THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 611/2020

In the matter between:

DUWAYNE ESAU	**First Appellant**
NEO MKWANE	**Second Appellant**
TAMI JACKSON	**Third Appellant**
LINDO KHUZWAYO	**Fourth Appellant**
MIKHAIL MANUEL	**Fifth Appellant**
RIAAN SALIE	**Sixth Appellant**
SCOTT ROBERTS	**Seventh Appellant**
MPIYAKHE DLAMINI	**Eighth Appellant**
and	
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**First Respondent**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Second Respondent**
MINISTER OF TRADE, INDUSTRY AND COMPETITION	**Third Respondent**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA IN HIS CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL	**Fourth Respondent**
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS IN HER CAPACITY AS CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS	

COMMAND COUNCIL **Fifth Respondent**

Neutral citation: *Duwayne Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* (611/2020) [2021] ZASCA 9 (28 January 2021)

Coram: Petse DP, Zondi, Van der Merwe and Plasket JJA and Mabindla-Boqwana AJA

Heard: 2 November 2020

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Summary: Disaster Management Act 57 of 2002 (DMA) – decisions and regulations made during state of national disaster under the DMA – policy decisions of the National Coronavirus Command Council, a cabinet committee comprising of the entire cabinet, not justiciable because they had no legal effect – regulations made in terms of the DMA (the level 4 regulations) made in a procedurally fair manner, alternatively in a rational decision-making process – Minister of Co-operative Governance and Traditional Affairs applied her mind to representations received from members of the public – with two exceptions, the level 4 regulations found to be reasonable and justifiable limitations of fundamental rights – reg 16(2)*(f)*, which permitted only limited forms of exercise during the level 4 lockdown, and items 1 and 2 of Part E of Table 1, read with reg 28(3), which prohibited the over-the-counter sale of hot food, declared to be invalid to the extent of their conflict with the Constitution – challenge to directions made by the Minister of Trade, Industry and Competition moot.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie and Baartman JJ sitting as court of first instance) judgment reported *sub nom Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC):

1. The appeal is dismissed, save to the limited extent set out in paragraph 2 below.
2. The order of the court below is amended to read:

'1. Save for the relief granted in paragraph 2 below, the application is dismissed.

2. It is declared that:

(a) regulation 16(2)*(f)* of the regulations promulgated in GN 480, *Government Gazette* 43258 of 29 April 2020 (the level 4 regulations) is invalid to the extent that it limited: the taking of exercise to three means, namely walking, running and cycling; the time during which exercise could be taken to the hours between 06h00 and 09h00; and the location for taking exercise to a radius of five kilometres from a person's residence; and

(b) items 1 and 2 of Part E of Table 1, read with reg 28(3), of the level 4 regulations are invalid to the extent that they prohibited the sale of hot cooked food, otherwise than for delivery to a person's home.'

JUDGMENT

Plasket JA (Petse DP, Zondi and Van der Merwe JJA and Mabindla-Boqwana AJA concurring)

[1] The Republic of South Africa has been under a state of national disaster, declared in terms of the Disaster Management Act 57 of 2002 (the DMA), since 15 March 2020. The purpose of the declaration and the subsequently promulgated regulations and directions was and is to prevent and contain the spread of the SARS-CoV-2 or Coronavirus Disease 2019 (Covid-19) and to regulate the State's response

to the pandemic that has caused such widespread health and economic devastation in the country. In the course of doing so, it is beyond doubt that many of the regulations and directions issued by the national executive have limited the rights of the populace. This appeal concerns the constitutional validity of certain decisions taken by members of the executive and of regulations made in order to deal with the pandemic.

[2] The relief claimed by the appellants, as applicants in the Western Cape Division of the High Court, Cape Town, was wide-ranging and included an attack on the lawfulness of the establishment and functioning of a body that has played a central role in the response to the Covid-19 pandemic – the National Coronavirus Command Council (the NCCC). In addition, a further four issues arose for determination by the court below. They were, first, whether the Disaster Regulations of 29 April 2020 were consistent with ss 26 and 27 of the DMA; secondly, whether the Minister of Co-operative Governance and Traditional Affairs (the COGTA Minister) acted in a procedurally fair and rational manner when she made those regulations; thirdly, whether certain of the regulations were unreasonable and unjustifiable infringements of fundamental rights and were invalid on that account; and fourthly, whether directions issued by the Minister of Trade, Industry and Competition were invalid for want of legality and rationality.

[3] In the court below,[1] Allie J, with whom Baartman J concurred, found in favour of the respondents – the COGTA Minister, the Minister of Trade, Industry and Competition and the President of the Republic of South Africa – on all of the issues. This had the result that the application brought by the appellants, who were acting in the public interest in terms of s 38*(d)* of the Constitution, was dismissed. As is customary in matters such as this, in which constitutional rights are unsuccessfully sought to be vindicated, no order of costs was made against the unsuccessful applicants. The matter is before us with the leave of the court below.

[4] What is the role of the courts in circumstances such as these? In Lord Aitkin's famous dissenting judgment in *Liversidge v Anderson*,[2] he made the point that in times

[1] *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC).
[2] *Liversidge v Anderson* 1942 AC 206 (HL).

of national disaster – the Second World War, in that case – 'the laws are not silent'; that 'they speak the same language in war as in peace'; and that it 'has always been one of the pillars of freedom . . . that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law'.[3] These words echo what had been said by De Villiers CJ in this country, more than 60 years earlier, in the matter of *In re Willem Kok and Nathaniel Balie*,[4] that even in times of upheaval, the courts' 'first and most sacred duty is to administer justice to those who seek it'.

[5] In other words, even in times of national crisis, as this undoubtedly is, the executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution.[5] The rule of law, a founding value of our Constitution,[6] applies in times of crisis as much as it does in more stable times. And the courts, in the words of Van den Heever JA in *R v Pretoria Timber Co (Pty) Ltd and Another*[7] should not, even when the legislature has conferred 'vast powers' to make subordinate legislation on the executive, 'be astute to divest themselves of their judicial powers and duties, namely to serve as buttresses between the Executive and the subjects'.

[6] That is not to say that the courts have untrammeled powers to interfere with the measures chosen by the executive to meet the challenge faced by the nation. Judicial power, like all public power, is subject to the rule of law.[8] Perhaps the most obvious constraint on the power of the courts is the doctrine of the separation of powers, a principle upon which our Constitution is based[9] and which allocates powers and responsibilities to the three arms of government – the legislature, the executive and

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[3] At 244.
[4] *In re Willem Kok and Nathaniel Balie* (1879) 9 Buch 45 at 66.
[5] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1451 (CC). At para 56, Chaskalson P, Goldstone and O'Regan JJ said that 'it is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful' and, at para 58, they said that 'the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law'.
[6] Constitution, s 1*(c)*.
[7] *R v Pretoria Timber Co (Pty) Ltd and Another* 1950 (3) SA 163 (A) at 180-181.
[8] *S v Mabena and Another* [2006] ZASCA 178; 2007 (1) SACR 482 (SCA) para 2.
[9] Constitutional Principle VI of Schedule 4 of the interim Constitution required the Constitutional Assembly, when drafting the final Constitution, to make provision for the separation of powers.

the judiciary.[10] What the separation of powers means in a case such as this, is that a court may not set aside decisions taken and regulations made by the executive simply because it disagrees with the means chosen by the executive, or because it believes that the problems that the decisions or regulations seek to address can be better achieved by other means: the wisdom of the executive's exercises of power are not justiciable, only their legality. Somewhat cynically, Schreiner JA, in *Sinovich v Hercules Municipal Council*,[11] said that '[t]he law does not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby'.

[7] The point must be stressed that the function of the court is to vet the challenged decisions and regulations made in terms of the DMA for their regularity and not their wisdom. The reason for this was highlighted by Laws J in *R v Somerset County Council, ex parte Fewings and Others*,[12] a case concerning the review of a decision by a local government to prohibit stag hunting on land owned by it, and which had elicited intense public responses in favour of and against the decision. He said:

'Although judicial review is an area of the law which is increasingly, and rightly, exposed to a good deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, "Is this decision right or wrong?" Far less does the judge ask himself whether he would himself have arrived at the decision in question. It is, however, of great importance that this should be understood, especially where the subject matter of the case excites fierce controversy, the clash of wholly irreconcilable but deeply held views, and acrimonious, but principled, debate. In such a case, it is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, "Which view is the better one?" Otherwise, justice would not be seen to be done: those who support the losing party might believe that the judge has decided the case as he has because he agrees with their opponents. That would be very damaging to the imperative of public confidence in an impartial

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[10] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) paras 106-113; *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) SA 77 (CC) paras 24-25.

[11] *Sinovich v Hercules Municipal Council* 1946 AD 783 at 802-803.

[12] *R v Somerset County Council, ex parte Fewings and Others* [1995] 1 All ER 513 (QB) at 515d-g.

court. The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did.'

[8] In what follows, I shall first outline the principal provisions of the DMA that are relevant for purposes of this appeal. I shall then set out the background to the matter, focusing on the chronology of events that led to the making of the impugned decisions and regulations. Finally, I shall consider the attack on the role and function of the NCCC, the challenge to the validity of the regulations made by the COGTA Minister and the challenge to the validity of the directions issued by the Minister of Trade, Industry and Competition.

