circumstances where it was just and equitable to do so and where it was necessary that people remain indoors and not be evicted onto the streets with a global pandemic ravaging them. The criteria of just and equitable are built into considerations that a court must make in terms of PIE.

212. Applicants seize upon paragraph 56 of the Minister of CoGTA's answering affidavit to make the point in reply that her approach to the making of regulations was impermissibly broad.

213. Paragraph 56 follows on from paragraphs 54 and 55 of the answering affidavit in which the Minister states that full and perfect knowledge of how SARS-Cov-2 is transmitted was not available and the medical advice at the time, was that the virus spread by droplets expelled when an infected person sneezes, coughs and speaks. She alleges that droplet transmission is more difficult to control than sexual transmission. She was also warned that the virus could survive for several days on surfaces and might be airborne in certain instances, hence she adopted "*broad and general measures to combat any infectious outbreak, namely, improved personal hygiene practices, social distancing, screening and testing which depended on public awareness and compliance*."

214. The Minister does not say that she adopted wide measures that went beyond scientific advice, which she is obliged to consider, on how to contain the spread of the virus. Nor can it be established that those measures imposed at the time were not necessary to contain the spread. Each regulation was designed to convey the seriousness of the consequences of contracting the virus and the need for people to comply immediately and adequately.

215. In arguing for a narrow construction to be placed on the interpretation of the Act, applicants submit in reply for the first time, that the Minister must adopt a

narrow interpretation to the Act as a whole. Reliance is then placed on the case of **Pheko v Ekurheleni Metropolitan Municipality.** [16]

216. The Constitutional Court in **Pheko's** case found that a narrow interpretation must be placed on section 55(2) (d) of the DMA because it expressly provided for evacuation to temporary shelter in order to save lives and not for eviction without a court order. The court said that section 55(2) (d) adversely affects the right to adequate housing and section 26(3) of the Constitution provides that no one will be evicted without a court order so that right to adequate housing is protected.

217. **Pheko's** case did not however determine that the entire DMA must be narrowly interpreted.

218. The narrow approach to the DMA is inconsistent with the purposive approach to interpretation as enunciated in **Endumeni** [17] where the court described the approach to interpretation of contracts and statutes as follows*: " [26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the* ***apparent purpose*** *of the provision and the* ***context*** *in which it occurs will be important guides to the correct interpretation An interpretation will not be given that leads to*

[16] 2012 (2) SA 598 (CC) at [37].
[17] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at [26]

*impractical, unbusinesslike or oppressive consequences or that* ***will stultify the broader operation of the legislation*** *or contract under consideration".* (my emphasis)

219. Applicants' argument that there is no rational connection between compelling people to remain indoors and the objective of containing the spread of the virus is a fallacious one because the science as demonstrated by the expert affidavit of Professor Abdool Karim is that there is no fail-safe in the use of protocols but it is the only known way of attempting to protect people from having contact with the virus. He illustrates that the virus spreads by infected people coming into contact with other people and surfaces. Although based on an *ex post facto* conclusion in South Africa, he showed that by people remaining indoors in large numbers over a protracted period of 5 weeks, the curve was flattened and the spread was contained statistically. He also submitted that lockdown measures were implemented in 86 other countries and that it led to a reduced spread of the virus.

220. Therefore, it cannot be said that there is insufficient relationship between the objectives prescribed by section 27 and the regulations. The means used to contain the spread of the virus are also justified because it was the only known method of containment available at the time and currently there is no guaranteed method of containment free of risks in any event.

221. The respondents have a primary Constitutional obligation to save lives and the DMA does not grant them the election to only do so once they have full and complete knowledge on how to do so.

**Analysis of the objectives of the regulations sought to be impugned**

222. Applicants submit that in making the regulations, the respondent ministers exercise public power and hence their conduct is subject to the principle of legality and accordingly must be consistent with the Constitution, therefore it must be lawful and rational and made for a proper purpose. Respondents agree that the regulation making power of the respondents are subject to the principle of legality.

223. In **Affordable Medicines Trust and Others v Minister of Health and Others** [18], Ncgobo CJ held as follows:

> *"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.*
>
> *. . .*
>
> *The exercise of such power must be rationally related to the purpose for which the power was given.*
>
> *. . .*
>
> *As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere*

[18] 2006 (3) SA 247 (CC) at paras 49, 75 and 77

*simply because it disagrees with it or considers the legislation to be inappropriate."*

224. Applicants rely on the case of **Prinsloo v Van der Linde and Another**[19] for the proposition that substantive rationality requires a relationship between the scheme which is adopted and the achievement of a legitimate purpose. Applicants contend, therefore rationality has both substantive and procedural components.

225. In **Prinsloo**, the court held that: "[35]… *In essence, applicant contended that section 84 lacked rationality because it did not use the least onerous means of achieving its objectives. This approach, however, is based on two misconceptions. First, the applicant is prematurely importing a criterion for justification into a test to be applied at the infringement enquiry (definitional or threshold) stage. The question of whether the legislation could have been tailored in a different and more acceptable way is relevant to the issue of justification, but irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought, for purposes of the present enquiry*."

