IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case Number**:** 1741 / 2021

In the matter between:

VINPRO NPC

(Registration Number: 2008/012968) Applicant

and

PRESIDENT OF THE

REPUBLIC OF SOUTH AFRICA First Respondent

THE MINISTER OF CO-OPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS Second Respondent

THE PREMIER OF THE WESTERN CAPE PROVINCE Third Respondent

MINISTER OF HEALTH, WESTERN CAPE PROVINCE Fourth Respondent

MINISTER OF COMMUNITY SAFETY

(WESTERN CAPE PROVINCE) Fifth Respondent

MINISTER OF HEALTH Sixth Respondent

Coram: Dolamo, Wille *et* Slingers, JJ

Heard: 23rd, 24th and 25th of August 2021

Delivered: 3rd of December 2021 delivered via email

JUDGMENT

DOLAMO, WILLE *et* SLINGERS, JJ: (unanimous)

INTRODUCTION

[1] In this application the applicant challenges the constitutionality and lawfulness of the nationwide liquor bans imposed by the national government during the Covid-19 pandemic. The applicant ostensibly launched the application to vindicate the constitutional values of respect for the rule of law, inter-governmental co-operation and public accountability. It also sought to vindicate various constitutional rights. One of the grounds on which the applicant challenged the constitutionality and lawfulness of the nationwide liquor ban was that the power to impose the liquor ban fell within the provincial sphere and not within the national government sphere (the structure of government argument).

[2] The applicant is an organization that represents wine producers, wine sellers and some industry stakeholders in South Africa. This application is concerned with the capacity of the government to realise and implement processes to uphold and protect the lives, health and the livelihood of South Africans in order to manage the Covid-19 pandemic.[1]

[3] At the outset, the applicant makes the concession that by temporarily reducing the consumption of alcohol, this does indeed protect our healthcare system and prevent it being overwhelmed by the pandemic. Put in another way, it is common cause for the purposes of this application, that a reduction in the consumption of alcohol reduces the number of trauma cases which, as a matter of necessity, be dealt with in and by our healthcare system. Coupled

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[1] The 'pandemic'.

with this is the fact that such a reduction allows for an increased capacity to deal with the real and crucial effects of the pandemic.

[4] Several preliminary issues arose for determination in view of the fact that the initial application at the instance of the applicant underwent a chameleonic change due to the effluxion of time. This because the regulations issued out by the second respondent were amended from time to time to deal the fluidity of the pandemic. Besides, at the time of the refinement and finalization of this judgement, further regulations had been promulgated, in the interim, partially lifting certain of the restrictions dealing with the sale of alcohol.

[5] The preliminary issues that bore scrutiny were the following, namely, the amendment application, the issue of mootness[2] and the governmental structural challenge. This latter issue was and is in no manner affected by the amendment issue or the issue dealing with the mootness of the application. This issue of the amendment and the mootness issue are by their very nature, inextricably linked to and with each other.

[6] In the initial application by the applicant the relief sought was in connection with the striking down of regulations that have since been repealed about (6) months prior. In order to

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[2] On no less than (3) grounds.

preserve the initial application, the applicant sought to amend its relief to include a challenge to the more recent regulations.[3] As time progressed however, these more recent regulations were also repealed. The structural challenge issue is progressed by the applicant on the basis that a provincial, as opposed to a nationwide temporary limitation, would have been of preferable application in the Western Cape Province.

[7] The initial application was piloted during January 2021. The relief sought was, inter alia, a striking down of certain Regulations in Government Notice No. R. 11 (GG44066) under the DMA[4], in response to the pandemic.[5] These regulations suspended the selling, dispensing, distributing and transporting of liquor. Moreover, in this connection, the applicant sought urgent interim interdictory relief.

[8] This relief was set down for hearing on the 5th of February 2021. The *January Regulations* were the subject of repeal on the 1st of February 2021. As a direct consequence, the urgent interim relief was abandoned, coupled with a reservation of rights to re-enrol the application at a later stage, should this be necessary. Indeed, this was and is the application

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[3] Applicable at the time. Understandably so, because this was a 'moving target' so to speak.

[4] The Disaster Management Act, 57 of 2002.

[5] The 'January' Regulations.

that was set down for hearing before us for the period from the 23rd to the 26th of August 2021.

[9] In the intervening period, the applicant re-enrolled the application seeking urgent temporary interim relief because the second respondent imposed a further temporary suspension on the selling, dispensing, distributing and partially on the transporting of liquor in response to the onset of the third wave of the pandemic.[6] The applicant formulated the relief it contended for in the form of an - *authorization* - that the third respondent be permitted to adopt deviations from the *June Regulations* relating to the sale, distributing, dispensing and transportation of liquor, alternatively wine, whilst limiting such deviations to the Western Cape Province.