The DMA

[9] The DMA's principal purpose is to provide 'an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation'.[13] It seeks to achieve this purpose by creating structures and processes for dealing with disasters on the national, provincial and local levels.[14] It defines a disaster as 'a progressive or sudden, widespread or localised, natural or human-caused occurrence which' has the effect of either causing or threatening to cause 'death, injury or disease'; 'damage to property, infrastructure or the environment'; or 'significant disruption of the life of a community'; and 'is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources'.[15]

[10] The DMA applies when a disaster is not serious enough to justify the declaration of a state of emergency, but serious enough that the ordinary law cannot deal with it.[16] It is administered by a minister designated by the President.[17] In the current state of disaster, that minister is the COGTA Minister.

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[13] Long title.
[14] The most important structure that the DMA creates is the National Disaster Management Centre, an institution within the public service s 8). Its objective is to 'promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities' (s 9).
[15] Section 1.
[16] Section 2.
[17] Section 3.

[11] Apart from allowing for the making of regulations, the DMA also creates and empowers a range of administrative bodies, and authorizes a variety of actions during the currency of a state of disaster. In addition, empowerments in other laws can also be used to deal with a disaster, as has happened with the present Covid-19 disaster through the use of unemployment insurance funds in terms of the Unemployment Insurance Act 63 of 2001, tax relief in terms of the tax legislation and enhanced social assistance in terms of existing social security legislation. Enhanced administrative activity of this sort is not unusual in times of crisis, as the South African government's response to the Spanish influenza pandemic of the immediate post-World War I years and the great depression of the late 1920s and early 1930s attest.[18]

[12] Section 26 of the DMA allocates responsibilities in respect of national disasters. It provides that the cabinet, in the national sphere of government, 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'.[19]

[13] In terms of s 26(2), the cabinet is required to deal with a national disaster:

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

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

Section 26(3) provides that provincial and local governments may provide assistance to the national government in a national disaster and in dealing with its consequences; and that the cabinet, 'in exercising its primary responsibility, must act in close co-operation with the other spheres of government'.

[14] In the event of a national disaster befalling the country, s 27(1) vests powers in a designated minister, by notice in the *Government Gazette*, to declare a national state of disaster. He or she may only do so, however, if one of two preconditions is present: if 'existing legislation and contingency arrangements do not adequately provide for the

[18] Lawrence Baxter *Administrative Law* (1984) at 10-13.
[19] Section 26(1).

national executive to deal effectively with the disaster; or if 'other special circumstances warrant the declaration of a national state of disaster'.

[15] After a national disaster has been declared, the designated minister may, in terms of s 27(2), 'make regulations or issue directions or authorise the issue of directions' concerning a range of issues that include: 'the release of any available resources of the national government, including stores, equipment, vehicles and facilities';[20] the implementation of any national disaster management plan that may exist;[21] the evacuation of people to temporary shelters if this is necessary to preserve lives;[22] the 'regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area';[23] the 'suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area';[24] emergency procurement procedures;[25] and the 'facilitation of response and post-disaster recovery and rehabilitation'.[26] Section 27(2)*(n)* is a general empowerment. It allows for regulation-making for purposes of 'other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster'.

[16] Two further express curbs are placed on the regulation-making powers of the designated minister. First, in terms of s 27(2), he or she is required to consult with the 'responsible Cabinet member' before making regulations that bear on that minister's portfolio. So, for instance, before making a regulation concerning emergency procurement procedures, he or she must consult with the Minister of Finance. Secondly, in terms of s 27(3), his or her regulation-making power may only be exercised to the extent necessary to achieve certain stated purposes. There are five permissible purposes. They are:

'*(a)* assisting and protecting the public;

(b) providing relief to the public;

(c) protecting property;

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[20] Section 27(2)*(a)*.
[21] Section 27(2)*(c)*.
[22] Section 27(2)*(d)*.
[23] Section 27(2)*(f)*.
[24] Section 27(2)*(i)*.
[25] Section 27(2)*(l)*.
[26] Section 27(2)*(m)*.

(d) preventing or combating disruption; or

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

Regulations may be made that prescribe 'penalties for any contravention of the regulations'.[27]

[17] A national state of disaster has a limited lifespan. A state of disaster that has been declared lapses after three months. It may be revoked sooner but also may be extended for periods of one month at a time.[28]

Background

[18] The first Covid-19 cases were diagnosed in Wuhan, China in late 2019 and early 2020. The virus spread rapidly around the world and the first case in South Africa was confirmed on 5 March 2020. About a week later, as a result of the global spread of Covid-19 infections, the World Health Organisation (the WHO) declared the outbreak of Covid-19 to be a pandemic – a disease affecting people over a large geographical area.[29]

[19] By 15 March 2020, the number of cases in South Africa had risen to about 40. On that day, the head of the National Disaster Management Centre, 'after assessing the potential magnitude and severity of the COVID-19 pandemic in the country', issued a notice in terms of s 23(1)*(b)* of the DMA in which he classified the pandemic as a national disaster.[30] The effect of this classification was, in terms of s 23(8) of the DMA, to place the primary responsibility for coordinating and managing the disaster on the national executive.

[20] On the same day, and as a result of the classification of the pandemic as a national disaster, the COGTA Minister, having been designated by the President as the responsible minister in terms of s 3 of the DMA, declared a national state of disaster in terms of s 27(1) of the DMA.[31] The state of national disaster has been extended from time to time, and is still in operation.

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[27] Section 27(4).
[28] Section 27(5).
[29] *Collins Concise Dictionary* (21st Century Edition).
[30] GN 312, *GG* 43096 of 15 March 2020.
[31] GN 313, *GG* 43096 of 15 March 2020.

[21] On that day too, the NCCC was formed as a cabinet committee. It consisted of the President and 19 ministers. Five days later, on 20 March 2020, the NCCC was expanded to include the entire cabinet.

[22] On 18 March 2020, the COGTA Minister promulgated the first regulations in terms of the DMA (the initial regulations).[32] Their purpose was stated to be to 'prevent an escalation of the disaster or to alleviate, contain and minimize the effects of the disaster'. To this end, the regulations, inter alia, prohibited gatherings,[33] closed schools and partial care facilities[34] and limited the sale, dispensing or transportation of liquor.[35] Regulation 10 empowered ministers to issue directives and reg 11 created criminal offences, such as the offence of convening a gathering.

[23] On 23 March 2020, the President addressed the nation. He announced that a lockdown of the entire population was to be implemented with effect from 26 March 2020. By this time, the number of infections had risen dramatically, from 40 cases when the state of disaster was proclaimed on 15 March 2020 to 402 cases by 23 March 2020. The purpose of the lockdown was principally to 'flatten the curve' – to slow the spread of Covid-19 in order to buy time for the country's health care system to expand its capacity (including by the establishment of field hospitals), preparing and equipping health care facilities with such necessary equipment as personal protective equipment (PPE) and ventilators, and intensifying testing and prevention programs.

[24] In order to implement the lockdown, the regulations were amended on 25 March 2020 (the lockdown regulations).[36] Regulation 11A defined the term 'lockdown' to mean 'the restriction of movement of persons during the period for which this regulation is in force and effect, namely from 23H59 on Thursday, 26 March 2020, until 23H59 on Thursday 16 April 2020, and during which time the movement of persons is restricted'. The term 'movement' was defined in the same regulation to

[32] GN 318, *GG* 43107 of 18 March 2020.
[33] Regulation 3.
[34] Regulation 6.
[35] Regulation 8.
[36] GN 398, *GG* 43148 of 25 March 2020.

mean ‘entering or leaving a place of residence or, in the case of people not ordinarily resident in the Republic, their place of temporary residence while in the Republic’.

[25] The regulations provided that for the duration of the lockdown ‘every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, collecting a social grant, or seeking emergency, life-saving, or chronic medical attention’.[37] Movement between provinces was prohibited.[38] The regulations also provided that ‘[a]ll businesses and other entities shall cease operations during the lockdown, save for any business or entity involved in the manufacturing, supply, or provision of an essential good or service’.[39] On the following day a number of amendments were effected to the regulations.[40] For instance, the regulation closing all businesses except for those providing essential goods or services was amended to allow for people to work from their homes – in other words, remotely.[41]

[26] Thereafter, two more amendments to the lockdown regulations were promulgated in early April 2020. On 16 April 2020, the lockdown was extended to 30 April 2020.[42] This was effected by the simple expedient of substituting ‘30 April 2020’ for ‘16 April 2020’ wherever it appeared in the lockdown regulations. A number of other substantive amendments were also effected. For instance, regulation 11B(9) was inserted to allow for the movement of children between co-holders of parental responsibilities and rights and caregivers, in certain defined circumstances.

[27] On 20 April 2020, the regulations were amended yet again. Annexure B of the lockdown regulations had listed goods and services that were categorized as essential. They included, as essential goods, ‘[a]ny food products, including non-alcoholic beverages’.[43] The category was amended by GN 471, *Government Gazette* 43240 of 20 April 2020 to read:

‘Any food product, including non-alcoholic beverages, but excluding cooked hot food’.

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[37] Regulation 11B(1)*(a)*(i).
[38] Regulation 11B(1)*(a)*(iii).
[39] Regulation 11B(1)*(b)*.
[40] GN 419, *GG* 43168 of 26 March 2020.
[41] Regulation 3*(a)*.
[42] GN 465, *GG* 43232 of 16 April 2020.
[43] Item A.1(i).

