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

Case No: 10996/2021

In the matter between:

THE SOUTH AFRICAN BREWERIES (PTY) LTD Applicant

and

THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS First Respondent

THE MINISTER OF TRADE, INDUSTRY AND COMPETITION Second Respondent

Date of hearing: 9 July 2021 via virtual platform on MS Teams
Date of Judgment: 22 July 2021 (delivered by email to the parties' legal representatives. The Judgment shall be deemed to have been handed down at 16h00.)

JUDGMENT

Henney, J:

Introduction and background

[1] This matter is concerned with the scope of the first respondent's, the Minister of Corporative Governance and Traditional Affairs ("the Minister"), powers to make regulations in terms of section 27(2) the Disaster Management Act 57 of 2002 ("the

DMA"), and the nature and origin of such powers. The last mentioned issue relates to the question whether such powers reside within the realm of executive action or administrative action.

[2] The applicant ("the SAB") is aggrieved with the decision taken by the Minister on 27 June 2021 in making regulations to suspend and limit the sale, dispensing or transportation of alcoholic beverages, which led to a total prohibition on the sale and dispensing of alcoholic beverages as from the mentioned date. This led to the SAB seeking relief from this court, on an urgent basis, to have the decision which resulted in the Minister making the impugned regulations reviewed and set aside. In these proceedings the SAB does not take issue with the underlying reasons, and the rationale, for the Minister making the regulations in respect of the sale and distribution of alcoholic beverages.

[3] Subsequent to the novel coronavirus ("Covid 19") arriving on our shores in March 2020, a national state of disaster was declared on 15 March 2020. With the escalation of infections in this country it resulted in the country being placed under a so–called "hard lockdown" on 26 March 2020, termed the Level 5 lockdown, because the pandemic posed an unprecedented health risk to the lives and health of everyone living in South Africa, and across the world.

[4] Various adjustments of the lockdown levels followed - from the highest and most restrictive, which is level 5, to the lowest and least restrictive, level 1 - when the circumstances relating to the levels of infection of Covid 19 that prevailed at the given time, justified such adjustments. This in turn led to either a tempering or an intensification of the impact and consequences of these regulations.

[5] During each level the restrictions are adjusted by means of regulations, the most important of which is in relation to the movement of persons, the operation of certain businesses and hours of operation and, particularly relevant in this case, the intensification or moderation of the impact of the regulations in respect of the sale, dispensing, distribution or transportation of alcoholic beverages. As her reasons for the necessity of the impugned regulation, the Minister states, *inter alia*, in her answering affidavit, that certain restrictive measures (such as a temporary suspension) have been necessary at different stages of the pandemic depending,

inter alia, on the rate of new infections, the rate of hospitalisations, the capacity of the healthcare system, and its ability to cope.

[6] The underlying imperative, according to the Minister, has been to ensure that the health system does not become overwhelmed and that as a result lives are not lost unnecessarily; the government has been fully alive to the fact that measures such as the temporary suspension have come at a significant financial cost to those working and operating in the affected sectors, but notwithstanding that, measures such as the temporary suspension have been necessary to ensure the capacity of the healthcare system to deliver healthcare services to those in need thereof, and in so doing to avoid any unnecessary loss of lives.

[7] Cabinet, as was in the case in December 2020/January 2021, is alive to the fact that the temporary suspension would once again affect livelihoods in certain sectors of the economy, and they recognise that the liquor industry is a major employer and an important contributor to the South African economy. They realise that some sectors would be affected more greatly than others, particularly so in the context of what is known about the Delta variant, which brings about increased transmissibility. A balancing exercise is required, which is directed at saving lives and ensuring capacity in the healthcare system moving forward.

[8] The government realised that when the decision was made to impose the suspension, contained in the impugned regulation which forms the subject of these proceedings[1], the healthcare infrastructure of some more economically advanced and better-resourced countries, when faced with similar challenges, had reached critical or near breaking point, and that based on these experiences of what happened in other countries and how they coped with the new variants of Covid 19 the government on the advice rendered by scientists from South Africa and other medical experts adapted certain measures to mitigate the number of Covid 19 related deaths and to ensure continued access to healthcare services.

[9] The government's underlying objective is to ensure that no person who needs medical assistance is turned away from healthcare facilities, for the reason that the system does not have the capacity to provide such assistance. Unless this approach

[1] Reg 29(1) of the current regulation states the following: 'The sale, dispensing and distribution of liquor is prohibited.'

is followed Covid 19 will, on account of an overburdened healthcare system, kill people in South African in more significant numbers and potentially leave hundreds of thousands of others impacted and permanently affected. In particular, the impugned regulation resulting in suspension and limitation of the sale and distribution of alcohol in terms of regulation 29 of the Regulations issued in terms of Government Notice No. R 565 and the Government Gazette for 4772 dated of 27June 2021[2], is centrally aimed at achieving the ultimate objective of increasing the capacity of the healthcare system, through a reduction in the number of alcohol-related trauma and emergency cases.

[10] These measures also decrease the likelihood of transmissions, because of the social aspect of liquor consumption and an associated decrease in inhibition, which may translate into an increase in risky behaviour, which in relation to Covid 19 involves not adhering to social distancing, mask wearing and regular hand washing/sanitising rules. Based on the best available information at their disposal at the time, and in the prevailing circumstances, the difficult decision had to be taken to impose the temporary suspension as detailed in the impugned regulation. The failure to do so (in the face of an exponential increase in the number of overnight infections and increased transmissibility of the Delta variant) could result in the virus spiralling out of manageable control, unimaginably desecrating our healthcare service and leading to a devastating (and preventable) loss of life, with a further direct indirect and direct impact on the economy.

[11] According to the Minister the impugned regulation is permissible, sanctioned by and indeed necessary under the current legal framework. In particular, it is necessary, firstly, to alleviate the impact and effects of the pandemic. Secondly, to prevent the escalation thereof. Thirdly, to alleviate, contain and minimise as best possible the effects of the pandemic. And lastly, to assist and protect everyone in South Africa by providing relief to the public, preventing and combating the myriad of disruptions caused by the pandemic, whilst also dealing with the fallout caused by the pandemic at every level of government in relation to every aspect of governance.

The relief

[2] At the time of writing this judgment, 3 days after the hearing of this application on 11 July 2021, some of these regulations were amended, but it is unrelated to the regulation under scrutiny in this application, and will have no bearing on the outcome of this application.

[12] The relief the SAB is seeking in this matter, is that it be declared that regulation 29 of the Regulations published by the first respondent under section 27(2) of the DMA, in Notice 565 on 27 June 2021, be declared unlawful and invalid and that it be reviewed and set aside. This case is concerned with the extent of the Minister's powers, in terms of section 27 of the DMA, to make regulations to suspend or limit the sale, dispensing or transportation of alcoholic beverages during the disaster. The Minister opposes the application on the following grounds:

1) that the application is not urgent;

2) that she did not act *ultra vires* when she made the regulations and that the regulations are in conformity with the provisions of sections 26(2) and 27(2)(i) of the DMA and the Constitution.

3) that she had adequately consulted with all the stakeholders, between 15 June 2021 and 27 June 2021, before she made the impugned regulation; alternatively, that the exigencies brought about by the rapid rate of the spread of the infection brought about by the Delta variant, justified the lack of full and proper consultation with all the stakeholders, including the SAB;

4) that it is improper to challenge the rule-making powers of the Minister in terms of the provisions of the Promotion of Access to Administrative Justice Act 3 of 2000 ("PAJA"); alternatively that it was administrative action susceptible for review based on the principle of legality.