[10] This latter application was heard on the 21st of July 2021 and the judgment therein was reserved. Prior to any judgment or order being delivered and on the 25th of July 2021, the second respondent issued out regulations setting aside the *June Regulations*. On the 3rd of August 2021, a judgment was handed down in connection with this latter application which ruled that the urgent application was rendered moot, and the matter was accordingly struck from the court roll.

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[6] This, after the promulgation on the 27th of June 2021 of the 'June Regulations' by the second respondent.

[11] This initial application was not the only application which sought to challenge the validity of the pandemic regulations. During January this year, South African Breweries[7], launched a separate application seeking to have declared unlawful and of no force and the *December Regulations* in connection with the sale and distribution of alcohol. The government respondents in this application filed extensive answering papers in the SAB application and these papers were also annexed to the opposing papers in this application.

[12] It is common cause that the *December, January and June Regulations* were no longer of any force and effect as there was no longer in existence, at the time of the hearing of the application, any general suspension of the selling, dispensing, distributing and transporting of liquor. These pandemic regulations were not aimed at addressing the impact of alcohol on society generally but were rather aimed at capacitating the health system during trying times. This, because South Africa has a much higher burden of alcohol related trauma cases than experienced in many other countries.

[13] As alluded to earlier it is common cause that there is a clear and obvious correlation between the sale and availability of alcohol on the one hand and the demands on trauma units and emergency units on the other hand. When there is an additional strain on the existing health care system because of the pandemic, clear and direct indications are that such strain

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[7] The 'SAB' application.

can be alleviated by restricting the public's access to alcohol as unrestricted access unduly burdens the public health care system. This nexus does not form the subject of any dispute as between the parties to this litigation.

THE APPLICATION TO AMEND

[14] Firstly, the applicant seeks to amend a specific prayer in its notice of motion by essentially including an - *additional prayer* - for a declaration of unlawfulness and invalidity of the *June Regulations*.[8] Regulation 29 provided, inter alia, as follows:

'(1) The sale, dispensing and distribution of liquor is prohibited.

(2) The transportation of liquor is prohibited, except where alcohol is required for industries producing hand sanitizers, disinfectants, soap, alcohol for industrial use and household cleaning products.

(3) The transportation of liquor for export purposes is permitted.

(4) No special or events liquor licences may be considered for approval during the duration of the national state of disaster'

[15] Regulation 29 was subsequently amended in Government Notice No. R 567 dated 29 June 2021 published in Government Gazette 44778 and provided as follows:

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[8] Promulgated in Government Notice No R. 565 of 27 June 2021 – the 'first' of the 'June Regulations'.

'(1) The sale, dispensing and distribution of liquor is prohibited.

(2) The transportation of liquor is prohibited, except where the transportation of liquor is

(a) in relation to alcohol required for industries producing hand sanitizers, disinfectants, soap or alcohol for industrial use and household cleaning products.

(b) for export purposes;

(c) from manufacturing plants to storage facilities; or

(d) being transported from any licence premises for safe keeping.

(3) The transportation of liquor for export purposes is permitted.

(4) No special or events liquor licences may be considered for approval during the duration of the national state of disaster

(5) The Cabinet member responsible for transport must, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, police and trade, industry and competition, issue directions for the transportation and storage of liquor'

[16] At that - *moment critique* - when the applicant sought to amend the relief that it sought to challenge to the validity and lawfulness of Regulation 29 as contained in Government Notice R 565, it no longer existed in the form in which it was formulated, prior to its amendment on the 29th of June 2021. By this stage, the second respondent had already signed into law different regulations, by introducing, inter alia, Regulation 44 (Government

Notice No. R 673 dated 25 July 2021 published in Government Gazette 44895)[9], which indicated as follows:

'(1) The sale of liquor –

(a) By a licenced premises for off-site consumption is only permitted from 10h00 to 18h00, from Mondays to Thursday, excluding Fridays, Saturdays, Sundays and public holidays, and

(b) By a licenced premises for on-site consumption is permitted until 20h00.

(2) The provisions of sub-regulation (1)(a) do not apply to duty-free shops at international airports which are permitted to operate in accordance with their operating licence.

(3) The consumption of liquor in public places, except in licensed on-site consumption premises, is not permitted.

(4) Registered wineries, wine farms, micro-breweries and micro-distilleries may continue to operate in offering wine-tastings and other brew-tastings, and the selling of wine and other brews to the public for off-site and on-site consumption is permitted until 20h00 and further subject to strict adherence to social distancing measures and health protocols.