[28] Clearly, the lockdown could not endure indefinitely. With that in mind, the COGTA Minister briefed the cabinet on 20 April 2020 on a system that would be used to ease the restrictions progressively. It had three components: a system of what were termed alert levels, which calibrated the levels of response to the spread of the virus and the readiness of the health care system to respond; an industry classification system for the staggered re-opening of the economy; and a system for enhanced public health and social distancing arrangements in workplaces and public spaces.

[29] Five alert levels were proposed in the COGTA Minister's presentation. The highest level – level 5 – was the most stringent and involved a lockdown to deal with high levels of the spread of the virus and low health system readiness. Level 4 involved less restrictions on the movement of people and applied when there was moderate to high virus spread with low to moderate readiness. Level 3 involved what were described as moderate restrictions and applied when the virus spread was moderate, with moderate readiness. Level 2 involved further reduced restrictions and applied when the virus spread was moderate and readiness was high. Finally, level 1 involved minimum restrictions and applied when the virus spread was low and there was a high degree of readiness.

[30] The President addressed the nation on 23 April 2020. He introduced the concept of a 'risk-adjusted approach' and the different alert levels. He announced that the entire country would be moved from level 5 – the strict lockdown that had been in place since 26 March 2020 – to level 4. The effect of that was to be that some of the lockdown restrictions would be eased and more economic activity would be permitted.

[31] On 25 April 2020, the COGTA Minister published a document entitled a 'draft framework for sectors'. It contained proposals for what activities would and would not be allowed during each level. She called for public comment on the content of the document, with specific reference to the activities proposed for level 4. After a significant number of responses over the next two days, the COGTA Minister, having

consulted with 'relevant Cabinet members', promulgated regulations on 29 April 2020 (the level 4 regulations) to give effect to the move to level 4.[44]

[32] It is these regulations that are the subject of challenge in this appeal. In addition, the appellants challenge certain policy decisions that, they alleged, were taken by the NCCC, and that were then given effect to by the COGTA Minister when she made the level 4 regulations. I shall deal with the content of the level 4 regulations in more detail below. Suffice it to say at this stage that they ameliorated the harshness of the lockdown regulations in a number of significant respects.

[33] The alert level of the country has since been reduced further to level 1, before being increased again to level 3. Many of the restrictions in the level 4 regulations no longer apply. Despite that, the appellants argue that the issues they raised are not moot, particularly as the country could be placed once more on level 4 or level 5. While the respondents argued in their papers that the matter was moot, they did not persist with that contention and argued the merits of the appeal fully. I am satisfied that the interests of justice require a decision from this court on the issues raised by this appeal, even though the level 4 regulations have been replaced with level 3 regulations.[45] It is only in respect of one matter – the validity of directions issued by the Minister of Trade, Industry and Competition – that they rely on mootness. I shall deal with that issue in due course. I turn now to the issues that we are required to decide.

The NCCC

[34] The appellants sought an order, in terms of paragraph 3 of the notice of motion, declaring that three decisions taken by the NCCC were unconstitutional and invalid. Those decisions, described as 'policy decisions', were the decisions to place the country under lockdown, to extend the lockdown, and to place the country on level 4.[46]

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[44] GN 480, *GG* 43258 of 29 April 2020.

[45] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) paras 9-11; *MEC for Education, KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) para 32; *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) paras 109-117.

[46] Counsel for the eighth appellant argued this aspect of the appeal. Paragraph 3 of the notice of motion refers to 'any decision taken or purported to have been taken' by the NCCC but that relief was pruned

They accepted that, in respect of each decision, legal effect was given to it when the COGTA Minister made the lockdown regulations on 25 March 2020, amended those regulations to extend the lockdown on 16 April 2020 and made the level 4 regulations on 29 April 2020.

[35] I shall first consider the evidence concerning the creation, role and composition of the NCCC before considering the issues that must be determined. They are twofold: whether these decisions, made antecedent to the regulations, are justiciable; and if they are, whether, if the NCCC took the decisions, it had the lawful authority to do so.

[36] The creation, role and functioning of the NCCC was dealt with in detail in the answering affidavit of the COGTA Minister. It came into being on 15 March 2020, the day the national state of disaster was declared. On that day, the cabinet took a decision to create it as a structure of the cabinet that would devote itself exclusively to dealing with the pandemic. At that stage it was made up of 19 members of the cabinet and was chaired by the President.

[37] The creation and composition of the NCCC was confirmed in a letter written by the President on 18 March 2020 in which he identified the purpose of the structure as being the coordination of the 'national emergency response to the coronavirus'. The original members of the NCCC were set out in the letter. They included the Deputy President, the Minister of Health, the COGTA Minister, the Minister of Finance, the Minister of Police, the Minister of Defence and Military Veterans, the Minister of Trade, Industry and Competition and the Minister of Transport. The letter concluded by stating that due to the urgency of addressing the pandemic, the NCCC would meet three times per week.

[38] The ministers who first comprised the NCCC were chosen on the basis of the anticipated important roles that their departments would play in dealing with the pandemic. It soon became clear, as infections began to spike dramatically, that the pandemic would be worse than initially anticipated, and that the entire cabinet should

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down to the three specific decisions in para 1, read with fn 1, of the eighth appellant's heads of argument.

be drawn into the NCCC. The President invited the entire cabinet to the NCCC meeting of 20 March 2020 and, since then, all cabinet members have participated in its functioning.

[39] The COGTA Minister described the role and functioning of the NCCC as follows:

'116 Although the whole of Cabinet is now on the NCCC, it is not, *qua* the NCCC, a decision-making body. Rather, it coordinates, facilitates and implements the government's response to Covid-19. The facilitation role includes enabling me, as the designated Minister under the Disaster Management Act, to consult relevant Ministers, for the purposes of section 27 of the DMA and more generally.

117 Many Cabinet members also have statutory powers to issue regulations in response to COVID-19, and have also been empowered to issue directions for the same purpose. The NCCC is a committee through which they are able to consult their relevant peers, and more generally on their respective department's responses to the COVID-19 pandemic.

118 None of this, however, should be understood as taking responsibility away from the relevant Minister that is empowered to publish regulations or directions. In each instance, the relevant decisions are taken by the empowered Ministers where this is required.'

[40] She made the point that, if decisions had to be made, they would be taken by the responsible minister usually after debate in the NCCC. There was, she said, 'generally a seamless line between discussions that happen at the NCCC, and the decisions that ensue, and that are taken by Cabinet or the relevant Minister'.

[41] The NCCC provided a high-level, multi-disciplinary forum for ministers 'to obtain the buy-in, advice and support of their fellow Cabinet members for decisions they need to take, and it gives Cabinet the opportunity to ensure consensus positions are being adopted'. That said, however, when action was required, the relevant minister remained responsible 'for preparing his or her particular directions, and his or her department will prepare the specific wording used in those instruments, generally in consultation with other departments'. Individual ministers, in other words, still had to apply their minds to the regulations or directions they were empowered to make.

[42] The COGTA Minister stated that various statements made by a number of people, including the President, that the NCCC took certain decisions were not

accurate. It was, in fact, the cabinet that decided that a strict lockdown was necessary, but she took the decision to amend the initial regulations to give effect to this decision. When it became apparent that the lockdown had to be extended, she, after consulting 'relevant Cabinet members', amended the lockdown regulations to achieve this end. And after the cabinet 'sitting in committee as the NCCC' had decided that the country should be moved to level 4, she promulgated regulations to this effect on 29 April 2020.

[43] The COGTA Minister's version was criticized by the appellants. It was argued that this version should be rejected on the papers and that the appellants' contrary allegations should be accepted. This argument is without merit. The COGTA Minister gave a full and detailed explanation that cannot be categorised as being far-fetched, clearly untenable, uncreditworthy or palpably implausible, so as to justify its rejection out of hand.[47] On her version, only one relevant policy decision – to move the country from level 5 to level 4 – was taken by the NCCC. I turn now to the reviewability of that decision.

[44] In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*[48] Harms JA drew a distinction between policies and laws. He stated:

'The word "policy" is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school can fairly be called a "policy" and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word "young" has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot

[47] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635D. See too *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

[48] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59; 2001 (4) SA 501 (SCA) para 7.

override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear.'

[45] As a general rule, policies that have been formulated and adopted by the executive will not be ripe for review until they are implemented, usually after having been given legal effect by some or other legislative instrument. Two principles come into play in this regard: first, that in order for an exercise of public power to be ripe for review, it should ordinarily be final in effect; and secondly, that the decision must have some adverse effect for the person who wishes to review it, because otherwise its setting aside would be an academic exercise which courts generally eschew.

[46] I accept, however, that the mere fact that the impugned conduct involves the formulation or adoption of a policy does not necessarily mean that it is not justiciable. If the application of a policy infringes or threatens rights, it may be challenged on review. That was the case in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*,[49] in which a policy not to dispense a drug that prevented mother to child transmission of HIV/AIDS was found to violate fundamental rights.[50]

[47] Generally speaking, a challenge to a policy decision before it has been implemented will not be justiciable because it is premature. There are instances, however, in which a policy decision may have the result that a constitutional infringement is likely to occur, and that a court may, in order to prevent that apprehended harm, grant appropriate relief before the policy is implemented.

