THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs (700/2022) [2024] ZASCA 65 (30 April 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

On 15 March 2020, the Minister of Co-Operative Governance and Traditional Affairs (the Minister) issued a Notice declaring a National State of Disaster on account of the Covid-19 pandemic. On 18 March 2020, the Minister made regulations embodying a national public health response to the Covid-19 pandemic (the Covid-19 regulations). On 23 March 2020, the fourth respondent (the President) announced a national lockdown in South Africa, commencing on 26 March 2020. Consequently, on 25 March 2020, the Minister amended the regulations in order to bring about a nationwide lockdown. The country moved between five 'alert levels' restricting movement and economic activity, alert level five being the most restrictive of the alert levels, and level 1 the least restrictive. The lockdown regulations were extensive, and in some respects, they placed unprecedented restrictions on many constitutionally guaranteed fundamental rights and freedoms. On 29 April 2020, the Minister published the disaster management regulations. These regulations were subsequently amended in order to ease the lockdown restrictions in line with the alert levels in the risk-adjusted strategy. Thereafter, the Minister promulgated regulations as and when the need arose in accordance with the alert levels or the easing of restrictions. During alert level 4 lockdown, the Democratic Alliance (the DA) filed an application seeking an order declaring s 27 of the DMA to be unconstitutional and invalid.

In the high court, the DA's application came before a specially constituted court of three judges (Musi, JP, Matojane J and Windell J) (the full court) sitting as a court of first instance within the contemplation of s 14(1)*(a)* of the Superior Courts Act 10 of 2023. The majority judgment (Musi JP and Windell J) found that the delegation of power to the Minister in terms of s 27 of the DMA fell within constitutional bounds and contained sufficient safeguards to render it constitutionally valid. In his dissenting judgment, Matojane J (the minority judgment) pointed out that he would have upheld the application. Relying on the maxim *delegare non potent delegare* (a delegate was prohibited from sub-delegating powers unless authorised to do so), he found that s 27(2) of the DMA constituted an excessive delegation of legislative power by Parliament to the Minister. On those bases, the minority judgment would accordingly have held that s 27(2) was unconstitutional.

Aggrieved by the majority decision, the DA applied for leave to appeal to this Court against the majority judgment. On 25 March 2022 the full court unanimously granted leave to appeal. On appeal, they brought the following issues for determination by this Court. First, whether s 27 of the DMA was unconstitutional because it constituted an impermissible delegation of plenary legislative power by Parliament. Second, whether the aforesaid provision was unconstitutional because it permitted the creation of a de facto state of emergency without following constitutional requirements for the declaration of a state of emergency. Third, whether the same provision was unconstitutional because it failed to require the National Assembly to exercise its oversight role required by ss 42(3) and 55(2) of

the Constitution. In the event of a finding of unconstitutionality on any of the three issues raised, the fourth issue arising would be the determination of a just and equitable remedy.