Urgency

[13] I think it would be appropriate at this stage to deal with the question whether this matter justified a hearing on an urgent basis, in terms of the provisions of Rule 6(12) of the Uniform rules of Court. The Minister, in contending that these proceedings are not urgent, states that regulations limiting and suspending the sale of alcohol had been in force since March 2020, and the SAB at no stage until the regulations promulgated on 29 December 2020[3] sought to challenge the lawfulness of such regulations. In respect of the December 2020 regulations, which no longer exist, there is pending litigation, aimed at having the alcohol suspension under those

[3] Government Gazette number 44044, Notice number R1432, dated 29 December 2020.

regulations declared unlawful and of no force and effect.

[14] This application was not pursued expeditiously by the SAB and subsequent to the lifting of the temporary suspension, little effort has been made to date to have its application adjudicated. Now on top of that pending application, the SAB brings an application on an extremely urgent basis, with limited notice to the respondents, seeking in essence the same relief as it seeks in the pending application. In this application the SAB only advances its own commercial interests and pays little regard to the factual context in which it seeks relief. The SAB, in countering this argument, refers to what the Minister stated in her answering affidavit[4] regarding the proceedings in the pending application:

'It was explained in my answering affidavit in the pending application that that application is moot, because at the time of filing the answering affidavit there in, the alcohol suspension had been lifted; and that any further suspension would be determined on the relevant facts at that point in time and would accordingly need to be challenged and adjudicated on those new facts. This is exactly what has now occurred with the Delta variant. South Africa also in a different position than it was a year ago relation to how to deal with the pandemic.'

[15] I agree with Mr. Campbell, who appeared together with Mr. Cockrell for the SAB, that, based on the position the Minister had taken in the pending proceedings, notwithstanding their persistence to proceed with the pending application, that it does not behove the Minister in these proceedings to raise the point that, due to the pending proceedings, they are not entitled to institute these proceedings afresh, on an urgent basis. Ordinarily though, a court would not permit a party to adopt such a procedure. It is well-established that a party's failure to institute proceedings on an issue that existed, and of which that party may have been aware for some time, would make it difficult for such a party to have that issue adjudicated on an urgent basis.[5]

[16] There are exceptions to this general rule, especially in cases where there is an ongoing violation of rights of persons notwithstanding their delay in bringing the application.[6] Van der Westhuizen J, at 462H-463B, said the following on this

[4] Para 185 page 154 of the answering affidavit in these proceedings.
[5] *Schweizer Reneke Vleismaatskappy (Edms.) Bpk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T).
[6] *Prinsloo v RCP Media Ltd t/a RAPPORT* 2003 (4) SA 456 (T).

particular point:

'This matter came before me as one of urgency. The urgency was opposed by counsel on behalf of the respondent. I found the matter to be urgent indeed for the following reasons:

The applicant alleges that the dignity and privacy of himself and Ms Prinsloo are violated on an ongoing basis, because of the intimate sexual nature of the images in the possession of the respondent. Dignity and privacy are important constitutionally recognised fundamental rights, to which I later return. On the assumption that the applicant's case may indeed have merit (without deciding that point at the moment) I am of the view that the violation of an individual's privacy and dignity in a manner as alleged in this case, namely by the possession by another of photographic material of a sexual and highly intimate nature, creates a degree of urgency which is at least sufficient to justify a ruling that the matter not be struck off the roll and therefore have to wait for a court date three or four months further into the future. An applicant in a situation such as the one which allegedly prevails here cannot be expected to endure the anxiety and embarrassment of a continued violation of his or her privacy, which directly relates to one's human dignity.'

[17] Similarly, in my view, in this particular case the SAB, and other entities and persons associated with the business conducted by the SAB, are suffering on an ongoing basis, which results in the violation of their rights. The mere fact that the regulations prohibiting the sale, distribution and dispensing of alcoholic beverages has been in place for some time, and the fact that they are involved in pending litigation regarding the regulations that were made in December 2020, does not make their case less serious or undeserving to be heard on an urgent basis.

[18] The Minister herself recognises that the circumstances that currently exist in the country are totally different from the circumstances under which previous regulations were issued. Also that given the uncertainty and unpredictability of the virus and its various strains, there exists some uncertainty as to what effect the regulations would have, not only the SAB, but also on other businesses and persons living in this country affected by the regulations at any given time. The uncertainty and unpredictability about the prohibition of the sale, dispensing or distribution of alcoholic beverages existed throughout since the inception of the state of disaster, in March 2020.

[19] In some instances there was a total prohibition, and in other instances there were certain limitations with respect to the hours and days of operation, for example under Government Notice 659, Government Gazette 43364 of 28 May 2020, where the so-called alcohol suspension was eased and the sale of liquor at any licensed premises, or through e-commerce delivery, was permitted from Monday to Thursday between 9:00 and 17:00 hours. This changed once again under alert level 3, in Government Notice 763, Government Gazette 43521 of 12 July 2020. Under Government Gazette 43725 dated 18 September 2020, under alert level 1, the normal trading hours were restored for the sale of alcohol at retail outlets, and this lasted until 29 December 2020. Thereafter, until 15 June 2021, the country was operating under alert level 1, and no restrictions were placed on the sale, dispensing, distribution and transportation of alcoholic beverages.

[20] It is understandable given the circumstances, and the uncertainty that existed with regards to the sale, dispensing, distribution and transportation of alcoholic beverages, that the SAB and other parties did not enthusiastically pursue litigation against the government. I do not think the Minister, in my view having realised the impact that the regulation suspending or limiting the sale, distribution and transportation of alcoholic beverages would have on the industry and also the livelihoods of people affected, thereby cannot possibly view the matter as urgent. Further, it seems that all of us, including the Minister and the government, up to 24 hours before the president announced that the country would be adjusted to alert level 4, were unaware of what impact the Delta variant would have on the spread of infections in the country, especially during the third wave.

[21] Whilst the SAB might have brought this application to promote their commercial and own self-interest, and not merely for the interests of the industry or society at large, that does not mean that the court cannot view it as urgent. They are, in my view, entitled to do so and I agree with Mr. Campbell that it is well-established that where a party acts in its own commercial interests, such a party is justified in bringing such an application on an urgent basis.[7]

[22] In *Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd*, Goldstone J, at 586E, thus said:

[7] 1982 (3) SA 582 (W).

'The respondent's counsel submitted that there was no urgency in the absence of some serious threat to life or liberty and that the only urgency here was of a commercial nature. It was because of this factor that the applicants' attorney in fact decided to set the matter down on a Tuesday when the Chamber Court was in any event in session during the Court recess to dispose of unopposed applications. In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicants' case was a good one and that the respondent was unlawfully infringing the applicants' copyright in the films in question.'

[23] This is especially so in circumstances such as we find ourselves in, as a result of the disastrous effect the pandemic has had on the economic interests and livelihoods of people such as the SAB in this case. In my view, for all of these reasons mentioned, the SAB was justified in bringing this application on an urgent basis, because not only were their own rights and economic interests under threat, but also those of other entities like themselves that operate in the same environment, as well as ordinary members of the public whose livelihoods are dependent on the industry within which the SAB operates.

Does the Minister's power to make regulations amount to administrative action in terms of PAJA?

[24] It will also be very convenient at this stage to deal with the question as to whether the Minister's regulation-making powers falls within the sphere of her executive functions, or whether it constitutes administrative action in terms PAJA. There is no uncertainty in my mind that this issue was adequately settled by Plasket JA in *Esau v Minister of Corporative Governance and Traditional Affairs*[8], despite the Minister's insistence that her powers to make regulations constitutes executive action.