(5) The transportation of liquor is permitted.

(6) The sale and consumption of liquor in contravention of sub-regulations (1) and (3) is an offence'

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[9] The 'July Regulations'

[17] Moreover, in terms of the now new regulations[10], restaurants, bars, shebeens and taverns whether indoors or outdoors were to close at 21h00. This also applied to theatres and casinos. Further, the number of persons allowed in restaurants, bars, shebeens and taverns were limited to (50) or less indoors and (100) outdoors with the observance of social distancing between persons. This with a capacity limitation.

[18] There was no challenge to the then extant regulations which came into effect on 25th of July 2021.[11] The order sought was connected to and with Regulation 29 which, by then no longer existed in any manner or form. The challenge was on the following basis: that the second respondent was not competent to have acted for the reasons set out in the notice of motion: that the imposition, and maintenance, of a uniform prohibition in all areas of South Africa was not necessary for the purpose of achieving any of the objectives listed in section 27(3) of the DMA and that the nationwide temporary restriction imposed by Regulation 29 was and is inconsistent with section 10, 11, 14, 22, 25 and 27 of the Constitution and was further not justified in terms of section 36 of the Constitution.

[19] Most significantly, there was no case made out in the initial application (or in the application for the urgent interim relief), for a declaration of invalidity and unlawfulness in

[10] As indicated at the time of formulating this judgment further updated regulations have been promulgated which allow for a more liberal trade and distribution of alcohol both in respect of the off-site sale and the on-site sale of alcohol.

[11] The position has again since changed due to the now new regulations.

connection with this specific Regulation 29. The national government respondents contend for the position that the urgent application was in essence not a re-enrolment of revised urgent application, but rather an entirely new application for interim relief because it was connected to and with a different regulation[12], informed by a different factual matrix.

[20] Moreover, the founding papers in the urgent application made it clear that the relief sought was limited to interim relief in relation to off-site sales and not on-site sales of alcohol. The relief sought was also limited to the Western Cape. On this score, it was argued that the nature of the interim relief sought was explained in the founding papers as being limited to the following: authorising the Premier,[13] to adopt deviations from Regulation 29 to enable the sale of alcohol for off-site consumption: alternatively, that the Premier should be consulted about the imposition, extension or lifting of the liquor ban in the Western Cape Province (which relief was abandoned).

[21] In addition, this was only to the extent that the liquor ban was still in force in the Western Cape Province (by the time that the application for interim relief was heard) and declaring the second respondent's failure to lift the ban in the Western Cape Province unconstitutional and invalid (which relief was also abandoned).

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[12] Regulation 29.

[13] The premier of the Western Cape.

[22] The relief sought by the applicant at the hearing of the urgent application for interim relief was, *inter alia*, the following:

'...pending the determination of the application for final relief to be heard on 23 to 26 August 2021 by a Full Bench of this Court, Third Respondent is authorised to adopt deviations from the provisions of Regulation 29 of the Regulations made by Second Respondent in terms of section 27(2) of the Disaster Management Act 57 of 2002 ("the DMA") and promulgated by Government Notice No R. 565 of 27 June 2021 (GG 44772) relating to the sale, dispensing, distribution and transportation of liquor, provided that such deviations will only be applicable in the Western Cape Province and will take effect on promulgation in the Provincial Gazette'

In the alternative:

'...pending the determination of the application for final relief to be heard on 23 to 26 August 2021 by a Full Bench of this Court, Regulation 29 of the Regulations made by Second Respondent in terms of section 27(2) of the Disaster Management Act 57 of 2002 ("the DMA") and promulgated by Government Notice No R. 565 of 27 June 2021 (GG 44772) relating to the sale, dispensing, distribution and transportation of liquor, is suspended in respect of the Western Cape Province but may be reinstated by Second Respondent at any time if necessary to preserve the capacity of hospitals and health care facilities in the Western Cape Province to treat Covid-19 patients'

[23] Moreover, no relief was sought in the terms now being sought in the amendment[14] and it seems that the cause of action now advanced is somewhat different to that which the respondents were obliged to respond to and, indeed answered in the urgent application for interim relief. Of importance was an omission to launch an attack on the unlawfulness and invalidity on Regulation 29, when same was extant.

[24] This challenge was pioneered for the first time on the 3rd of August 2021. What it in effect pre-ordained was the introduction a fresh cause of action that was moot. This, because it did not exist and there was no live controversy. Put in another way, we were requested to adjudicate upon declaratory relief in respect of a 'law' which did not exist at the time when such relief was being sought. We are requested to 'hang something on nothing'.