On the first issue the first judgment of the SCA held that s 27 did not confer overly broad delegated powers on the Minister and based it on the following findings: First, the general scheme of the DMA revealed a requirement for the Minister to constantly engage with several role-players in her decision making. Clearly, the exercise of her powers was part of a broader collaborative venture. This was one of the ways in which the Minister's delegated regulation-making authority was circumscribed. Second, the Minister could only have exercised her powers once the disaster had been classified as a national disaster by the head of the National Centre for Disaster Management (National Centre). Third, the Minister could only declare a national state of disaster by notice in the Gazette if existing legislation and contingency arrangements did not adequately provide for the national executive to deal effectively with the disaster or if there were other special circumstances that warranted such declaration. The Minister was thus not given carte blanche to whimsically declare a state of disaster. Fourth, the DMA's stated purpose was to implement urgent measures to address the disaster. The DMA therefore expressly advocated for rapid and effective interventions. Parliament's slow procedures would have clearly inhibited the achievement of that goal. Coming to the second issue on appeal, the first judgment held that, in order for it to answer this issue it was imperative to understand that there was a distinction between a state of disaster and a state of emergency. Once that fundamental distinction between a state of emergency and a state of disaster was understood, the complaint that the state of disaster was akin to a state of emergency but without the constitutional safeguards of s 37 lost its force. Nothing in the DMA suggested that it permitted a deviation from the normal constitutional order. The safeguards enunciated in s 37 therefore had to be seen against the backdrop of an appreciation that the provision in question legitimised a drastic reduction in constitutional protections in the first place. The same, according to the first judgment, simply could not be said for states of disaster as regulated under the DMA. Regarding the third issue, the first judgment held as follows: the mere fact that the DMA did not, unlike the State of Emergency Act 108 of 1996 (SOEA), expressly provide for parliamentary supervision, did not mean that Parliament's supervision was ousted. This was because parliamentary oversight was constitutionally ordained in ss 42(3) and 55(2)*(b)* of the Constitution, both of which expressly provided for Parliament's supervisory role. The Minister's exercise of her regulation-making powers envisaged in the DMA in no way violated or eroded the constitutional imperatives of supervision and accountability prescribed in s 42(3) and 55(2)*(b)(*i) of the Constitution, as the executive remained accountable to parliament even during a state of disaster; the Oversight and Accountability Model did not state otherwise. Against that background, the first judgment held that, the DA's contention that s 27 of the DMA enabled a situation in which 'government could grant itself dictatorial powers' lacked merit and, as a result, fell to be rejected. As it related to the fourth and last issue, the first judgment held that, under such circumstances, there was no need to address the issue of an appropriate remedy. Accordingly, there was no reason to deviate from that principle and no order as to costs would be made. In conclusion, the first judgment held that s 27 of the DMA passed constitutional muster and as a result, the appeal had to fail.

The second judgment agreed with the conclusion of the first judgment that s 27 of the DMA does not impermissibly delegate plenary powers to the Executive. It however, disagreed with the first judgment in its conclusion that s 27 passed constitutional muster even though there was no express provision in it for Parliament's role in s 27 when a state of disaster was declared or extended. It further held that a state of disaster brought about a situation akin to a state of emergency in which human rights could be derogated as would be the case in a state of emergency; all this happened without the people, through their democratically elected representatives in Parliament, having any say about it, either at the declaration of the state of disaster, or when it was extended. The second judgment emphasised that the extent to which s 27 permitted the denudation of human rights was so intrusive that it ought to occur only with Parliament's approval, control and supervision. The fact that there was no role for Parliament under these circumstances, offended the very essence of a constitutional democracy such as ours. The second judgment further held that, the normative position should be that the declaration of a state of disaster and the extension thereof, must have the imprimatur of Parliament. Where the nature of the disaster was such that that was not feasible, the Executive could then have proceeded to declare it without reference to Parliament. That should, however, be the exception rather than the norm. Where that was the case, Parliament should then be consulted as soon as circumstances permit, for it to: (a) ratify the declaration of a state of disaster, and (b) approve any extension thereof. In all the circumstances, the second judgement concluded that the DMA permitted the Minister, by fiat of s 27(2)*(a)-(o),* to achieve an outcome similar to a state of emergency without the constitutional safeguards attendant in state of emergency. The absence of any express parliamentary role in all circumstances in

a state of disaster offended the very essence of a democratic state such as ours based on the principles of transparency, accountability, and responsiveness, among others. According to the second judgement, it would have upheld the Democratic Alliance's appeal with costs and declared s 27(2) unconstitutional and invalid based on lack of parliamentary supervision in a state of disaster. To remedy the defect, it would have applied the Democratic Alliance's proposal that there should be a read-in of s 24(4A) to provide for Parliamentary control, in a similar way that s 37(3) did, together with the power of Parliament to disapprove any declaration, regulation or direction. The second judgement would also have granted that order, subject to a rider that where the nature of the disaster was such that obtaining prior Parliamentary approval was not feasible, Parliament should be consulted as soon as circumstances permit for its ratification.

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