[48] *Law Society of South Africa and Others v President of the Republic of South Africa and Others*[51] was such a case. South Africa is a member of the South African Development Community (SADC). A tribunal was established by SADC to determine disputes between member states and between individuals and member states. After the tribunal had found against the government of Zimbabwe at the instance of people who had been unlawfully dispossessed of their land during that country's land reform

[49] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).
[50] Paras 98-99.
[51] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC).

process, the Zimbabwean government persuaded the South African President at the time, as well as a number of other heads of state, to sign a protocol that purported to remove the tribunal's jurisdiction to determine disputes between individuals and member states. The President also made common cause with his colleagues to hamstring the tribunal's functioning in other ways.

[49] When an application was brought to review the President's decision to sign the protocol, it was argued on his behalf that the application was premature because the process had not been completed: Parliament still had to decide whether to ratify the President's decision, and only then would a challenge be ripe for determination. Mogoeng CJ, in the confirmation proceedings that followed upon the court of first instance granting the relief, held that the application was not premature: the President's decision threatened the right of South Africans to access to court[52] and also had 'serious consequences'[53] in that it had legal effect pending Parliament deciding whether to ratify it or not.[54]

[50] This case is different. The decision-making process was completed when the COGTA Minister made the level 4 regulations. That gave legal effect to the policy decision taken by the NCCC. And it was those regulations that impacted on the rights of people, not the prior policy decision.

[51] Rather than this challenge being premature, as was the case in *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd and Another*,[55] it is moot because it is aimed at the wrong target – at a decision that had no legal effect, while the exercise of power that does have that effect continued to operate.[56] It is, in this sense, similar to the matter of *Wings Park Port Elizabeth (Pty) Ltd v MEC,*

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[52] Para 29.
[53] Para 41.
[54] Paras 39-40.
[55] *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd and Another* [2019] ZASCA 88; 2019 (6) SA 400 (SCA).
[56] For the difference between ripeness and mootness, see Cora Hoexter *Administrative Law in South Africa* (2 ed) (2012) at 585: 'The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late.'

Environmental Affairs, Eastern Cape and Others,[57] in which an applicant sought to review a decision at first instance, but did not take the decision in the subsequent internal appeal, which had upheld the initial decision, on review.

[52] In other words, even if the review of the policy decision was to succeed, the adverse impact on rights brought about by the subsequent regulations would continue. The review would consequently have no practical effect. The court below was correct to dismiss this challenge.

[53] There is another basis for the dismissal of this challenge. That relates to the nature of the NCCC. By the time that the impugned policy decision was taken, the NCCC comprised of the entire cabinet. The eighth appellant's counsel conceded in argument that if the NCCC was the cabinet under another name, as he put it, the review could not succeed. For the reasons that I shall state briefly, I am of the view that counsel's concession was well-made and correct.

[54] In terms of s 85(1) of the Constitution, executive authority is vested in the President. Section 85(2) determines how that authority is exercised. In provides:

'The President exercises the executive authority, together with the other members of the Cabinet, by-

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

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.'

[55] In terms of this section, the Constitutional Court held in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[58] the exercise of executive authority 'is a collaborative venture in terms of

[57] *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG).

[58] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 41. See too *President*

which the President acts together with the other members of the Cabinet'. The consequences of this allocation of power in s 85(2) were spelt out in *Minister of Justice and Constitutional Development v Chonco and Others*.[59] Ministers act collectively with the President and they are all 'collectively and individually accountable to Parliament under s 92(2) of the Constitution'. That means that the entire collective is responsible for every decision, whether or not particular individual members were party to a particular decision.[60]

[56] While the Constitution allocates executive power to the President and the cabinet, it does not dictate how the cabinet is to function. That is left to them to determine and they are free to arrange their affairs largely as they please. Murray and Stacey say that the way in which the cabinet operates depends to a large extent on the President's style – his or her way of doing things – and that includes 'what matters should be discussed by Cabinet as a whole, what can be dealt with in Cabinet committees and what matters need not come to Cabinet at all'.[61]

[57] The NCCC is a cabinet committee. That is not in dispute. It is also not in dispute that the cabinet may function through committees and that decisions taken by cabinet committees bind the entire cabinet as much as decisions taken by the entire cabinet in a cabinet meeting. The result is that the NCCC's policy decision was a valid decision of the cabinet.

The level 4 regulations and ss 26 and 27 of the DMA

[58] The COGTA Minister is empowered by s 27 of the DMA to make regulations. She may not make any regulations that take her fancy because she does not have an unfettered discretion, which is a contradiction in terms in a constitutional state.[62] Section 26 and s 27 both place significant limits on her powers.

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of the Republic of South Africa and Others v Quagliani and Two Similar Cases [2009] ZACC 1; 2009 (2) SA 466 (CC); 2009 (4) BCLR 345 (CC) para 23.

[59] *Minister of Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25; 2010 (4) SA 82 (CC); 2010 (2) BCLR 140 (CC) para 36.

[60] Murray and Stacey 'The President and the National Executive' in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (2 ed) 18-16.

[61] Murray and Stacey in Woolman and Bishop (note 60) 18-36.

[62] Baxter (note 18) at 409; *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A) at 48D-E; *Ismail and Another v Durban City Council* 1973 (2) SA 362 (N) at 371H-372B. See too Timothy Endicott *Administrative Law* (2009) at 230 who says: 'Having a discretion does not mean that anything

[59] It was argued by the appellants that the level 4 regulations were invalid because they did not augment existing legislation, as required by s 26(2)*(b)* of the DMA, but purported to amend legislation, and that the COGTA Minister strayed beyond the purposes permitted in terms of s 27(2).

[60] I have my doubts as to the correctness of these arguments on the facts of this case understood in their proper context but I do not intend to traverse those issues. These challenges fail for a more fundamental reason. In motion proceedings, applicants are required to make out their case in their founding affidavit and may not make out their case in reply.[63] These challenges were not raised in the founding affidavit, but only in the replying affidavit, with the result that the respondents had no opportunity to answer them.

[61] This does not stem from an overly technical approach to pleading but concerns fundamental fairness. It has been considered and applied by the Constitutional Court recently in *Gelyke Kanse and Others v Chairperson, Senate of the University of Stellenbosch and Others*.[64] The appellant had sought to introduce a new cause of action in its reply. Cameron J observed that the High Court had 'rightly rejected this evidence, as must we'.[65] He explained the reason for doing so as follows:[66]

'This is not to stump Gelyke Kanse on technical points. It is to insist that a litigant should stick to the case it has set out in its challenge, and that it does not ambush its opponent in reply with a new case and new evidence entirely.'

[62] This challenge to the level 4 regulations was correctly dismissed by the court below. As the challenge was not properly raised, there is no reason to consider the merits.

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goes. Every public power must be exercised responsibly, and every public decision ought to be made reasonably. This means deciding in the public interest, and with respect for the private interests of persons affected by the decision.'

[63] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B; *Bayat and Others v Hansa and Others* 1955 (3) SA 547 (N) at 553C-E.

[64] *Gelyke Kanse and Others v Chairperson, Senate of the University of Stellenbosch and Others* [2019] ZACC 38; 2020 (1) SA 368 (CC); 2019 (12) BCLR 1479 (CC).

[65] Para 18.

[66] Para 19.

The level 4 regulations: procedural fairness and procedural rationality

[63] The validity of the level 4 regulations as a whole is challenged on procedural grounds as well. It was argued by the appellants that the public participation process that preceded them was inadequate; and that this resulted in procedural unfairness (if the making of the regulations amounted to administrative action) or procedural irrationality (if their making constituted executive action reviewable in terms of the principle of legality). In addition, it was argued that the COGTA Minister could not have applied her mind properly to the vast number of representations that were received. It is necessary, as always, to start with the facts, the COGTA Minister having explained in detail the process that she followed in making the level 4 regulations.

The facts

[64] Two observations may be made at the outset. They are, first, that from the inception of the state of disaster, it appears that the COGTA Minister consulted widely with cabinet colleagues, officials and experts. She and her colleagues consulted with a range of interest groups as well. Secondly, many members of the public made their views known to the COGTA Minister in one way or another concerning the lockdown and the regulations.

[65] That was the setting when consideration was given to introducing the system of levels and to move from the strict lockdown of level 5 to a less restrictive regime in terms of level 4. This process commenced with the COGTA Minister's presentation to the cabinet on 20 April 2020 when she introduced, inter alia, the system of levels. This presentation was, she said, 'the result of significant high-level coordination between the COGTA Department and other Departments, such as Trade and Industry, and directly between Ministers'.

[66] The system of levels was introduced to the nation on 23 April 2020 by the President in one of his addresses. He announced at the same time that a decision had been taken to move the country to level 4.

[67] On 25 April 2020, the COGTA Minister announced that she intended initiating a public participation process 'on the classification of industries at the various levels'. In plain terms, she was planning to invite the views of members of the public on what

economic and social activities should be permitted at each level. The invitation to the public was published on the COGTA website and a number of other websites as well. It took the form of a document entitled 'Draft Schedule' (the draft).