[25] On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that that party seeking the amendment must show *prima facie* that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause an injustice to the other side which cannot be compensated

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[14] To prayer 2.3 of the notice of motion.

by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.

[26] Absent on the papers before us is any noteworthy explanation why the applicant made the calculated election to wait until after Regulation 29 was repealed, before it commenced its challenge thereto. Besides, the applicant elected to bring the challenge by way of an urgent application pending the determination of the main application. The urgent application was launched on the 29th of June 2021. This would have been the opportune and crucial time to seek the amendment. Yet, this is only done on the 3rd of August 2021, absent any explanation why the applicant should be provided with such an indulgence.

[27] It may well be that such a course of action would lead to the inevitable result that should the amendment be granted it would have the result of rendering the cause of action subject to an legitimate exception. Of equal importance is that there was no consultation that ensued with the government respondents' deponents so to prepare affidavits in answer to the fresh case which is now being sought, for the first time, albeit via an amendment. In our view, herein lies the prejudice.

[28] It is submitted by the national government respondents that this prejudice is rendered insurmountable even if they were afforded an opportunity to file further affidavits to this

fresh challenge. On this, we agree because what the applicant contends for is the drawing of an inference from the government respondents in not identifying the precise nature of the evidence that it would need deal with this fresh challenge.

[29] The practical effect of the various regulations is the bringing into effect a temporary suspension on alcohol distribution and sale, made in entirely discrete factual circumstances. Each and every temporary suspension is buttressed by the facts that existed at the time those decisions were taken. If the amendment were to be granted it would allow the applicant, albeit under these most peculiar circumstances, an unopposed opportunity to cannonade the validity and lawfulness of a non-existent regulation and or regulations. Patently, this is not permissible.

[30] We say this because the prejudice would be too immense. The government respondents manifestly cannot be held to a factual matrix which they formulated in their opposing affidavits, only now to meet an entirely different case. This cannot be cured by a postponement and order as to costs. The proverbial clock 'cannot be turned back' so as to facilitate a triable issue. The applicant vacated the peremptory amendment procedures as set out in the court rules and sought to compel the respondents to respond to a fresh application, for new relief, under unilaterally imposed time frames. This because there is no urgency on the papers, as currently formulated, in connection with the applicant's challenge to the *June*

Regulations. More than a month has since elapsed. Put in another way, the applicant waited for more than a month to pass before it raised its lawfulness challenge.

[31] Finally, the relief now contended for as formulated in the application for amendment is a determination of declaratory relief, which is final in effect. This, contended for on an urgent basis, absent any explanation for urgency or any cogent reasons for the delay

[32] For these reasons, we are of the view that the application for amendment falls to be refused and it follows that the application to have the new evidence admitted, relating to the interim relief, also fails.

MOOTNESS

[33] A matter is moot if the issues underlying the dispute have, in some way, been resolved. A case is moot and therefore not justifiable if it no longer presents an existing or live controversy or the prejudicing or threat of prejudice, to a party, no longer exist[15].

[15] Constitutional Law of South Africa Woolman et Al 2nd Edition Volume 1 7-18.

[34] The government respondents in this matter submitted that this matter has become moot because the *January Regulations* which are challenged have since been repealed. The applicant, however holds the view that the matter is not moot notwithstanding the fact that the particular regulations have been repealed. The argument is that the lockdown is still in place and the government may again introduce the same or similar regulations and that this matter engages issues of public interest.

[35] In *President of the Ordinary Court Martial N.O. v Freedom of Expression Institute*[16] the Constitutional Court held mootness is likely to be a bar to relief where the constitutional issue is not merely moot as between the parties, but is also moot to society at large, and no consideration of compelling public interest requires the court to reach a decision. Where it is in the public interest that the constitutionality of legislation should be determined it is unlikely that a court will decline to entertain the matter[17].

[36] With regard to appeals section 16 of the Superior Courts Act[18] provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. This provision is

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[16] 1999 (4) SA 682 (CC)

[17] *S v Manamela* 2000 (3) SA 1 (CC)

[18] Act 10 of 2013.

applicable to the Supreme Court of Appeal and would also be applicable to the High Court, if it was sitting as a court of appeal against the judgment of a single Judge.

[37] While the section does not apply to the Constitutional Court it held in the *Court Martial N.O.* case, *supra*, that it has a discretion to exercise its powers in terms of section 172 (2) of the Constitution to confirm an order of another court declaring legislation to be invalid when the matter in issue had become moot. In *Independent Electoral Commission v Langeberg Municipality*[19],the Constitutional Court held that its discretion must be exercised according to the interests of justice. Relevant factors in the exercise of its discretion may include the practical effect that any possible order may have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.