In Esau, para 83, Plasket JA said:

'In this court . . . in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*, Maya JA, with reference to the *New Clicks* judgment, stated that she agreed with "the applicant's contention that the making of regulations by a Minister constitutes administrative

[8] 2021 (3) 593 (SCA).

action within the meaning of [PAJA]". So, too, in *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others*. Gorven J, after referring to Chaskalson CJ's judgment in *New Clicks* to the effect that, properly construed, rule-making fell within the ambit of administrative action in terms of s 33, concluded that this "being the case, in this matter the actions of the third respondent, who does not have original legislative powers, but is akin to a functionary with powers vested in him by the Act, are subject to review" and that "his actions are characterised as legislative administrative action and are reviewable under PAJA".'

Plasket JA continues, para 84:

'Although the respondents asserted that regulation-making was not administrative action, they put forward no argument why this was so. They never took issue with the finding to the contrary in this court in *City of Tshwane*, or with the reasoning in *New Clicks*, set out above, upon which it was based. I am aware of judgments, including in this court, in which misgivings have been expressed on the issue. This case is not, however, the correct case to explore whether those misgivings have any merit. We, of course, are bound by the finding in *City of Tshwane* unless we are convinced that it is clearly wrong. No attempt was made by the respondents to convince us of that.'

This court is clearly bound by this decision and regards the regulation-making function of the Minister as administrative action in terms of PAJA.

The applicable legislative provisions

[25] I have already referred to the impugned regulations which is regulation 29(1) above[9]. I will now set out the legislative provisions relevant to these proceedings. These are certain provisions of the DMA and, in particular regulation 29 of the regulations, as referred to above.

'26. Responsibilities in event of national disaster. —

(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—

[9] FN 1.

(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.

(3) . . .

27. Declaration of national state of disaster.—

(1) In the event of a national disaster, the Minister may, by notice in the *Gazette*, declare a national state of disaster if—

(a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or

(b) other special circumstances warrant the declaration of a national state of disaster.

(2) 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—

(a) the release of any available resources of the 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 in the circumstances;

(d) the evacuation to temporary shelters of all or part of the population from the 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 the movement of persons and goods to, from or within the disaster-stricken or threatened area;

(g) the control and 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 communication 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.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—

(a) assisting and protecting the public;

(b) providing relief to the public;

(c) protecting property;

(d) preventing or combating disruption; or

(e) dealing with the destructive and other effects of the disaster.

(4) Regulations made in terms of subsection (2) may include regulations prescribing penalties for any contravention of the regulations.

(5) A national state of disaster that has been declared in terms of subsection (1)—

(a) lapses three months after it has been declared;

(b) may be terminated by the Minister by notice in the *Gazette* before it lapses in terms of paragraph (a); and

(c) may be extended by the Minister by notice in the *Gazette* for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire.'

[26] Before dealing with the particular grounds upon which the SAB submits that regulation 29 is *ultra vires*, it would be best to deal with the comparison made by SAB between the consequences of the rights of persons affected under a state of emergency and that in a state of disaster with particular reference to the impugned regulations. The SAB submits that in a state emergency, declared in terms of section 37(1)[10] of the Constitution, section 37(2) clearly sets out the consequences regarding the effect of legislation or action taken during a state of emergency, and the powers of the courts to decide on the validity of such legislation or action. Furthermore, section 37(5)(b) and (c) determines which rights may not be derogated from, either by an act of Parliament or action as a consequence of a declaration of a state of emergency. The SAB argues that having regard to these provisions of the Constitution, in dealing with a state of emergency, the regulation dealing with the so-called alcohol ban had not been laid before the National Assembly for approval or extension, as required in a state of emergency under section 37(2)(a). As a

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[10] '(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when-
(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
(b) the declaration is necessary to restore peace and order.
(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only-
(a) . . .
(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.
(3) Any competent court may decide on the validity of-
(a) . . .
(b) . . .
(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that-
(a) the derogation is strictly required by the emergency; and
(b) the legislation-
(i) is consistent with the Republic's obligations under international law applicable to states of emergency;
(ii) conforms to subsection (5); and
(iii) . . .
(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise-
(a) indemnifying the state, or any person, in respect of any unlawful act;
(b) any derogation from this section; or
(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.'

consequence, fundamental and other rights have been attenuated in a manner the Constitution does not authorise.

[27] The SAB further contends that the Constitution recognises no other situation, other than a state of emergency, whereby ordinary laws and the rights enjoyed by citizens and inhabitants of South Africa can be attenuated. They therefore submit that if the DMA is to be read as constitutionally compliant, it must be read as not conferring powers upon the Minister that would only be constitutionally permissible under section 37 of the Constitution.

[28] Whilst the SAB has persistently characterised its case as not being based on a full frontal constitutional challenge, either against the DMA, and in particular section 27(2), or the regulations, these submissions, in my view, seem to be a veiled challenge on the constitutionality thereof. In my view, what the SAB contends is that the DMA, as a result of section 27(2)(i), which gives the Minister the power to make regulations to, *inter alia*, suspend or limit the sale of alcohol and, by implication, suspend or limit certain rights, is in effect unconstitutional.

[29] In these proceedings, there is no dispute that section 27(2) of the DMA gives the Minister the power to make regulations to, *inter alia*, suspend or limit the sale of alcohol. In my understanding of section 27(2) it clearly envisages a limitation or attenuation of a number of rights as contained in the Bill of Rights and, without deciding the issue in particular, the right of the SAB, in terms of section 22, to practice its trade, which includes its rights to manufacture, dispense, distribute and sell alcoholic beverages freely.[11]

To this extent, these submissions of the SAB clearly amount to a veiled challenge to the constitutionality of the DMA, more particularly, section 27(2)(i), and regulation 29 promulgated by the Minister as a consequence thereof. Whilst these submissions were made, I have, however, not been asked to adjudicate a dispute dealing with the constitutionality of the DMA, section 27(2)(i) or regulation 29. I will therefore, for the purpose of this judgment, deal with these provisions on the basis that they are constitutionally compliant despite these submissions. It is in any event not framed as part of the relief that the SAB sought in this application.

[11] See paras [119] and [121] of Esau (supra) (SCA Judgment)

The SAB's case

[30] The SAB submits that the impugned regulation constitutes unlawful administrative action, and that the regulation falls to be reviewed and set aside. They submit that the Minister's power to regulate the sale, dispensing or transportation of alcoholic beverages, does not include the power to impose a wholesale prohibition of the kind contained in the impugned regulation. They contend that the impugned regulation is therefore *ultra vires* to the Minister's powers. Mr. Cockrell submits these the regulation is *ultra vires* on the following grounds: firstly, regulation 29 operates indefinitely, unlike other provisions in the regulations that are stipulated to come to an end on 11 July 2021. He submits that according to the Minister, the alcohol ban was approved by the Cabinet (which also functions as the National Coronavirus Command Council).

[31] The affidavit of Minister Patel (the second respondent), however, states that the Cabinet decided 'on the suspension of alcohol sales for a two-week period.' He explained that the Cabinet decided that the measures 'would not be open ended as was the case during the first wave in 2020'. This was also what the President stated when he announced the alcohol ban on 27 June 2021. Regulation 29 therefore fails to give effect to the decision of the Cabinet, because it operates indefinitely and not only for two weeks. The SAB contends that for this reason alone regulation 29 is *ultra vires*. Secondly, the SAB submits that regulation 29 does not 'suspend' or 'limit' the sale of alcohol. Section 27(2)(i) of the DMA deals specifically with alcohol and in accordance with the maximum *generalia specialibus non derogant*, the Minister cannot rely on the more general provisions of section 27(2), when it comes to regulating the sale of alcohol.