[68] When a request for comments on the draft was published, the COGTA Minister said that 'sectors and business organisations/trade unions and members of the public are invited to submit comments on the schedule of services to be phased in as per the Covid-19 Risk Adjusted Strategy to be implemented with effect from 01 May 2020'. The website address on which the 'draft framework' could be found was provided. The request for comments concluded as follows:

'Feedback and/or comments should be submitted in writing preferably for Level Four and following the attached guidelines. South Africa will be moving to level 4 economic activity as of 1 May 2020 hence comments particularly as contained in Level 4 is encouraged.'

An email address was provided for comments.

[69] The draft explained what each level entailed. It then set out what economic activity would be permitted and, where appropriate, specific conditions under which an activity would be allowed. In respect of each level, the proposed impact on people is dealt with under the heading 'Personal Movement'. For instance, with reference to level 4, the draft explained that, in general terms, it required that '[a]ll Covid-19 health and safety protocols must be followed at all times', including the observance of social distancing and the wearing of masks, that people 'may travel to perform and acquire services only where such services cannot be provided from the safety of one's home' and that references to permitted levels of employment 'must take into account the necessary social distancing guidelines as per the National Department of Health'.

[70] The draft then dealt with the permitted economic activities. For instance, under the first heading it provided:

'All agriculture, hunting, forestry, fishing and related services including the export of agricultural products permitted.'

Under a heading 'Accommodation and food service activities', the schedule stated:

'1. Accommodation not permitted, except for quarantine and essential services.

2. Restaurants only for food delivery services (9am-8pm) and subject to curfew (no sit-down or pick-up allowed).'

The first provision was identical to the corresponding provision under level 5 but the second was an amelioration of the level 5 provision which had not permitted restaurant, take-away, bar and canteen services.

[71] The final heading dealt with personal movement. It contains 14 provisions. It was proposed, inter alia, that in level 4, interprovincial travel would not be permitted except 'to return to work with proof of employment, in exceptional circumstances such as funerals (with approval) or essential services'; that no 'recreational travel or to meet family or friends' would be permitted; that people would be allowed to exercise 'under strict public health conditions, subject to directions, which will exclude organized activities, recreational facilities and gyms'; and that a curfew would be imposed between 20h00 and 05h00.

[72] The public was requested to submit comments by 12h00 on 27 April 2020. The COGTA Minister said, however, that many comments were received after the deadline, and were considered nonetheless.

[73] A large volume of comments was anticipated and, in fact, materialized. Teams from COGTA and the Department of Trade, Industry and Competition were established to deal with the comments. The working of the teams was described thus by the COGTA Minister:

'As comments came in, they were sifted in accordance with themes and issues raised. Each was then considered and a summary of submissions was collated into a document titled "Report on Issues Raised by Sectors and the Public".'

[74] A summary of the report was presented to the National Joint Intelligence and Operational Structure, referred to by the COGTA Minister as NATJOINTS, and reported on to the NCCC. It was also used by COGTA officials to revise the draft level 4 regulations then being prepared. These, in turn, were then presented to both NATJOINTS and the NCCC for comment and discussion. On 29 April 2020, the COGTA Minister, after consultation with 'the relevant Cabinet members', promulgated the level 4 regulations.

[75] Those regulations ameliorated the lockdown regulations in significant ways. In this respect, the COGTA Minister said that while some of the operative provisions of the level 4 regulations were identical to the lockdown regulations, 'many had been altered to ease the impact of the Lockdown, in line with the staggered approach to easing the lockdown'.

Procedural fairness

[76] I intend to determine whether the public participation process that resulted in the promulgation of the level 4 regulations was procedurally fair on the basis that the making of subordinate legislation is administrative action for purposes of s 33 of the Constitution and s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). My reasons for doing so are set out below. I shall then, in the alternative, consider whether the process was a rational one on the assumption that the making of regulations is executive action to which the rules of procedural fairness do not apply;[67] and that the principle of legality, rather than the PAJA, applies to the review of subordinate legislation.

[77] Prior to 27 April 1994, the common law treated the making of subordinate legislation as an instance of administrative action. Indeed, Baxter described rule-making as 'an administrative process in its own right'.[68] In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)*,[69] Chaskalson CJ described the making of subordinate legislation as 'an essential part of public administration'. He held that it had been regarded as administrative action for purposes of the interim Constitution and that nothing suggested that the final Constitution regarded it differently.[70] He concluded that to 'hold that the making of delegated legislation is not part of the right

[67] In *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) para 77, the majority of the Constitutional Court held that it 'would not be appropriate to constrain executive power to requirements of procedural fairness'.
[68] Baxter (note 18) at 190. See too Baxter at 74-75; 194-195.
[69] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 113.
[70] Para 109.

to just administrative action would be contrary to the Constitution's commitment to open and transparent government'.[71]

[78] When Chaskalson CJ turned to whether the making of subordinate legislation fell within the definition of administrative action in the PAJA, he observed that the PAJA had to be interpreted consistently with s 33 of the Constitution (and not the other way around).[72] Administrative action is defined in s 1 of the PAJA as follows:

'"administrative action" means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) . . .

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)*(a)*, *(b)*, *(c)*, *(d)*, *(f)*, *(g)*, *(h)*, *(i)* and *(k)*, 85(2)*(b)*, *(c)*, *(d)* and *(e)*, 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

. . .'

[79] As the making of subordinate legislation complied clearly with most of the definition of administrative action in the PAJA, Chaskalson CJ only had to consider two aspects: whether rule-making fell within one of the express exclusions from the definition; and whether it fell within the definition of a decision. He found, on the first

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[71] Para 113. See further, para 118. See too *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (note 5) para 27 in which Chaskalson P, Goldstone and O'Regan JJ said: 'Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be "legislation", the process by which the legislation is made is in substance "administrative".'

[72] Para 100.

issue, that it was significant that s 85(2)*(a)*, the power of the President and the cabinet to implement legislation (and the corresponding power in the provincial sphere of government, s 125(2)*(a)*, *(b)* and *(c)*) was *not* excluded from the definition.[73] He concluded:[74]

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

[80] A 'decision' is defined in s 1 of the PAJA to mean:

'. . . any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly.'

[81] Chaskalson CJ accepted that the making of subordinate legislation was not expressly included in the definition of a decision. Nonetheless, he found that this form of administrative conduct did constitute a decision:[75]

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[73] Para 125.

[74] Para 126. In this paragraph, Chaskalson CJ also referred to *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (note 58) para 142, in which the court had observed that the duty in terms of s 85(2)*(a)* that rests on the national executive to implement legislation 'is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s 33'.

[75] Para 128.

'It is true that the making of regulations is not referred to in subparas (a) - (f). But the reference in the main part of the definition to "any decision of an administrative nature" and in the general provision of subpara (g) to "doing or refusing to do any other act or thing of an administrative nature" brings the making of regulations within the scope of the definition. This seems to me to be the clear meaning of the definition. But if there is any doubt on this score, the definition of "administrative action" must be construed consistently with s 33 of the Constitution.'

[82] There was no clear majority on the issue of whether rule-making constitutes administrative action in terms of the PAJA. Chaskalson CJ and four other members of the court found that the PAJA was applicable, five others concluded that it was not necessary to answer this question and one decided that the PAJA did not apply.[76]

[83] In this court, however, in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*,[77] Maya JA, with reference to the *New Clicks* judgment, stated that she agreed with 'the appellant's contention that the making of regulations by a Minister constitutes administrative action within the meaning of the [PAJA]'. So too, in *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others*.[78] 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'.

[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

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[76] Para 13.4.
[77] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; 2010 (3) SA 589 (SCA) para 10. Leave to appeal was refused by the Constitutional Court in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZACC 34; 2010 (5) BCLR 445 (CC), although no mention is made in the judgment of the legal nature of the regulations in issue.
[78] *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others* 2011 (4) SA 406 (KZP) para 17.

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.

[85] In terms of the common law, no one had a right to be heard before subordinate legislation was made, unless the empowering legislation made provision for a hearing of one form or another.[79] That position was ameliorated to an extent by this court in *South African Roads Board v Johannesburg City Council*,[80] in which it was held that while the public in general had no right to be heard prior to the taking of administrative action having legislative effect, individuals who were specifically affected were entitled to be heard. Despite this development, the common law lacked coherent, principled rules for rule-making.[81]

[86] The position was changed fundamentally by s 4 of the PAJA, which Hoexter described as 'a great innovation in South African administrative law'.[82] It requires that administrative action that affects the public must be procedurally fair and creates specific mechanisms that are designed to afford large numbers of people a hearing. Section 4(1) provides:

'(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether-

(a) to hold a public inquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or

(e) to follow another appropriate procedure which gives effect to section 3.'

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[79] Baxter (note 18) at 580-582; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) at 261H-262A; *S v Moroka en Andere* 1969 (2) SA 394 (A) at 398H.

[80] *South African Roads Board v Johannesburg City Council* [1991] ZASCA 63; 1991 (4) SA 1 (A) at 12E-13A.

[81] See generally, O'Regan 'Rules for Rule-Making: Administrative Law and Subordinate Legislation' 1993 *Acta Juridica* 157. See too Baxter 'Rule-Making and Policy Formulation in South African Administrative Law Reform' 1993 *Acta Juridica* 176.

[82] Hoexter (note 56) at 407.

[87] Sections 4(2) and 4(3) set out the procedures to be followed in public enquiries and notice and comment processes. Section 4(4) regulates permissible deviations from the procedures provided for in certain instances. It provides:

'*(a)* If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)*(a)* to *(e)*, (2) and (3).