[19] 1997 (3) SA 1012(CC)

226. **Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others** [20] the court held at [55]:

> " *[55] While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained."*

227. In advancing the argument that a failure to take account of relevant material will result in the means employed being irrational, applicants counsel rely on **Democratic Alliance v President of South Africa and Others.**[21] What the court ultimate clarifies in that case is the following:

> "*[40] I must explain here that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose."*

228. The regulations sought to be impugned are contained in Regulation Gazette No. 43258 dated 29 April 2020.

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[20] 2018 (5) SA 349 (CC)
[21] 2013 (1) SA 248 (CC)

229. The preamble to those regulations contain the statement that they are made in terms of Section 27(2) of the Act and they are made after consultation with the relevant Cabinet Members. Applicants bases for challenging the content of the regulations is because they are allegedly, contradictory and arbitrary.

230. What applicant does to support that contention is to compare the regulations with one another.

231. That is not the test that section 36(1) of the Constitution enjoins courts to apply, which is that the measures adopted must be reasonable and justifiable in an open and democratic society.

232. Applicants merely juxtapose one regulation with another, proceed to draw illogical and unsubstantiated conclusions from that comparison and then attribute those conclusions to the means used by the regulations.

233. The Minister of the DTIC states pointedly that the infection rate among people in shops and malls rose to ten times that in the general population.

234. Applicants reasoning is based on taking up the cause for rights and freedoms of people who can afford to shop for all goods and services; to exercise far away from their homes; to have an occupation/profession; to travel through the country at the expense of people who can’t afford all of the aforementioned and who don’t have access to good nutrition and healthcare

and those who have co-morbidities. The latter category of persons are defined in section 1 of the DMA as those with vulnerabilities.

235. Many vulnerable people work in the goods and services sector to provide for the needs and wants of those who wish to go out to shops and malls. Those are the people who often have to take public transport, such as taxis, who live in crowded townships where physical distancing is not always possible and who now risk their lives to pack store shelves in close proximity to shoppers in order to replenish goods bought and sold and who generally tend to the needs of shoppers.

236. I now proceed to analyse the means used to attain the common objective of curbing and managing the movement of people in order to contain the spread of the virus.

237. Regulation 16(1) confines people to their homes. At the time, its purpose was to protect lives by curbing the spread of the virus and it did so by minimising contact among people who didn't live together.

238. Regulation 16(2) lists circumstances in which people could leave their homes. It achieves the same objective as that for regulation 16(1) but provides exceptions to Regulation 16(1) to enable people to obtain money; to obtain food; to seek medical assistance; to exercise contact with their children and to exercise within limited hours so that the effect of curbing movement and consequently the spread of the virus is not negated by people exercising

throughout the day. The relaxation of Regulation 16(1) by providing for exceptions in Regulation 16 (2) do not detract from the purpose of Regulation 16(1) nor does it render 16(1) nugatory and ineffectual.

239. Regulation 16(3) imposes a curfew. Once again, the primary objective to contain the spread of the virus and save lives is through limiting the movement of people and therefore a curfew is rationally connected to that purpose.

240. Regulation 16 (4) allowed for movement of people to other provinces and metropolitan areas only in circumstances of performing an essential service, attending a funeral of a relative or transporting mortal remains.

241. The purpose is clearly to contain the spread of the virus from one area/ region/ municipality and province to another so that the health care system in each area can cope with the outbreak it has to contend with before it is overwhelmed and so that contact tracing and its accompanying quarantine measures can be more readily undertaken.

242. Applicants argue that the relaxation on the ban on movement to other areas demonstrates that a ban on movement in totality is unnecessary.

243. However if the relaxation or exception is intended to achieve the purpose of containing movement and permitting it only in necessary situations, for example, where other people require the services of the person permitted to leave the area of his/her residence or where he/she can demonstrate that

he/she is a relative of a deceased and wished to attend the burial or move mortal remains, then it has a rational link to its purpose.

244. In those instances, the relaxation on the ban of movement does not negate the ban. For example, a deceased is not in the same position as a living person with regard to likelihood of transmission of the virus. A deceased person can't sneeze, cough, talk, splutter and emit droplets that can infect those close to the body or mortal remains. A living person however has the potential to spread the virus more rapidly by those means.

245. However, applicants also claim that the purpose of the regulations ought to be narrowly construed in the terms set out in section 27(3) of the Act, namely, to (i) assist, protect and relieve the public; (ii) protect property and prevent disruption; or (iii) deal with the disaster's effects. The three objectives in section 27(3) are themselves framed widely and not specifically.

246. The DMA goes further than the express objects listed in section 27 (3), when in section 59(1)(a)(ii), it provides that the Minister may make regulations not inconsistent with it but that is *necessary* to prescribe for the effective carrying out of the objects of the Act. That provision effectively authorises ancillary issues not expressly stated in the Act but which are necessary to achieve the implementation of those objects, also to be regulated on.