[32] Section 27(2)(i) provides that the Minister may make regulations concerning the 'suspension' or the 'limiting' of the 'sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area'. The SAB submits that this must be read with section 26(2)(b), which provides that the 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)'. According to them the ordinary meaning of 'augment' is 'to add to'. In this regard they rely on the decision of *Esau and others v Minister of Co-operative Governance and Traditional Affairs and others*[12]. They contend that section 26(2)(b) therefore means that regulations may add to existing legislation, but that it does not authorise the making of regulations that subtract from existing legislation. This argument, they contend, equally applies to 'suspension' as envisaged in section 27(2)(i).

[33] According the SAB regulation 29(1) does not 'limit' the sale, dispensing or transportation of alcoholic beverages. On the contrary, it prohibits those activities altogether. To 'limit' an activity means to impose restrictions on the activity, not to prevent the activity from being performed at all. They further contend that regulation 29(1) does not 'suspend' the sale, dispensing or transportation of alcoholic beverages. They say so for the following reasons:

1) Regulation 29 does not purport to suspend anything. It uses the language of prohibition and not the language of suspension;

2) A 'suspension' means a temporary cessation, and the Minister correctly accepts that the suspension must be 'of a temporary nature'. Regulation 29 contains no end date. The SAB therefore submits an activity 'is not suspended' if it is prohibited indefinitely. Cabinet approved the alcohol ban for two weeks, but this is not reflected in the wording of regulation 29. They contend that an indefinite prohibition is permanent unless it is lifted;

3) they submit that section 27(2)(i) gets its colour from section 26(2)(b), which refers to the augmenting of existing legislation, and existing legislation is not augmented when it is non-operational.

[34] They therefore contend that the Minister's power to regulate the sale, dispensing or transportation of alcoholic beverages, does not include the power to impose a wholesale and indefinite prohibition of the kind contained in regulation 29. It is neither a 'suspension' nor a 'limiting' of the 'sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area'. They further submit,

[12] (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020) para 201, where it was stated that to 'augment means to widen and give more value to.'

relying on the judgment of Didcott and Hoexter in *S v Perumal*[13]*,* that 'the power to regulate an activity by subordinate legislation does not normally include the power to ban it, either entirely or substantially.'

[35] The *Perumal* decision referred to *Williams*[14], where Appellate Division held that "trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.' They also rely on the decision of Telkom SA SOC Ltd v Cape Town (City) and another[15] where it was said that 'where a power to regulate is given, it may not be used to prohibit, either in whole or in substantial measure, the activity in question.'

[36] The SAB therefore contends that regulation 29 is *ultra vires* the Minister's powers, and the decision to make regulation 29 should be reviewed and set aside in terms of section 6(2)(a)(i) of PAJA. Thirdly, regulation 29 is *ultra vires* because it is inconsistent with existing legislation. In particular, inconsistent with national and provincial legislation, because different considerations apply in each case.

[37] Regarding national legislation, the Liquor Act 59 of 2003 ("the Liquor Act") is legislation that was enacted by Parliament for the entire country. It provides that subject to conditions, a manufacturer (such as the SAB) may distribute the liquor it has manufactured to another manufacturer, to a distributor and to a retail seller in terms of section 4(3).

[38] They submit that to the extent that regulation 29 prohibits the 'distribution' of liquor indefinitely, it is inconsistent with the Liquor Act. That is because regulation 29 prohibits a manufacturer (such as the SAB) from performing the very activity that the Liquor Act authorises the manufacturer to perform, namely to distribute liquor. The Minister, the SAB submits, is wrong in her contention that regulation 29 does not override legislation, because it takes away the rights that are conferred by the Liquor Act.

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[13] [1977] 1 All SA 567 (N) at 569.
[14] R v Williams 1914 AD 460.
[15] 2020 (1) SA 514 (SCA) para 49.

[39] Section 27(2) all the DMA does not confer on the Minister the power to make regulations that are inconsistent with legislation enacted by Parliament (such as the Liquor Act). Further, that Parliament could not empower the Minister to make delegated legislation that is inconsistent with the legislation of Parliament itself. They reiterate that section 26(2)(b) of the DMA refers to the augmenting of existing legislation by regulations made in terms of section 27(2), and once again they argue that to augment means to add to and not to subtract from.

[40] According to the SAB, it is wrong for the Minister to argue that, because it did not challenge the constitutionality of section 27(2)(i) of the DMA, the SAB cannot adopt such a position. This is because section 27(2)(i) of the DMA would be unconstitutional if it purported to confer on the Minister the power to make regulations that are inconsistent with national legislation. They submit that in accordance with well-established authority[16], section 27(2)(i) should be interpreted in a manner that preserves its constitutionality. Section 27(2)(i) should be interpreted as not to empower the Minister to make regulations that are inconsistent with an act of Parliament.

[41] In this regard, the applicant relies on *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs*[17], where the full court of the Gauteng Division, contrary to the view held by this court in *BATSA*[18], was of the view that nowhere in the Act does it give the Minister the power to amend or repeal existing legislation. The Minister only has the power to augment existing legislation and contingency arrangements. The applicant submits that this court should follow the reasoning in *Democratic Alliance*. According to them, regulation 29(1) is *ultra vires* to the extent that it prohibits the distribution of liquor, because the Minister has no competence in law to prohibit an activity that is permitted by the Liquor Act.

[42] Regarding regulation 29(1)'s inconsistency with provincial legislation, they submit that provincial legislation in all nine provinces authorise the sale of liquor by persons who are in possession of the appropriate licenses, issued by the provincial

[16] Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In Re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others 2001 (1) SA 545 (CC) para 23.
[17] 2021 JDR 0780 (GP) para 41.
[18] *British American Tobacco South Africa (Pty) Ltd and others v Minister of Co-operative Governance and Traditional Affairs and others* [2020] ZAWCHC 180 (11 December 2020).

licensing authorities. Regulation 29(1) now prohibits those licensees from performing the very activity that the provincial legislation authorises, which is to sell liquor. To the extent therefore that regulation 29 prohibits the sale of liquor, the applicant contends it is inconsistent with provincial legislation.

[43] In this regard, they argued that Schedule 5 to the Constitution lists 'liquor licenses' as a functional area of exclusive provincial competence. This issue was already considered by the Constitutional Court in *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill*[19], where the court held that the term 'liquor licenses' encompasses the grant or refusal of permission to sell liquor, the imposition of conditions relevant to that permission, and the collection of revenue attached to the grant of such permission. In this regard they submit that the Constitutional Court held that the regulation of the retail sale of liquor resides with in the exclusive power of the provinces, under the functional area of 'liquor licenses' in Schedule 5 of the Constitution. Parliament may generally not legislate on those matters, and may only do so under its power of intervention in terms of section 44(2) of the Constitution, when it is necessary for the limited purpose sanctioned by that section.

[44] Section 44(2) of the Constitution provides that 'Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary' for one or more of the purposes listed in paragraphs (a) to (e). In this particular case it is the Minister, and not Parliament, that has purported to intrude into the functional area of liquor licenses by making regulation 29, which the Minister, in terms of section 44 of the Constitution, has no competence to do. The Constitution does not empower the Minister to deal with a matter listed in Schedule 5, it is only Parliament that may do so.

[45] The SAB disagrees with the Minister that, in the absence of a frontal challenge to the constitutionality of section 27(2)(i) of the DMA, this argument does not avail in these proceedings. They submit that the frontal challenge is not required, because section 44(2) of the Constitution does not allow Parliament to delegate to the Minister the power to make legislation of the sort referred to in that

[19] 2000 (1) SA 732 (CC).

section. Also, that section 27(2)(i) should be interpreted in a manner that preserves its constitutionality. The SAB contends that section 150 of the Constitution requires a court to prefer any reasonable interpretation of legislation that would avoid a conflict between national and provincial legislation. Section 27(2)(i) should therefore be interpreted as not empowering the Minister to exercise a power that is foreclosed by the Constitution itself.