[38] No such discretion however, accrues to the High Court when sitting as a court of first instance. This much was made clear in *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others.*[20] Wallis JA, in *Stransham-Ford* sharply criticised the court of first instance for having decided a matter that was moot and indicated the position to be as follows:

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[19] 2001 (3) SA 925 (CC).

[20] 2017 (3) SA 152 (SCA)

'When a court of appeal addresses issues that were properly determined by a first instance court and determines them afresh because they raise issues of public importance, it is always mindful that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues. A feature of all the cases referred to in the footnotes to para 22 above is that the appeal court either overruled the judgment in the court below or substantially modified it. The appeal court's jurisdiction was exercised because 'a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required'. The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination'[21]

[39] Factually, the potential 'mootness' in connection with this application arose more than (6) months ago when the *January Regulations* were the subject of appeal. By contrast, in *BATSA*, the application was fully argued when the dispute was 'live'. Judgment was reserved and the issue of mootness only made an appearance (2) weeks later, this before the judgment was handed down.

[40] Conversely, in the current application, whatever the factual position and circumstances were in January 2021 and, whatever influences these held for the lawfulness or otherwise of the *January Regulations* would have no bearing on any future regulations that may or may not be contemplated by the government respondents.

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[21] At para 25

[41] Unterhalter AJA, writing for the court in *Capitec Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*[22], eloquently set out the correct test to be applied when a shield of mootness is raised in the following terms, namely:

'...if the appeal remains live in respect of the principal litigants, there is no basis to rule that the appeal is moot…'

[42] In our view this court does not have any discretion to hear a matter which has become moot and in our view, this matter has become moot.

STRUCTURE OF GOVERNMENT

[43] The applicant seeks an order directing that section 27(2)(i) of the Disaster Management Act, Act 57 of 2002 **('DMA')**,must be read to conform with section 44(2) and/or the rationality requirement in section 1 of the Constitution and on such a reading:

> *(i) the second respondent may not make regulations or issue directions concerning the suspension or limiting the sale, dispensing or transportation of alcoholic beverages in a disaster-stricken or threatened area; and*

[22] (470/2020) [2021] ZASCA 99 (9 July 2021) at para [21].

(ii) second respondent may authorise the relevant provincial premier to issue directions concerning the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages within a particular province.

[44] In the alternative, the applicant seeks an order declaring section 27(2)(i) of the DMA to be inconsistent with section 44(2), alternatively section 1 of the Constitution and invalid to the extent that it authorises second respondent, without any form of consultation with responsible provincial authorities, to make regulations or issue directions concerning the retail sale of liquor.

[45] Furthermore, the applicant sought a declarator that regulations 44 and 86 of the regulations made by the second respondent in terms of section 27(2) of the DMA to be unlawful and invalid in that:

(i) the second respondent was not competent to make the regulations;

(ii) the imposition, and maintenance, of a uniform prohibition of in all areas of South Africa of the sale, dispensing, distribution and transportation of liquor as provided for in the regulations is not necessary for the purposes of achieving any of the objectives listed in section 27(3) of the DMA; and/or

(iii) the nationwide ban is inconsistent with sections 10, 11, 14, 22, 25 and 27 of the Constitution and not justified in terms of section 36 of the Constitution.

[46] Regulation 44 reads as follows:

'44(1) The sale and dispensing of liquor for-

(a) off-site consumption; and

(b) on-site consumption,

is prohibited.

(2) The consumption of liquor in public places is prohibited.

(3) The tasting and selling of liquor to the public by registered wineries, wine farms, and other similar establishments registered as micro manufacturers, is prohibited.

(4) The transportation of liquor is prohibited, except where the transportation of liquor is-

(a) in relation to alcohol required for industries producing hand sanitizers, disinfectants, soap or alcohol for industrial use and household cleaning products;

(b) for export purposes;

(c) from manufacturing plants to storage facilities; or

(d) being transported from any licensed premises for safe-keeping.

(5) No special events liquor licences may be considered for approval during the duration of the national state of disaster.

(6) The Cabinet member responsible for transport must, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, health, police and trade, industry and competition, issue directions for the transportation and storage of liquor.

(7) The sale, consumption and transportation of liquor in contravention of subregulations (1), (2), (3), (4) and 5 is an offence.'

[47] Regulation 86 echoes regulation 44 but, applies to areas designated as hotspots.

[48] This portion of the judgment will address the applicant's case based on the structure of government challenge and will, *inter alia,* pose the question whether or not the national respondents were constitutionally empowered to make the regulations or whether it amounted to an unlawful infringement of the provincial competencies.