(b) In determining whether a departure as contemplated in paragraph *(a)* is reasonable and justifiable, an administrator must take into account all relevant factors, including-

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.'

[88] An administrator's choice of procedure in terms of s 4(1) is final.[83] (It is difficult to conceive of any adverse effect on rights, real or potential, or prejudice caused by this decision, hence it is, for all practical purposes, unreviewable.) The true focus is on the way in which the chosen procedure is applied. Once a choice of procedure has been made, that procedure must be applied fairly. The formulation of s 4(1) suggests 'that regulations, the most common form of administrative action affecting the rights of the public, are indeed subject to review under PAJA'; and, if the making of regulations was excluded, that would probably give rise to a constitutional challenge based on the PAJA not complying with s 33(1) of the Constitution.[84]

[89] I turn now to the content of the specific right to be heard that was created by s 4(1). While the content of public enquiries and notice and comment processes are set out in ss 4(2) and (3), and fair but different statutory procedures will generally be regulated by the specific statutes concerned, the other appropriate procedures allowed by s 4(1)*(e)* are different. The only qualification attached to s 4(1)*(e)* is that, whatever procedure is utilized, it must give 'effect to section 3' of the PAJA.

[90] There is a debate in academic circles as to whether s 4 stands alone or is linked to s 3. Mass argues that when interpreting s 4, reference to s 3 is necessary because

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[83] In terms of ss *(ii)* of the definition of administrative action, 'any decision taken . . . in terms of section 4(1)' is excluded. See too *New Clicks* (note 72) para 132.

[84] *New Clicks* (note 69) para 133.

s 3 fleshes out the content of s 4.[85] Hoexter, one of the members of the South African Law Reform Commission's committee that drafted the first iteration of the PAJA, takes a different view. She argues that there is no link between ss 3 and 4, and that the single reference to s 3, in s 4(1)*(e)*, is a mistake. While the committee made the link expressly in its draft, the legislature chose to remove it, but inadvertently left the single reference to s 3 by mistake.[86]

[91] The reference to s 3 cannot simply be ignored, and must be given meaning. In the case of alternative procedures contemplated by s 4(1)*(e)*, s 3 serves the useful purpose of giving content to otherwise unspecific procedures. It injects a standard of fairness into the empty vessel of 'another appropriate procedure'. In other words, whatever the procedure chosen by the administrator, in order for it to be fair, it must comply with the requirements of s 3. That means that, while recognizing the flexibility and fact-specific variability of procedural fairness in its application,[87] the procedure chosen must ensure that adequate notice of the intended administrative action is given to members of the public, that they are given an adequate opportunity to be heard, and so on.[88] In the absence of a link from s 4 to s 3, the same substantive result would be achieved in another way: in order to give content to the right to procedural fairness

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[85] Caroline Mass 'Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: a Comparative Perspective' in Claudia Lange and Jakkie Wessels (eds) *The Right to Know* (2004) 63 at 65-68.

[86] Hoexter (note 56) at 416.

[87] Section 3(2)*(a)*.

[88] Section 3(2)*(b)*. This section provides:

'In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.'

Section 3(3) contains three additional elements of procedural fairness that may, in the discretion of an administrator, be afforded to a person in an appropriate case. Legal representation is an example.

in terms of s 4(1)*(e)*, the common law would apply[89] and has much the same content as s 3(2)*(b)* and s 3(3).[90]

[92] The appellants' complaints are that adequate notice of the proposed administrative action was not given in the invitation to make representations and that, because of the short return day, a reasonable opportunity to make representations was denied to members of the public. These aspects of procedural fairness have long been regarded as being at its core: in *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another*,[91] for instance, Van Rensburg J, held that while 'no specific, all-encompassing test can be laid down for determining whether a hearing is fair, two fundamental requirements need to be satisfied before a hearing can be said to be fair, namely there must be notice of the contemplated action and a proper opportunity to be heard'.[92]

[93] The rules of procedural fairness are not to be applied by rote, but flexibility and contextually, due regard being had to the empowering statute.[93] The position was summed up in *Russell v Duke of Norfolk and Others*,[94] in which the Court of Appeal stressed that the 'requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth'. When all is said and done, the test is one of fundamental fairness.[95]

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[89] *Pharmaceutical Manufacturers Association of SA and Another: Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (2) BCLR 241 (CC) para 45: 'That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development.' *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 22: 'The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter.'

[90] See, on the content of the rule at common law, Corder 'The Content of the *Audi Alteram Partem* Rule in South African Administrative Law' (1980) 43 *THRHR* 156. See too Baxter (note 18) at 542-546.

[91] *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (2) SA 849 (E). See too *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 (3) SA 476 (T) at 486F-G.

[92] At 854H.

[93] *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) at 106d-h; *Du Preez and Another v Truth and Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A) at 231I-232C.

[94] *Russell v Duke of Norfolk and Others* [1949] 1 All ER 109 (CA) at 118e; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646D-E.

[95] Baxter (note 18) at 546; *Marlin v Durban Turf Club* 1942 AD 112 at 126; *Turner v Jockey Club of South Africa* (note 94) at 645E-646A.

[94] The proposed administrative action of which the public was given notice was both general and specific. The draft, which unveiled the system of levels, contained detail of the measures the COGTA Minister was considering in respect of economic and social activity in each level. In her notice inviting representations from members of the public, however, she asked for representations, in particular, in respect of the proposals for level 4. By this stage, the public had endured the strict lockdown for about a month under level 5. The proposed level 4 restrictions were thus an amelioration of the restrictions that were in place at the time.

[95] The draft did not contain a draft of the regulations that the COGTA Minister was considering making. It contained a fairly detailed and lengthy list of the activities, both economic and social, that she was considering permitting or restricting, the extent of the restrictions and the conditions under which permitted activities could be undertaken. That list, in respect of level 4, did not stand alone: it was embedded in a larger list dealing with each of the other levels, and was also informed by the experiences of members of the public of living under a state of disaster, including a strict lockdown. In these circumstances, I am of the view that sufficient detail had been given by the COGTA Minister to enable members of the public to make meaningful representations on the content of the level 4 regulations.

[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*,[96] 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

[96] *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* [2007] ZACC 25; 2008 (2) SA 319 (CC); 2008 (4) BCLR 417 (CC).

not struggle to meet in submitting its representations, was adequate by the procedural fairness standards required by PAJA'.[97]

[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.[98] 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 earth quake, 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 recognizes a sliding scale in the nature of disasters, ranging from the sudden to the progressive.[99] 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.[100] 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

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[97] Para 49.

[98] In terms of the common law, if legislation was silent as to whether affected people were entitled to be heard, the rule was that they were so entitled. The rule was that 'there is a right to be heard, unless the statute shows, either expressly or by implication, a clear intention on the part of the Legislature to exclude such a right'. See *Attorney-General, Eastern Cape v Blom* [1988] ZASCA 83; 1988 (4) SA 645 (A) at 662H-I; *Administrator, Transvaal and Others v Traub and Others* [1989] ZASCA 90; 1989 (4) SA 431 (A) at 748G-H; *South African Roads Board v Johannesburg City Council* (note 80) at 10G-I. The fundamental right to just administrative action and the PAJA operate in the same way. See *Transvaal Agricultural Union v Minister of Land Affairs* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) para 25; *National Director of Public Prosecutions and Another v Mahomed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BLR 476 (CC) para 37.

[99] Section 1.

[100] See by way of analogy, *Visagie v State President and Others* [1989] ZASCA 83; 1989 (3) SA 859 (A) at 865E-866A, in which it was held that an emergency detainee who had been released from detention subject to a 'banning order' was not entitled to a prior hearing on the conditions of his banning order because of the urgency involved in releasing him and thus ameliorating the harshness of his circumstances. He was, however, entitled to be heard after his release.

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.

[99] The two-day period for the furnishing of representations was shown to be adequate ex post facto: more than 70 000 submissions were made to the COGTA Minister in the time allowed. What is more, the deadline for submissions was flexibly applied and a number of representations received after the deadline were also considered.

[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.

Procedural rationality

[101] I have dealt with the adequacy of the process followed by the COGTA Minister on the basis that s 4 of the PAJA applies to the making of subordinate legislation – that the making of regulations constitutes administrative action for purposes of s 33 of the Constitution, and the PAJA which gives effect to s 33. If I am wrong in that finding, I am of the view that, on the assumption that regulation-making in this case constituted executive action, which is not required to be procedurally fair,[101] it nonetheless meets the standard of procedural rationality.

[101] *Masetlha v President of the Republic of South Africa and Another* (note 67); *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC).

[102] The requirement of procedural rationality was first articulated in *Albutt v Centre for the Study of Violence and Reconciliation and Others*.[102] That case concerned a special dispensation vested in the President for the pardoning of prisoners alleged to have committed politically-motivated offences. One of the central issues that confronted the court was whether the President was obliged to hear the victims of the applicants for pardon before taking decisions. Ngcobo CJ held that the constitutional requirement that, in order to be valid, the exercise of public power had to be rational extended beyond the merits of official decisions: the means chosen to take the decision – the procedure to be followed – also had to be 'rationally related to the objective sought to be achieved'.[103] He concluded:[104]

'Before the President decides whether to grant pardon, he must establish the facts in accordance with the criteria set out in the special dispensation process, namely, whether the offence was committed with a political motive. To establish the facts the President must hear both the perpetrators and the victims of the crimes in respect of which a pardon is sought. It is difficult to fathom how the President can establish the truth about the motive with which a crime was committed without hearing the victim of that crime. Decisions based on the perpetrators' versions and their supporting political parties are more likely to be arbitrary, considering the President's objective of determining whether a pardon applicant qualifies for a pardon for an allegedly politically motivated crime. It is not inconceivable that a victim may want to make representations to demonstrate that the crime committed was not of a political nature, but due to other motives.'