[46] The SAB does not agree with the Minister's contention that the DMA should be classified as dealing with the functional area 'disaster management' (which is listed in Schedule 4 of the Constitution), rather than the functional area 'liquor licenses' (which is listed in Schedule 5). They contend therefore that regulation 29(1) is *ultra vires* to the extent that it prohibits the sale of liquor, because the Minister may not make regulations for the functional area 'liquor licenses'. Regulation 29(1) is *ultra vires* and should be reviewed and set aside, in terms of section 6(2)(a)(i) of PAJA; alternatively in terms of the principle of legality.

[47] The further ground upon which the SAB contends that the regulation should be reviewed and set aside, is on the basis that it was made in a procedurally unfair manner. In this regard they contend that in terms of PAJA, where administrative action materially and adversely affects the rights of the public, section 4(1) of PAJA determines that an administrator is required to make a decision regarding the process he or she deems it appropriate to follow, in order to give effect to the right to procedurally fair administrative action. This can be done in various ways: the administrator may decide to hold a public inquiry; by following a notice and comment procedure; by following another fair procedure described in legislation; or by following another appropriate procedure that gives effect to section 3.

[48] It is common cause that the Minister made no attempt to comply with any of the procedures contemplated in section 4 of PAJA before regulation 29 was promulgated. The Minister, in her answering affidavit, concedes that neither public comment nor public submissions were sought. She submits rather that the views of the affected parties were sought on an earlier occasion, namely in the lead up to the regulations of 15 June 2021. The SAB submits that this cannot be regarded as proper consultation, because on that occasion the Minister decided not to impose a total prohibition on the sale of alcohol, and that when she changed her mind two

weeks later, fairness required that the affected parties be afforded an opportunity to make representations; this did not occur. The Minister's decision to make regulation 29 should, therefore, be reviewed in terms of section 6(2)(c) of PAJA.

[49] The SAB argues in the alternative that if PAJA should be held not to be applicable, the principle of procedural rationality would apply as a component of a legality review. In terms of this principle, the process followed by the decision-maker (no less than the decision itself) must be rational. In other words, the requirement of rationality applies not only to the decision, but also to the process in terms of which that decision was taken.

[50] The SAB accepts that procedural rationality does not mean that the decision-maker must always afford a hearing to the affected party, but there will however be occasions where it is indeed irrational to make a decision without hearing from the affected parties. In this regard, they rely on the decision of *Earthlife Africa and another v Minister of Energy and others*[20]. The SAB therefore submits that regulation 29 should be reviewed and set aside, on the basis that it was made in a manner that was procedurally unfair within the meaning of section 6(2)(c) of PAJA; alternatively on the basis that it was procedurally irrational in terms of the principle of legality.

I will deal with the issues raised by the SAB, and also the Minister's case, hereunder.

Does regulation 29 operate indefinitely?

[51] The SAB contends that regulation 29 is *ultra vires*, because regulations dealing with other matters state the specific time limit within which those regulations will be in operation and reviewed, until 11 July 2021. This is clearly contrary to what Minister Patel stated in his affidavit, that cabinet decided on a suspension of alcohol sales for a two-week period. In this regard Mr. Cockrell referred to regulation 21, which states that all gatherings are prohibited and, in particular, regulation 21(3), (4), (6), (7), (8), (9) and (10).

[20] 2017 (5) SA 227 (WCC) para 50; Albutt v Centre for the Study of Violence and Reconciliation, and others 2010 (3) SA 293 (CC).

[52] These the regulations *inter alia* state that all social gatherings and faith-based gatherings are prohibited until 11 July 2021; gatherings at political events and traditional Council meetings are prohibited until 11 July 2021; gatherings at cinemas and theatres are prohibited until 11 July 2021; gatherings at casinos are prohibited until 2021, etc. All the sub regulations state that the prohibition will be in existence until 11 July 2021, after which these provisions will be reviewed. In respect of regulation 29(1), however, it only states that the sale, dispensing and distribution of liquor is prohibited, it does not clearly state that this is until 11 July 2021, after which it will be reviewed.

[53] The Minister, in countering this allegation, firstly states that the SAB never raised this objection in its founding affidavit, and that if it had been raised in the founding affidavit the Minister would have had the opportunity to give an explanation in her answering affidavit. Mr. Cockrell submitted that this was only noticed at the time that Minister Patel filed his affidavit which formed part of the Minister's answering affidavit.

[54] I agree with the Minister; this is a totally new point that was only raised in a detailed manner in the SAB's heads of argument. From the SAB's replying affidavit, the impression was clearly created that they would not be raising a substantial challenge based on the Minister's failure to mention the time within which the regulation was to operate. The SAB, in its replying affidavit, deposed to by their Legal Ethics and Compliance Director, Warren Shane Van Rooyen, at paragraph 31.2, states the following in passing in this regard:

'. . . I also note on the second respondent's affidavit that the national executive authorised only a two-week suspension. The first respondent has strayed beyond her powers in this regard as well.'

[55] The fact that the SAB only noticed this aspect for the very first time after they had regard to Minister Patel's affidavit, is not a convincing argument. It does not detract from the fact that the Minister was clearly taken by surprise, and limited her answering affidavit, and subsequent heads of argument, to the attack on the regulations based on those aspects which were set out in the founding affidavit. I say that the argument is not convincing, because in the President's address to the

nation on the evening of 27 June 2021, he stated that the measures to prohibit or to limit the spread of the virus, including *inter alia* the prohibition on all gatherings, funerals and cremations, a curfew between 9 PM and 4 AM, as well as the ban on the sale of alcohol for both on-site and off-site consumption, would last until 11 July 2021.

[56] Furthermore, on publication of the regulations, the SAB should have been alerted to the fact that some of the regulations were drafted in the manner as pointed out by Mr. Cockrell, namely that the prohibition of certain matters and affairs would only be in force until 11 July 2021, whereafter it would be reviewed. No explanation was given as to why the SAB was not aware, at the time of deposing to its founding affidavit, that regulation 29 did not have the same time limit as the other regulations, in order that it could have specifically raised this point. It is clear that on a plain reading of the regulations, it would have been alerted to this anomaly.

[57] In my view, therefore, the contention that the SAB only became aware of this two-week time limit, until 11 July 2021, after they were alerted to that fact in Minister Patel's affidavit, is not a convincing reason to allow them to have raised this point at this late stage. This salutary principle is well established in motion proceedings, that a party's case cannot stray beyond the case they set out in their founding affidavit. This principle was once again confirmed in *Esau*[21], where it was said that in 'motion proceedings, applicants are required to make out their case in their founding affidavit and may not make out their case in reply.'

[58] In any event, if one has regard to the structure of the DMA, no measure taken in terms of the act can operate indefinitely and, at most, a measure like regulation 29 would only be in operation during the state of disaster. In terms of section 27(5) a national state of disaster lapses three months after it has been declared, or may be terminated by notice in the Gazette before it lapses. Section 27(5)(c) furthermore states that a national state of disaster may also be extended by the Minister by notice in the Gazette for one month at a time, before it lapses. Therefore, the challenge based on the argument that regulation 29 operates indefinitely falls to be dismissed for these reasons.

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[21] 2021 (3) SA 593 (SCA) para 60.

Does regulation 29 suspend or limit the sale of alcohol?

[59] I cannot agree with the submission of the SAB that regulation 29, based on the provisions of section 27(2)(i) of the DMA – which gives the Minister the power to make regulations concerning in particular 'the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area' – does not suspend or limit the sale, dispensing or distribution of alcoholic beverages. Based on the fact that read with section 26(2)(b) of the DMA, which provides that the 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).