[49] The question of which sphere of government may make the impugned regulations is important as it will address any doubt the public or spheres of government themselves may have pertaining to the legislative competence with regard thereto. This certainty will preclude any dispute about whether the provinces have legislative competences with regard to the matter concerned.[23]

[50] The structure of government challenge is premised on Schedules 4 and 5 of the Constitution. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence and includes *'disaster management'* and *'trade'* under part A thereof. Schedule 5 lists the functional areas of exclusive provincial legislative competence and lists *'liquor licences'* under part A thereof.

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[23] *Premier, Limpopo v Speaker of Limpopo Provincial Government* 2011 (6) SA 396

[51] The applicant contends that section 27(2)(i) of the DMA obliterates provincial control over the selling, dispensing and transportation of liquor without any form of consultation with provincial government and therefore, it intervenes in schedule 5 competencies. Furthermore, as there is no Cabinet member responsible for the retail selling and dispensing of liquor, the provisions of section 27(2) cannot be complied with. In response to this challenge, the national respondents have stated that the Minister of Trade, Industry and Competition is the relevant Cabinet member to consult, and that he was in fact so consulted.

[52] Although the provincial respondents have formally elected to abide by the decision of the Court, in reality they have made common cause with the applicant in respect of the challenge to the impugned regulations based on the structure of government argument and have presented both written and oral arguments in respect thereof. Therefore, any reference to the respondents in this section of the judgment should be understood as a reference to the national respondents.

[53] Before addressing the merits of this challenge, it is necessary to understand the structure of government and the constitutional principles which underpin it.

[54] Section 40(1) of the Constitution stipulates that government consists of a national, provincial and local sphere, which are all distinctive, interdependent and interrelated. Section

40(2) of the Constitution obliges each sphere of government to observe and adhere to the principles set out in Chapter 3 of the Constitution and must conduct their activities within the parameters provided by Chapter 3. The principles of co-operative government and intergovernmental relations are set out in section 41(1) which reads as:

'All spheres of government and all organs of state within each sphere must-

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with another in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.'

[55] In the constitutional scheme for the allocation of legislative powers between Parliament and the provinces, the legislative powers of the provinces are enumerated and clearly defined, while those of Parliament are not. On the contrary, Parliament's legislative powers are described as being plenary.[24]

[56] When Parliament assigns its legislative powers to the provinces it must do so in a manner that creates certainty about the nature and extent of the powers assigned. This will enable the provinces to exercise those powers in accordance with, and within the limits of, the terms of assignment.[25] A defining feature of this model of government is that the legislative functions between the national and provincial sphere of government are not rigidly assigned and many important functions are shared. Consequently, the Constitution introduced a new philosophy and introduced the principles of co-operative government and intergovernmental relations.[26]

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[24] *Premier, Limpopo supra*

[25] ibid

[26] *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214

[57] This approach is consistent with the constitutional principles set out in Chapter 3 of the Constitution.

[58] If the legislative powers of the provincial legislatures were to be implied beyond those expressly set out in the Constitution, it would diminish, through an expansive reading of the Constitution, the residual legislative powers of Parliament. This would be inconsistent with the scheme of the Constitution, by which the provincial legislatures are given specific powers under the Constitution, and Parliament is assigned the rest. The plenary legislative powers granted to Parliament are not to be diminished by implying legislative powers of provincial legislatures not expressly stated in the Constitution. The assignment of powers to the provinces must be expressed in clear and unequivocal language.[27]

[59] The structure of the government challenge centres around sections 44(1)(a)(ii), 44(2) and 44(3) of the Constitution. Section 44(1)(a)(ii) vests the national legislative authority in Parliament to pass legislation with regard to any matter, including a matter within a

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[27] *Premier, Limpopo supra*

[27] ibid

functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5.

[60] 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 to:

> (a) maintain national security;
>
> (b) maintain economic unity;
>
> (c) maintain essential national standards;
>
> (d) establish minimum standards required for the rendering of services; or
>
> (e) prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

[61] Section 44(3) provides that 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.

[62] The applicant contends that the impugned regulations do not comply with the requirements of section 44(2), which would authorise the national sphere of government to override the exclusive provincial legislative competence, and therefore, the necessary legislative competence to pass regulation 44 and 86 was absent rendering them unlawful and invalid. The respondents contend that the impugned regulations are covered by the provisions of section 44(3) and that the regulations were necessary and incidental to disaster management and trade, which are both listed in Schedule 4. The applicant disputes that the necessary and incidental matters contemplated in section 44(3) include matters within the exclusive provincial competences in Schedule 5.