[103] The public participation process was about the content of the regulations at each level, with special reference to level 4, and not about which level was to apply. The power vested in the COGTA Minister to make regulations in terms of the DMA is broad in its sweep. The subject-matter involved is extensive. The effect, potential or real, on the rights, lives and livelihood of every person subject to them is drastic. The experience of people who endured the strict lockdown was highly relevant to the COGTA Minister's decision-making in respect of the content of the regulations. She could not rationally have taken decisions on the content of those regulations without having afforded members of the public an opportunity to make representations – as

[102] *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC). See too *Minister of Home Affairs and Others v Scalabrini Centre and Others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA).
[103] Para 51.
[104] Para 70.

she did. I am also of the view that, for the reasons I have given in relation to the procedural fairness of the regulation-making process in terms of s 4 of the PAJA, that procedure was also rational.

Did the COGTA Minister apply her mind to the representations?

[104] It was argued on behalf of the appellants that because of the short period between the deadline for the making of representations and the promulgation of the level 4 regulations, coupled with the large number of representations made, the COGTA Minister could not have applied her mind to the representations. This attack on the regulations, it seems to me, is based on the ground of review set out in s 6(2)*(e)*(iii) of the PAJA, namely that the COGTA Minister failed to take into account relevant considerations (or, in the alternative, the same ground of review in terms of the principle of legality[105]). The position was summed up by Henning J, in *Bangtoo Bros and Others v National Transport Commission and Others*,[106] when he said that the duty cast on an administrative official to consider 'all relevant and material information placed before him' is not met if that official pays 'mere lip-service to this obligation . . . just as it would be a dereliction of duty to hear representations which are pertinent, and then to ignore them'.

[105] The COGTA Minister's evidence established that she did consider the representations made by members of the public. In order to do so, teams comprising of officials of her department and the Department of Trade, Industry and Competition were set up to consider, collate and summarise the representations. The representations were 'fed into' her decision-making process in this way. This challenge was therefore correctly dismissed by the court below.

The attacks on particular regulations

[106] It was argued on behalf of the appellants that certain of the regulations were invalid because they infringed fundamental rights and were not reasonable and justifiable limitations for purposes of s 36 of the Constitution. If, as I have accepted,

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[105] *Democratic Alliance v President of the Republic of South Africa and Others* [2011] ZASCA 241; 2012 (1) SA 417 (SCA) para 112; *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) paras 39-40; 86.

[106] *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N) at 685A-D.

the making of regulations is administrative action in terms of the PAJA, it follows that the validity of the impugned regulations must be determined with reference to the grounds of review listed in s 6(2) of the PAJA. The principal ground of review that arises on the basis of the appellants' attack on the regulations is s 6(2)*(i)* – that the regulations concerned are 'otherwise unconstitutional or unlawful'. If my assumption is incorrect, there will be no substantive difference: s 2 of the Constitution provides that 'law or conduct inconsistent with it is invalid' and in terms of s 172(1)*(a)*, courts must declare law or conduct that is inconsistent with the Constitution to be invalid to the extent of the inconsistency.

[107] The regulations that are attacked on this basis are regs 16(1) to 16(4), dealing with restrictions on the movement of people, and regs 28(1), 28(3) and 28(4), read with Part E of Table 1, dealing with economic activity. In broad terms, the appellants argue that these regulations infringe their fundamental rights to human dignity,[107] to freedom and security of the person,[108] to freedom of movement[109] and to freedom of trade, occupation and profession.[110]

The limitation of fundamental rights

[108] The determination of the constitutionality of the impugned regulations involves a two-stage process. First, the appellants are required to establish that the regulations infringe one or more of their fundamental rights. Secondly, if they succeed in establishing this, the burden shifts to the respondents to justify the infringement or infringements in terms of s 36(1) of the Constitution.[111] If they fail to do so, the offending regulations must be declared to be invalid to the extent of their inconsistency with the Constitution.[112] If it is just and equitable to do so, a court may limit the retrospective effect of the declaration of invalidity or suspend it for a period to allow the competent authority to correct the defect.[113] If the respondents justify the

[107] Constitution, s 10.
[108] Constitution, s 12.
[109] Constitution, s 21.
[110] Constitution, s 22.
[111] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 21; *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 100. See too Woolman and Botha 'Limitations' in Woolman and Bishop (note 60) at 34-3 to 34-6.
[112] Constitution, s 172(1)*(a)*.
[113] Constitution, s 172(1)*(b)*.

infringement or infringements of fundamental rights, the regulations are valid, their impact on fundamental rights having been sanctioned by the Constitution.

[109] Section 36, the limitation clause, provides:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[110] In *S v Makwanyane and Another*,[114] Chaskalson P explained how the limitation provision in s 33(1) of the interim Constitution was to be applied. That provision was broadly similar to s 36(1) of the final Constitution, but did not contain the five factors listed as sub-sections *(a)* to *(e)*. He held:[115]

'The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired

[114] Note 111.
[115] Para 104.

ends could reasonably be achieved through other means less damaging to the right in question.'

[111] It has been held that this approach holds good for the application of s 36(1) as well. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[116] Ackermann J stated:[117]

'[34] . . . The relevant considerations in the balancing process are now expressly stated in s 36(1) of the 1996 Constitution to include those itemised in paras (a)--(e) thereof. In my view, this does not in any material respect alter the approach expounded in *Makwanyane*, save that para (e) requires that account be taken in each limitation evaluation of "less restrictive means to achieve the purpose (of the limitation)". Although s 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.

[35] The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.'

The impugned regulations

[112] Regulation 16 concerns restrictions on the movement of people. Regulations 16(1), 16(2), 16(3) and 16(4) read:

'(1) Every person is confined to his or her place of residence.

(2) A person may only leave their place of residence to –

(a) perform an essential or permitted service, as allowed in Alert Level 4;

(b) go to work where a permit which corresponds with Form 2 of Annexure A has been Issued.

(c) buy permitted goods;

(d) obtain services that are allowed to operate as set out in Table 1 to the Regulations;

(e) move children, as allowed;

(f) walk, run or cycle between the hours of 06h00 to 09h00, within a five kilometre radius of their place of residence: Provided that this is not done in organized groups.

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[116] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) 1517 (CC).

[117] Paras 34-35. See too *Moise v Transitional Local Council of Greater Germiston and Others* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) para 18.

(3) Every person is confined to his or her place of residence from 20h00 until 05h00 daily, except where a person has been granted a permit to perform an essential or permitted service as listed in Annexure D, or is attending to a security or medical emergency.
(4) Movement between provinces, metropolitan areas and districts are prohibited except –

(a) for workers who have a permit to perform an essential or permitted service who have to commute to and from work on a daily basis;

(b) the attendance of a funeral, as allowed;

(c) the transportation of mortal remains; and

(d) for learners who have to commute to and from school or higher education institutions on a daily basis during periods when those institutions are permitted to operate.'

[113] Regulation 28 is headed 'Operation of economic sectors'. The three sub-regulations that are challenged by the appellants read as follows:
'(1) Businesses and other entities as set out in Table 1 may commence operations.
. . .
(3) Retail stores selling goods as provided for [in] Table 1 are prohibited from selling other goods that are not permitted in terms of Table 1.
(4) Persons performing essential services or permitted services must be duly designated in writing by the head of an institution, or a person designated by him or her, on a form that corresponds with Form 2 in Annexure A: Provided that [the] Cabinet member responsible for small enterprises may issue directions in respect of small and micro enterprises, co-operatives, informal traders and spaza shops in respect of those entities.'

[114] Table 1 provided that people involved in industries and activities listed in the table 'will be permitted to perform work outside the home, and to travel to and from work', subject to three conditions. They were that 'strict health protocols, and social distancing rules' were adhered to; that the return to work under level 4 was to be phased in to enable measures to be taken to 'make the workplace COVID-ready'; and that the return to work was to be effected 'in a manner that avoids and reduces risks of infection'.

[115] Then followed lists of industries and activities that could, and in some instances, could not, be undertaken in level 4. Often conditions were attached to the permission to engage in a particular industry or activity. For instance, Part A permitted '[a]ll

agriculture, hunting, forestry and fishing, bee-keeping, including preparation, cultivation, harvesting, storage, transport of live animals and auctions (subject to health directions) and related agricultural infrastructure and services (including research, inspection, certification and quality control'. Item 2 of Part B provided that the manufacture of 'paper and paper products, excluding stationary' was permitted 'scaling up to full employment and subject to strict health protocols'. Other industries were only permitted to 'scale up' to 50 percent employment,[118] and one category – '[a]ll other manufacturing' – was only permitted to 'scale up' to 30 percent employment.[119]

[116] Part E listed what products could and could not be sold, either in the wholesale or retail trade in stores and spaza shops as well as by e-commerce and informal trade. For instance, food products, including non-alcoholic beverages and animal food, were permitted to be sold,[120] as were '[h]and sanitisers, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment'.[121] Item 19 prohibited the sale of alcohol.