[60] Whilst I agree with the argument of the SAB that the ordinary meaning of 'to augment' is to add to, and that section 26(2)(b) of the DMA means that regulations may add to existing legislation, I however disagree that regulation 29 'subtracts' from existing legislation. This is for the simple reason that there is no provision in the existing legislation that deals with the sale, distribution and transportation of alcoholic beverages during a state of national disaster.

[61] I was not shown any such provision, either in the Liquor Act or provincial legislation dealing with the sale, distribution and transportation of alcoholic beverages. The obvious reason for that, is that it is the purpose and object of existing national and provincial legislation to deal with the sale, distribution and transportation of alcoholic beverages under normal circumstances, and not in circumstances where there is a national disaster. Otherwise there would have been no need for a provision dealing with the sale, distribution and transportation of alcoholic beverages in a national state of disaster. In this regard the regulations and, in particular, regulation 29, augments existing legislation, or fills a void which existing legislation does not cater for. In my view, if 'augment' cannot be interpreted in this particular manner, then the power given to the Minister in terms of section 27(2)(i) would be rendered meaningless and this provision would be totally unnecessary or superfluous.

[62] Parliament has specifically, by means of section 27(2)(i), given the power to the Minister to make regulations regarding the sale, distribution and transportation of

alcoholic beverages in a national state of disaster. Whilst I agree that regulation 29(1) in its present form does not 'limit' the sale, dispensing or transportation of alcoholic beverages, it surely 'suspends' these activities. Section 27(2)(i) plainly gives the Minister the power to either 'limit' or 'suspend'. With this particular regulation, the Minister exercised her discretion, given the existing circumstances, not to simply limit as she did in the previous iterations of the regulations, where the sale and distribution of alcoholic beverages had been limited to certain hours of the day and certain days of the week (or in certain instances where on-site consumption had not been allowed).

[63] I also do not agree that regulation 29 does not purport to suspend anything, because it uses the language of prohibition and not the language of suspension. This interpretation clearly ignores the overall provisions of the DMA and the purpose for which it was enacted, and any such regulations made in consequence thereof. It further does not have regard to the normal and ordinary rules of interpretation, that requires that a unitary approach be adopted. In this regard, the decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[22] clearly provides helpful guidance. In a more recent judgment, Unterhalter AJA in *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd and others*[23] neatly summarised the principles enunciated in Endumeni, and warned against courts applying it in a mechanical fashion without applying the principles to a particular text or document. He stated:

'Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases,

[22] 2012 (4) SA 593 (SCA), paras 18 - 19.
[23] (470/2020) [2021] ZASCA 99 (9 July 2021) para 25.

"[t]he inevitable point of departure is the language of the provision itself".' (Internal footnotes omitted.)

These principles in Endumeni had once again been endorsed recently by the Constitutional Court in New Nation Movement NPC and others v President of the Republic of South Africa and others[24] as well as in the decision of South African Legal Practice Council v Alves and others[25].

[64] In coming back to this case, and applying the unitary approach, when interpreting a document or legislation one should consider the context as well as the language of the document or piece of legislation. In this regard the language used should not be interpreted in isolation, and one has to have regard to the word prohibition as opposed to the word suspension. It is clear from a common understanding of the DMA, which only operates during a limited time under a state of national disaster, and for a period not longer than three months (unless extended by notice in the *Gazette*), that regulation 29 cannot possibly be interpreted to mean that the sale, distribution and transportation of alcoholic beverages will remain in place for an indefinite period. The only sensible interpretation is that regulation 29 'suspends' the sale, distribution and transportation of alcoholic beverages for a specific period. To hold that the suspension is indefinite, would not give a sensible meaning to, and understanding of, the provisions of the DMA, as well as the regulations, in its entirety. So, for instance, it cannot possibly be imagined, if one should have regard to regulation 17 dealing with the movement of persons, which confines every person to his or her place of residence from 21H00 until 04H00, that such a restriction will endure indefinitely, simply because no time limit or date upon which it will be reviewed had been determined by the Minister.

[65] I am therefore of the view that whilst regulation 29 does not limit the sale of alcoholic beverages, it suspends same for a period and, given the overall context of the regulations, up until 11 July 2021. The Minister, by means of regulation 29, did not prohibit the sale of alcoholic beverages indefinitely, but only suspended it for the above-mentioned period. This challenge against regulation 29 also falls to be dismissed.

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[24] 2020 (6) SA 257 (CC) para 165.
[25] 2021 (4) SA 158 (SCA) para 5.

Is regulation 29 inconsistent with existing legislation, and the provincial legislation in all nine provinces which authorises the sale of liquor by persons who are in possession of the appropriate licenses issued by the provincial authorities?

[66] I do not agree that regulation 29 prohibits 'distribution' of liquor indefinitely or that it is inconsistent with the Liquor Act. Whilst it is correct that regulation 29 prohibits the SAB from performing the very activity that the Liquor Act authorises it to perform, which is the distribution of liquor, I do not agree with its proposition that the Minister made regulations that are inconsistent with legislation enacted by Parliament, such as the Liquor Act, when she made the regulations in terms of section 27(2) of the DMA. In my view, what the Minister did, as explained earlier, was to fill a void in existing legislation, like the Liquor Act, as it does not provide for dealing with the sale, dispensing and transportation of alcoholic beverages during a national state of disaster. Section 27(2), in my view, clearly gives the Minister such powers. In my view these regulations are not inconsistent with existing legislation enacted by Parliament, rather it compliments it, providing for a situation which the existing legislation does not provide for during a national state of disaster.

[67] Parliament, in my view, must have been alive to the provisions of the Liquor Act and the powers it had given to entities in terms of the Act, such as the SAB, to distribute and sell liquor, when it enacted the provisions of the DMA. The provisions of section 27(2)(i) of the DMA deal with the powers of the Minister during a national state of disaster. What is important is that the Minister has no such powers under normal or ordinary circumstances. The objects and purpose of the Liquor Act are totally different from the objects and purpose of the DMA. The purpose of the DMA, as set out in section 27, is that after a state of disaster has been declared, and if existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster, the Minister may make regulations and issue directions, or authorise the issue of directions, concerning any of those matters dealt with in section 27(2). This includes the issuing of regulations concerning the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in a disaster-stricken area, under section 27(2)(i).

[68] Whilst I am of the view that the regulations augment and cater for a situation which the existing legislation cannot adequately address in a state of disaster, I am

nevertheless in agreement with and bound by the decision of the full court in this division in BATSA[26], where the court was of the view that the Minister may make regulations which are inconsistent with existing laws. The court held:

'After considering the constitutional obligations of the Respondents, together with the wide definition of "disaster" and "disaster management" set out in the Act, as well as the wide sweeping and general powers bestowed in terms of section 27(2) . . . we are of the view it was not *ultra vires* for the Minister to pass regulations inconsistent with existing acts, insofar as the inconsistency did not amount to a prohibition.'

[69] The SAB has invited this court not to follow the reasoning of the full bench of this court in the decision as mentioned above, but rather the view taken by the full bench of the Gauteng Division, in *Democratic Alliance*[27], where the following was said on this very point:

'The applicant asserted that the Act gives the Minister the right to depart from existing legislation. This is incorrect. Nowhere in the Act does it give the Minister the power to amend or repeal any existing legislation. In terms of section 26(2)(b) the national executive, which is primarily responsible for the coordination and management of national disasters, must deal with a national disaster in terms of existing legislation and contingency arrangements augmented by regulations or directions made or issued in terms of section 27(2), if a national state of disaster has been declared. This makes it plain that the Minister does not have the power to amend or repeal existing legislation. In fact, the national executive, which includes the Minister, may only augment existing legislation and contingency arrangements. Parliament's plenary legislative powers are not implicated in this matter. The Act does not allow the Minister to usurp Parliamentary legislative powers.'