[63] The meaning and parameters of section 44(3) have yet to be judicially defined and interpreted. The applicant and provincial respondents rely heavily on the decision of *Ex Parte President of the RSA: Constitutionality of the Liquor Bill****('the liquor bill case')***[28], to support their argument that the respondents were not authorised to make the regulations. In this case, Cameron AJ stated the following:

> *'Determining the place of s44(3) in the constitutional scheme, and in particular its relationship in the exclusive provincial legislative competences in Schedule 5, is not free from difficulty... On one approach, s44(3) authorises an enlarged scope of encroachment on the exclusive competences by permitting national intrusion into Schedule 5 where this is reasonably necessary for, or incidental to, the effective exercises of a Schedule 4 power. On another approach, s44(3) is not directed to the*

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[28] 2000 (1) SA 732

Schedule 5 competences at all, but is designed to specify the ambit of national legislation and provincial legislation falling with functional area listed in Schedule4. The express allusion in s44(3) to Schedule 4 legislation may provide support for this approach.'

[64] The applicant and provincial respondents argue that the approach which is not directed at the Schedule 5 legislative competencies is the correct one and should be adopted.

[65] The above extract was expressed when the Constitutional Court was called upon to determine the tagging of the liquor bill as either affecting or not affecting provinces and the consequent procedure which had to follow pursuant to such determination. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter, nor is the process concerned with preventing interference in the legislative competence of another sphere of government. Rather, it is concerned with the extent and nature of the input of provinces on the content of legislation affecting them.[29] When determining legislative competence, it falls to determine the subject-matter or substance of the legislation, the true purpose and effect thereof.[30]

[66] Cameron AJ went on to state that:

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[29] *Tongoane supra*

[30] Ibid

> *'According to The New Shorted Oxford Dictionary, "trade" in its ordinary signification means the "(b)uying and selling or exchange of commodities for profit, spec between nations; commerce, trading, orig. conducted by passage or travel between trading parties". Nothing in Schedule 4 suggests that the term should be restricted in any way and the Western Cape government did not contend that Parliament's concurrent competence to "trade" should be limited to cross-border or inter-provincial trade. It follows that in its ordinary signification, the concurrent national legislative power with regard to "trade" includes the power not only to legislate intra-provincially in respect of the liquor trade, but to do so at all three levels of manufacturing, distribution and sale.'*[31]

[67] Not only did Cameron AJ recognise that the concept of *liquor licence* was narrower than that of *liquor trade* but also that liquor trade encompassed the manufacturing, distribution and sale of liquor.

[68] The structure of government challenge cannot properly be determined without considering same as contextualised but the Disaster Management Act, Act 57 of 2002 **('DMA')** to which, I now turn.

[69] The DMA was enacted to provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the

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[31] paragraph 54

severity of disasters, emergency preparedness, rapid and effective response to disasters and for the establishment of a national, provincial and municipal disaster management centre.

[70] The DMA defines a national disaster as a disaster classified as such in terms of section 23. Section 23(6) defines a disaster as a national disaster if it affects (a) more than one province or (b) a single province which is unable to deal with it effectively. Neither the applicant nor the provincial respondents contest that the disaster was incorrectly classified as a national disaster.

[71] Section 26 of the DMA sets out the responsibilities of the national government in the event of a national disaster and states that:

> *'(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.'*

[72] In accordance with the provisions of s26(2)(b) 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), if a national state of disaster has been declared.

[73] the DMA defines:

> *(i) disaster – a progressive or sudden, widespread or localised, natural or human-caused occurrence which causes or threatens to cause inter alia death, injury, or disease, significant disruption of the life of a community;*
>
> *(ii) disaster management – a continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at preventing or reducing the risk of disasters, mitigating the severity or consequences of disasters, emergency preparedness, a rapid and effective response to disasters and post [32]disaster recovery and rehabilitation.*

[74] It is the National Centre which is tasked with classifying the disaster as a local, national or provincial disaster and which determined that the COVID-19 pandemic was a national disaster.

[75] After a national disaster has been declared, 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 suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or

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[32] Section 27(2)((i) of the DMA

threatened area. Section 27(2)(i) is only activated after a national state of disaster has been declared. Section 27(2)(i) must not be looked at in isolation but must be examined as part of the DMA as a whole.

[76] It is the applicant's case that section 27(2)(i) drastically interferes with the exclusive provincial legislative competences concerning liquor licences, as listed under Schedule 5. The applicant contends that the provision pertaining to the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster -stricken or threatened area falls to be classified as an exclusive provincial legislative function under Schedule 5 as it pertains to liquor licence. The respondents dispute this and contend that it falls within Schedule 4A- a concurrent national and provincial competence because it is a disaster management and or trade issue and not a liquor licence issue.