247. The provisions of section 59(1)(a)(ii) do not support the contention that a narrow construction must be placed on section 27(3). It is an implementation

provision that grants the Minister the power to make regulations necessary to ensure that the section 27(3) objectives are enforced.

248. The Act itself makes it a criminal offence to refuse to provide information requested in terms of its provisions and provides in section 59(3) that regulations made under it may prescribe a penalty of imprisonment for no more than 6 months or a fine.

249. Enforcement of the regulations would be ineffectual if there was no penal provision. If people are compelled to abide the regulations designed to save lives under threat of criminal prosecution, then the penalty is proportional to the purpose, namely saving lives. To hold otherwise, is to grant licence to act negligently and/or recklessly in infecting people.

250. Despite Applicants' purported narrow approach to the interpretation of regulation making power in the DMA, they have no qualms about accepting the objective of limiting the spread of Covid-19 through health and hygiene measures that afford the health care system an opportunity to become more available to those infected with Covid-19 even though section 27(3) does not expressly refer to the health care system or hygiene and health measures. Applicant's argument on a narrow restrictive interpretation to regulation making contradicts its acceptance of the necessity for the initial lockdown and protocol measures.

251. I am satisfied that the regulations are justified and it is conceptually not possible to interpret the objectives of protect and relieve; prevent disruption and deal with the effects of a novel global pandemic which is transmitted by means of droplets when people cough, sneeze, talk and even exhale in circumstances where the virus has no cure, no adequate treatment, no guaranteed prevention, in narrower terms than the respondents have. Furthermore, the virus has resulted in huge numbers of lives lost prematurely and unduly.

252. The construction of the Act makes perfect sense because it contemplates a situation of national disaster, where regulations have to be made to give effect to containment of the harm caused by a national disaster. Implementation thereof would invariably have to be made briskly, in circumstances where the declaration is not of permanent duration but initially for 3 months.

253. The minister's approach to regulation making under the DMA, has to be in conformity with the purposive and contextual approach to interpretation of the statute. Once she correctly interpreted the purpose of the regulations as granting her the power to use necessary means to manage the national disaster, in this instance, the rapid spread of Covid-19, as well as to manage the consequences that result from the disaster, her approach to regulation making was lawful and in compliance with the Constitution. Therefore, the narrow approach to regulation making which applicants seek to place upon the minister in this instance, operate to limit government's ability to establish

measures necessary to contain the spread of the virus and those required to address consequences that result from the disaster and its management.

254. I accept that the measures do not satisfy everyone and there is a great deal of criticism levelled against them. The inconvenience and discontent that the regulations have caused the applicants and others have to be weighed against the urgent objective and primary Constitutional duty to save lives. That is the nature of the proportionality exercise which government has had to embark upon.

255. As the Minister of CoGTA states, it involved issues of high policy that have to be made in a polycentric manner. It is not for the Courts to prescribe to government how it should exercise its mandate in those circumstances.

256. I am satisfied that not only is the rational link between the measures and its purpose explained in the answering affidavits of the Ministers of CoGTA and the DTIC as well as the expert affidavit but it is also self-evident from the content of the regulations themselves, properly construed in its context.

257. I cannot conceive of an argument by applicant which is more destructive of their assertion that they bring this application in terms of section 38(d) of the Constitution, namely, that they act in the public interest than their argument that Regulation 19 suspending execution of eviction orders, serve to amend existing legislation and is therefore unlawful. It follows from this contention of

applicants that they want orders for eviction of people during the lockdown to be executed, despite the devastating consequences thereof in a pandemic.

258. For the reasons set out herein, I am not persuaded that applicants are entitled to any of the relief they seek.

259. Ordinarily costs should follow the result but in having regard to the Biowatch principle as well as the concessions that respondents make concerning confusion caused by statements on the role and powers of the NCCC, and applicants' conduct in having cast the ambit of their relief widely, I am of the view that each party should bear its own costs.

**IT IS ORDERED THAT:**

1. The application is dismissed;
2. Each party is ordered to pay his/her own costs.

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**JUDGE R. ALLIE**

**BAARTMAN, J:**

I agree.

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**JUDGE E.D. BAARTMAN**

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|---|---|
| ***Counsel for 1st – 7th Applicant:*** | *Adv Anton Katz SC* |
| | *Adv Kessler Perumalsamy* |
| ***Counsel for 8th Applicant:*** | *Adv Vuyani Ngalwana SC* |
| | *Adv Erin Richards* |
| | *Adv Farzanah Karachi* |
| ***Instructed by:*** | *Adriaans Attorneys* |
| | *Ref: Ashley Adriaans* |
| | *Ref: Dominique Dirks* |
| | *Ref: Zeandré Oliver* |
| ***Counsel for 1st – 8th Resp:*** | *Adv Moerane SC* |
| | *Adv Ngwako Hamilton Maenetje SC* |
| | *Adv Dave Watson* |
| | *Adv Nyoko Muvangua* |
| ***Instructed by:*** | *State Attorney* |
| | *Ref: Emil Scharf* |