[70] In this case, apart from the reasons I have stated above, I am not of the view that the regulations are inconsistent with existing legislation. I am nonetheless bound, as a single judge, by the decision of the full bench in BATSA. It must also be remembered that in both the decisions mentioned, there was a frontal challenge to the constitutionality of section 27(2) of the DMA, which, as highlighted by the Minister, is not the same challenge the court is faced with in these proceedings. For the purposes of these proceedings, as pointed out by the Minister, I have to accept, in the absence of such a frontal challenge that section 27(2) of the DMA is

[26] Fn 16 above, para 213.
[27] Fn 15 above, para 41.

constitutionally compliant.

[71] I am therefore of the view, firstly, given the reasons I have stated above, that regulation 29(1) is not *ultra vires*, because the Minister has the power, by augmenting existing legislation through regulations, to suspend the distribution of liquor in a state of disaster, and, secondly, that the Minister, based on the BATSA, decision, has the power to make regulations which are inconsistent with existing laws. This challenge against regulation 29(1) therefore also falls to be dismissed.

Does regulation 29 override provincial legislation?

[72] Before dealing with this question, it would be appropriate to have regard to the provisions of the Constitution regarding the legislative competencies of provinces and the national government respectively. In this regard, I will in particular have regard to the provisions of section 44 and Schedules 4 and 5 of the Constitution. Section 44 of the Constitution provides that:

'1) The national legislative authority as vested in Parliament—

(a) confers on the National Assembly the power—

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) . . .

(b) . . .

(i) . . .

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) . . .

(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.'

[73] Schedule 4 of the Constitution provides for the functional areas of concurrent national and provincial legislative competence, and is divided into Part A and Part B. The functional area 'Disaster Management' is one of the areas where there exists a concurrent national and provincial legislative competence.

[74] Schedule 5 of the Constitution provides for the functional areas of exclusive provincial legislative competence and, under Part A, the item 'Liquor Licenses' is one of the areas where there exists an exclusive provincial legislative competence. I agree with the SAB that in terms of section 44(1)(a)(ii), Parliament may not pass legislation with regards to a functional area listed in Schedule 5, which falls within the area of competence of the provincial legislature, such as liquor licenses, but it is authorised to do so in terms of section 44(2).

[75] I also agree that section 44(2) provides that 'Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary' under the circumstances listed in subsections 2(a)-(e), as referred to above.

[76] I do not, however, agree with the submission of the SAB, that it was the Minister, and not Parliament, that purported to intrude into the functional area of liquor licenses, by making regulation 29. Whilst I agree that the Minister has no competence to do so, it was Parliament, by means of the enactment of the DMA, in terms of section 44(2) of the Constitution, that gave the Minister the power, in particular in terms of section 27(2)(i) of the DMA, to make regulations regarding the sale, dispensing and distribution of alcoholic beverages in a state of disaster.

[77] I agree with the Minister's submission that, in the absence of a challenge to the constitutionality of section 27(2), Parliament exercised its functions in terms of Schedule 4 when it enacted section 27(2)(i) of the DMA. By enacting the legislation, Parliament in an unambiguous and deliberate manner gave the Minister the power to make regulations limiting and suspension of the sale, dispensing, distribution and transportation of alcoholic beverages under a state of disaster by including it in the DMA in the manner it did. Thereby, although it deals with the sale, dispensing, distribution and transportation of alcoholic beverages, it chose to deal with it as a matter falling within a functional area of concurrent national and provincial legislative competence listed in Schedule 4.

[78] Therefore, Parliament deliberately chose not to deal with it as falling with in the functional area of exclusive provincial legislative competence as listed in Schedule 5, which for the purpose of this case is liquor licenses, but chose to classify it as a matter to be dealt with under the DMA. In my view therefore, the suspension and limiting of the sale, dispensing, distribution and transportation of alcoholic beverages, as listed under section 27(2)(i) of the DMA, is clearly a disaster management competence in terms of Part A of Schedule 4 of the Constitution, over which there exists concurrent national and provincial legislative competence, and not a liquor licensing competence as provided for in Part A of Schedule 5, over which there exists exclusive provincial legislative competence.

[79] I also agree with the Minister that disaster management and trade are functional areas of concurrent national and provincial legislative competence, as contemplated in Part A of Schedule 4. I therefore do not agree with the submission of the SAB that regulation 29(1) is *ultra vires* to the extent that it prohibits the sale of liquor, because the Minister may not make regulations dealing with the functional

area ‘liquor licenses’, and their submission is wrong because the Minister did not make regulations dealing with the functional area of ‘liquor licenses’, but rather with the functional area of ‘disaster management’, when it made regulation 29, which it was empowered to do in terms of section 27(2)(i) of the DMA. It is a power that was properly delegated to her by Parliament, that enacted the DMA in terms of section 44(2) of the Constitution. This challenge against regulation 29(1) also falls to be dismissed.

Was the administrative action procedurally fair?

[80] In terms of section 3 of PAJA, administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. The minister conceded in her answering affidavit[28] that neither public comment nor submissions were sought. She stated that the very nature of the pandemic is fluid, requiring quick responses which militated against this. Further, that the manner in which the pandemic evolves is not always conducive to extensive consultation processes, such as calling publicly for written submissions, even if time permitted this, which it did not do in the case of the impugned regulation. According to her, it became apparent on 26 June 2020 that the government had to act swiftly based on the information at their disposable at that time. The situation that existed at the time was extremely urgent and action was required in response to the pandemic; there was no time for further planning or extensive canvassing of the public’s views.

[81] According to the Minister, there have been numerous engagements with the relevant industry role-players throughout the pandemic, both individually and as part of the Nedlac process, in relation to possible alcohol restrictions and suspensions in sales. The consultation process, the Minister submits, during a national disaster, must be put into context, where extreme urgent action was required particularly, after

[28] Para 83, page 123.

having been advised on the effect the delta variant has on the pandemic with regards to the rapid transmission thereof on 26 June 2021.

[82] As of 15 June 2021, the information received by the government was that the rate of Covid 19 infections, and the rate of hospitalisations was increasing. Recommendations were made by the Ministerial Advisory Committee ("MAC") for a tightening of the restrictions, and it was recommended that consideration be given to introducing a wide range of measures to limit the spread of the virus, including restrictions on the sale and distribution of alcohol, to address the negative effects which may result from the rising infections experienced as part of the third wave.

[83] On 15 June 2021 it was decided to apprise the stakeholders in the alcohol industry of, and obtain their inputs on, issues the government was contending with and the possibility of a third wave. Their input was sought in respect of a change to the existing liquor sales arrangements; the introduction of restrictions on the trading hours similar to that which applied during the second surge; or whether to introduce other restrictions which may be raised through the various consultation processes. Minister Patel, together with Minister Didiza and Deputy Minister Majola, coordinated these consultations with the different stakeholders in the alcohol industry.

[84] Various responses were received from these stakeholders. The Minister emphasised that the pandemic did not allow for lengthy consultation processes. Decisions based on the exigencies of the situation had to be taken quickly and decisively. It was not the first time that such restrictions were being considered and accordingly the role-players were all familiar with the options available to government in imposing restrictions. Thereafter, a report back was considered by Cabinet to enable consideration of the inputs received from the consultation process. After taking into consideration the level of infections at the time, the government, on the advice of the MAC, decided to impose limited restrictions, as per Government Notice 530 published in Government Gazette 44715, which took effect on 16 June 2021. At that stage, a complete suspension of the sale of alcohol was not imposed. After 15 June 2021 the infection rate continued to increase, and it was abundantly clear that South Africa was experiencing a sharp rise in a third wave of infection and further urgent steps were needed.