[77] In determining whether regulation 27(2)(i) is a liquor licence issue or a disaster management or trade issue, regard must be had to the subject matter or substance thereof, or to the true purpose and effect thereof.[33]

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[33] *Tongoane supra*

[78] The objectives of the Liquor Act, Act 59 of 2003 are set out in the preamble and section 2 thereof which states that the objects are to reduce the socio-economic and other costs of alcohol abuse and to promote the development of a responsible and sustainable liquor industry. As set out above, the DMA is enacted 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 for the establishment of a national, provincial and municipal disaster management centre.

[79] Regulations 44 and 86 gave effect to the objective of the DMA to provide for an integrated and co-ordinated approach to addressing the global COVID-19 pandemic. It was part of a national strategy and approach which included the implementation of curfews and the suspension and limitation of social gatherings. The regulations were part of a greater approach aimed at regulating and limiting the movement of people nationally. The objectives of the regulations were to control and regulate the distribution and sale of liquor in pursuit of social objectives at a time when the nation was vulnerable. Therefore, on applying the substance or true effect test to the regulations, it is clear that they form part of disaster management, which is a Schedule 4, concurrent legislative competence.

[80] Although the regulations had the effect of suspending or limiting the sale and distribution of liquor, it would have done so in furtherance of the objective of reducing the

socio-economic and other costs of alcohol use (not necessarily abuse) and of promoting the development of a responsible and sustainable liquor industry as the envisaged end result thereof was to ease the pressure on the health care system at a time when it was placed under severe strain by the demands of the COVID-19 pandemic. It was not focused on granting overall and general permission for the sale and distribution of liquor. To our mind, this resulted in the regulations being made in terms of the liquor trade and not as part of the liquor licencing. Liquor trade is a Schedule 4 competence.[34]

[81] Furthermore, even of the impugned regulations impacted on the issue of liquor licences, which is an exclusive provincial legislative competence, we are of the view that section 44(3) would have allowed the national respondents to encroach thereon. This approach is consistent with the recognition that the legislative functions of government are not rigidly assigned to the provincial or national sphere and that their functions often overlap, as well as the principles of co-operative government and intergovernmental relations. We are of the view that section 44(3) authorises an intrusion into the Schedule 5 competences when it is reasonably necessary or, incidental to, the effective exercise of a Schedule 4 power.

[82] The making of regulations 44 and 86 were reasonably necessary to and/or incidental for the effective exercise of the legislative competence relating to the management and

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[34] *Ex Parte President of the RSA* at para [54]

response to the national disaster in the sense that the response to the global pandemic would have been ineffective in the absence thereof. The applicant has conceded that the availability of alcohol resulted in additional pressure being placed on the healthcare system at a time when it needed to be resourced and equipped to attend to the demands placed on it by the COVID-19 pandemic. If the sale, distribution and availability of liquor were not suspended and/or limited by the regulations the national healthcare system would not have been able to free up the necessary resources and capacities, both human and non-human, to effectively address and manage the disaster, as a result of the demand placed on it by the availability of liquor; and the other steps taken by the respondents such as the imposition of a curfew and limitation and/or suspension of social gatherings could have been for nought.

[83] The applicant and provincial respondents argued that this would erode the exclusive legislative competence of the provinces as any matter could be said to be incidental to the exercise of a Schedule 4 power. We do not agree. The ability to invoke the provisions of section 44(3) are limited by the requirements set out therein. For a matter to be classified as being *reasonably necessary to* or *incidental to,* it has to be shown to be closely connected to or intrinsic to the principal matter set out in Schedule 4. Furthermore, it must be required for the effective exercise of the matter listed in Schedule 4.

[84] In conclusion, we find that the respondents were authorised to make regulations 88 and 44 as they fell under Schedule 4 as part of disaster management or trade, alternatively,

that the national respondents were authorised by section 44(3) to infringe on the exclusive legislative competence pertaining to liquor licence as set out in Schedule 5.

COSTS AND CONCLUSION:

[85] The parties were wisely in agreement that the *Biowatch* principle should be applied in connection with the costs of and incidental to this application. We agree. In the result, the following order is granted, namely:

1. That the application for leave to amend is refused.

2. That the application to introduce new evidence is refused.

3. That the application as formulated is 'moot'.

4. That the structural challenge application is dismissed.

5. That each party shall be liable for their own respective costs.

DOLAMO, J

WILLE, J

SLINGERS, J