[85] According to the Minister there was no need, and no purpose would have been served thereby, to repeat this process, already undertaken less than two weeks previously, as that consultation process had already indicated what the views of the stakeholders were in relation to the measures to be adopted in the regulations in anticipation of an increasing number of infections.

[86] Given the expert advice received, as well as the urgent need to impose more stringent measures to counteract the proliferation of the highly transmissible Delta variant, the exigencies of the situation required the most stringent approach to be taken, and for this to be done swiftly; it did not allow for, nor did fairness require, the process embarked on a mere 10 days early, to be repeated.

[87] The general stance of the alcohol industry was well known. The alcohol industry in the main did not support any restrictions that prevented the sale of alcoholic products. The stance was further communicated in a letter dated 27 June 2021, which was addressed to the National Coronavirus Command Council ("NCCC"), among others, the SAB, Distell, Diageo, the National Liquor Traders Council and other industry role-players. This letter was duly considered by the NCCC and the Cabinet, prior to the decision being taken to effect the temporary suspension. The Minister submits that, in fact, the engagement that had previously occurred was then specifically referred to again, as consideration was given to the proposals encapsulated in the letter of 27 June 2021, regarding the measures that the industry proposed for implementation.

[88] From the above it is clear that, immediately prior to the implementation of the current regulations published on 27 June 2021, there was no prior consultation, because of the situation that existed at that time, due to the rapid increase in infections due to the Delta variant. However, less than 14 days prior thereto, industry role-players had been invited to make representations, which they had considered prior to introducing the restrictions of 16 June 2021. In fact, the NCCC also received representations from the industry role-players on 27 June 2021, immediately prior to the implementation of the current regulations. Regarding the question of prior consultation before administrative action is taken, Plasket JA said the following in Esau:

'[96] I turn now to whether the time allowed for the making of representations was sufficient in the circumstances. Once again, context is crucial to the resolution of this issue: while, in one case, it may be unfair to allow a person two weeks to make representations, in another, it may be fair. It will always depend on the circumstances. In *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd*, for instance, a developer had been given 48 hours within which to make representations as to why a prohibitory directive should not be issued in terms of the Environment Conservation Act 73 of 1989. This, it was argued, was procedurally unfair. The Constitutional Court held, however, that –

> "in light of the serious harm already caused and the threat of continuing harm, the 48-hour notice period, which HTF did not struggle to meet in submitting its representations, was adequate by the procedural fairness standards required by PAJA".

[97] The DMA does not prescribe a procedure for the making of regulations in terms of s 27. That is left to the COGTA Minister who, whatever procedure she chooses, is under a duty to act fairly. The absence of a procedure in the DMA is not surprising, given the nature of disasters. In some cases, such as a flood or an earthquake, for instance, extremely urgent action may be required to manage the disaster, while in other cases, a long drought, for instance, more time for reflection, planning and consultation may be available to decision-makers. The definition of a disaster recognises a sliding scale in the nature of disasters, ranging from the sudden to the progressive. Within this context, the COGTA Minister was required to assess the urgency of the matter, and to calibrate the procedure adopted by her, including the time to be allowed for the making of representations, to the degree of urgency.

[98] In that weighing-up process, the need to relieve the populace of some of the more draconian economic and social restrictions was an important factor. As the lockdown regulations impacted on the rights of people, their planned amelioration brought with it a measure of urgency that justified the limiting of the time available to members of the public to make representations. As soon as regulations no longer served a legitimate purpose, they had to be repealed or amended as quickly as reasonably possible. It is also important to bear in mind that the level 4 regulations in their initial form were not necessarily to be the final word on level 4 restrictions: it had always been made clear by the COGTA Minister that rule-making in terms of the DMA was flexible, particularly because, in its response to the pandemic, the government was feeling its way in hitherto uncharted territory, there being no blueprint for how to respond to so unique and unexpected a disaster: if a measure was not, in retrospect, appropriate to the purposes of the DMA, it could at short notice be repealed or amended.' (Internal footnotes omitted.)

What is further relevant to this case is stated as follows:

'[100] When the nature of the process is viewed holistically in the context of the DMA, the circumstances prevailing in respect of this particular disaster, the lockdown regulations that had been in force, and the intention to ameliorate some of the economic and social harshness of the lockdown regulations, I am of the view that the two-day period afforded to members of the public within which to make representations was reasonable. It cannot be said, in other words, that by restricting members of the public to two days within which to make representations, the COGTA Minister acted in a procedurally unfair manner.'

[89] In coming back to this case, having regard to the exigencies that existed at the time when the minister had to make the decision to suspend the sale of alcohol and the fact that, less than 14 days prior to that, although in the context of the regulations that had been issued on 16 June 2021, the views of the industry role-players had been canvassed, which included a letter to which the SAB was a party being presented to the NCCC and Cabinet on the 27 June 2021, and which was considered immediately prior to the making of the regulations. The Minister also knew at that stage, and it was common cause, that industry role-players were opposed to any restrictions on the sale of alcohol. Given the circumstances and the limited timeframe in which the Minister had to act, it cannot be said that she acted in a procedurally unfair manner. In the result therefore, the submission made by the SAB, that regulation 29 was made in a procedurally unfair manner, also falls to be dismissed.

Costs

[90] The SAB submitted that the court should not grant a costs order against it because, whilst it acted in its own commercial interests, it also acted in the wider interests not only of the industry, but also of the community at large. Furthermore, whilst they did not challenge the constitutionality of the legislation, they acted to vindicate the right to fair administrative action. Mr. Campbell urged the court to apply the principles as set out in *Biowatch Trust v Registrar, Genetic Resources, and others* 2009 (6) SA 232 (CC), where the Constitutional Court referred to the dictum of Ngcobo J in *Affordable Medicines*[29], to the effect that where an applicant has raised important constitutional issues, and where the issues raised are beneficial not

[29] See *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC).

only to the parties in the case, but to others as well, as in this case other role-players in the industry, fairness and justice require that the applicant should not be burdened with an order of costs, and that to order costs might have a chilling effect on litigants who might want to raise constitutional issues.

[91] It was also held in Biowatch, based on the dictum in *Affordable Medicines*, that if in litigation between the government and a party seeking to assert a constitutional right, the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs[30]. In my view, given the circumstances of this case, it seems that the litigation was primarily pursued by the SAB in their own economic interests, wherein they employed no less than two eminent senior counsel and a junior. Furthermore, they are already engaged in litigation with the government regarding the very same regulations issued in December 2020.

[92] It seems, from a perusal of SAFFLI that, given the nature of the litigation which erupted around the regulations made in order to curb the spread of the virus, the government had to ward off and defend litigation on various points based on the regulations it made to protect society at large. It also seems that the government will, in future, be faced with similar challenges against the regulations. It would therefore be unfair not to award them the costs they incurred against a multinational entity like the SAB. It would also be unfair that the state coffers be burdened with such costs, in circumstances like these where the government was successful in litigation. These considerations, in my view, are sufficient justification not to award an order as to costs along the lines as contemplated in Biowatch. I am, however, not convinced that costs should be awarded to the respondents consequent upon the employment of four counsel, as was engaged in this matter.

[93] I therefore make the following order:

> That the application is dismissed with costs, such costs to include the employment of three counsel.

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[30] Para 22.

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R.C.A. Henney

Judge of the High Court