Analysis

[117] Section 21(1) of the Constitution provides that everyone 'has the right to freedom of movement'. This includes the right to move freely throughout the country. It 'guarantees free decision-making regarding how, when and where persons move from one place to another and how long they sojourn anywhere'.[122] It is clear that reg 16 infringed this right by confining everyone to their residences, albeit with exceptions and conditions. At the same time, by placing such a fundamental restriction on peoples' autonomy and freedom of choice, reg 16 also infringes the right of everyone to human dignity in terms of s 10 of the Constitution.[123] In the light of these findings,

[118] See for instance, items 5-8 of Part B.
[119] Item 9 of Part B.
[120] Item 1 of Part E.
[121] Item 4 of Part E.
[122] Rautenbach 'Introduction to the Bill of Rights' in Y Mokgoro and P Tlakula (eds) *Bill of Rights Handbook* at 1A-209. See too Azhar Cachalia, Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna and Gilbert Marcus *Fundamental Rights in the New Constitution* at 63-64; John Dugard *Human Rights and the South African Legal Order* at 136; Paul Sieghart *The International Law of Human Rights* at 178-179; Klaaren 'Freedom of Movement' in Woolman and Bishop (note 60) at 66-5 to 34-9.
[123] Rautenbach 'Introduction to the Bill of Rights' in Mokgoro and Tlakula (note 122) at 1A-147-150; Woolman 'Dignity' in Woolman and Bishop (note 60) at 36-11. See too *Ferreira v Levin NO and Others;*

there is no need to consider whether other fundamental rights have also been infringed by reg 16. As the breach of fundamental rights has been established, the enquiry moves to the second stage – whether the infringements were reasonable and justified in terms of s 36.

[118] I accept too that regs 28(1), 28(3) and 28(4) also infringe the fundamental right to human dignity to the extent that they limit the freedom that everyone has to make their own decisions, as consumers, as to what goods they wish to purchase. These regulations also infringe the fundamental right to freedom of trade, occupation and profession – the right to 'perform activities by means of which a livelihood is pursued'.[124] This right is infringed in that people may only practice their chosen trade, occupation or profession to the extent permitted by the regulations.

[119] The infringements were brought about by regulations, the making of which were authorised by the DMA. The regulations qualify as a law-making instrument and, by dint of their legislative character, they are a law of general application.[125] They are, in other words, the type of legal instrument that may be used to limit fundamental rights.

[120] The fundamental right to freedom of movement is a foundational right in a society such as ours. It fits with and complements such rights at the right to freedom and security of the person, the right to freedom of association and the right to privacy. In the past, the common law right to freedom of movement was subjected to systemic encroachments. One thinks, for instance, of the pass laws, influx control, race-based restrictions on inter-provincial movement, banishments and house-arrests under the security laws.[126] The link between the infringement of the right to freedom of movement and the right to human dignity in this instance is clear and direct.

Vryenhoek and Others v Powell NO and Others [1996] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) para 49.

[124] Rautenbach 'Introduction to the Bill of Rights' in Mokgoro and Tlakula (note 122) at 1A-210. See too *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) paras 58-59; 62-63.

[125] Rautenbach 'Introduction to the Bill of Rights' in Mokgoro and Tlakula (note 122) at 1A-95-103; Baxter (note 18) at 349-351; Hoexter (note 56) at 52-53; *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* [2013] ZASCA 70; 2014 (3) SA 251 (SCA) paras 29-32.

[126] Dugard (note 122) at 71-78; 136-145.

[121] The right to practice one's trade, profession and occupation is closely linked to the right to work – the right to earn a livelihood. It too has a close and direct connection to the right to human dignity. In *Affordable Medicines Trust*,[127] Ngcobo J explained this connection as follows:

'What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. "It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence".'

[122] The COGTA Minister's starting point in justifying the regulations under attack was that the State was under an obligation to respect, protect, promote and fulfil the fundamental rights of everyone to life,[128] to freedom and security of the person[129] and to access to health care services.[130] These rights were threatened by the pandemic. In order to arrest the spread of Covid-19, it was necessary to compel people to remain at home. The logic is clear:

'Uninfected persons who stay at home minimize their contact with infected persons and infected surfaces. Infected persons who stay at home reduce the occasions upon which they may infect others or public surfaces.'

[123] It is not possible to restrict people to their homes all of the time but the more frequently people go into public places, the longer they spend in those places and the greater the number of people present in those places, the greater the likelihood of infection and its spread. After the strict lockdown had slowed the rate of infection significantly, decisions had to be taken 'as to which public activities should be permitted, and who should be permitted to enter public spaces and when'. Given the

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[127] Note 124 para 59.
[128] Constitution, s 11.
[129] Constitution, s 12.
[130] Constitution, s 27(1)*(a)*.

large number of potential social and economic activities, choices had to be made. The COGTA Minister said:

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

[124] As the strict lockdown with its extremely limited number of permitted activities achieved its aim, it became possible to start a process of relaxing the restrictions. Deciding which activities to permit and which to prohibit required ‘a value judgment balancing a series of incommensurate but fundamentally important considerations’. This involved balancing considerations such as ‘the extent to which an activity gives effect to a constitutional right or obligation; the need to re-open the economy, but in a manner that did not undermine the gains of the strict lockdown; and the ‘effectiveness with which the activities and the lockdown generally could be policed’.

[125] Ultimately, the decision to permit some activities and not to permit others involved what the COGTA Minister described as unavoidable trade-offs between reducing the infection rate, on the one hand, and the obligation on the State to respect, protect, promote and fulfil fundamental rights, on the other. These trade-offs, she said, were ‘inherently polycentric’ and required ‘making value judgments in which there is room for reasonable disagreement’.

[126] In this scheme of things, the COGTA Minister and Professor Salim Karim, the chairperson of the Ministerial Advisory Committee on Covid-19, are sure of one thing: the appellants’ view is simply incorrect that the wearing of face-masks, social distancing and the observance of health protocols, such as hand sanitizing, is all that is necessary to keep the spread of Covid-19 in check. Professor Karim said in this regard:

’28. Faced with the reality of the global spread of [Covid-19], governments have been forced to decide how best to intervene to mitigate the effect of the pandemic on their nation. In addition to providing the public with reliable information and advice on infection prevention,

most governments around the world have recognized the importance of actively regulating the public's behaviour by enforcing infection prevention practices.
29. Because the virus spreads rapidly . . . there is little time available to implement prevention, especially social distancing, in the way that other prevention activities would routinely be implemented. Implementing social distancing and hand hygiene through health messaging would take a long time to get a sufficient number of people to adopt these behaviour changes. A week's delay in this epidemic could be an opportunity lost. To prevent a potentially catastrophic rapid escalation in Covid-19 cases, the most effective and immediate way to regulate the public's behaviour is by implementing a "lockdown". The purpose of a lockdown is to minimize interpersonal transmission of [Covid-19] by limiting the movement of individuals. It rapidly raises awareness of the threat posed by [Covid-19] and creates a platform to effectively promote the other available Covid-19 prevention measures.
30. When people stay at home and only enter public spaces infrequently and for short periods of time, the transmission rate of [Covid-19] is reduced as the virus is not transmitted from infected people to uninfected people due to a lack of interaction and proximity. There are simply fewer opportunities for the virus to be spread from an infected person to an uninfected person.
31. Unless the immediacy and magnitude of the threat is conveyed rapidly, starkly and decisively, it would take a long time for people to change their behaviour by taking up infection prevention practices, due to difficulty and inconvenience in having to comply with new behavioural norms such as not shaking hands.
32. South Africa is a country where poverty and disease occur in parallel and the risk of rapid spread of the virus in vulnerable communities is a major concern.'

[127] Similar considerations that applied to the movement regulations applied to the economic activity regulations. The COGTA Minister said that a complete re-opening of the economy after the strict lockdown would have significantly increased 'the amount of foot traffic in stores and shops', would have increased 'the number of potentially infected areas' and would have increased the Covid-19 infection rate. As a result, a staggered approach was adopted. One of the effects of this approach, she said, was that 'seemingly arbitrary lines' were sometimes drawn 'as to which goods and services could again be sold'.

[128] According to the Minister of Trade, Industry and Competition, difficult trade-offs had to be made in the process of the phased re-opening of the economy, as he and

his colleagues strove to achieve a balance between, as he put it, saving lives and saving livelihoods. The knock-on effect of opening particular sectors also had to be taken into account. He stated in this respect:

'In addition to the manufacturing operations, the full reopening of the sector would have included logistics operations to move goods from factories to warehouses, distribution centres and shopfronts. The increased numbers of employees expected at work would have further increased the demand for public transport, which would have brought people into closer [contact] with each other, during a time where "extreme precautions to limit community transmissions" ought to be taken. At the point that the country moved to Alert Level 4, there had not yet been enough time to put in place sufficiently robust public health measures to try and protect people when moving to and from work using public transport.'

[129] In the government's approach to re-opening the economy, the Minister said that he and his colleagues 'had a constitutional obligation to err on the side of caution'. To re-open the economy too quickly would have defeated the purpose of level 4, which was to 'continue to maintain extreme precautions to limit community transmissions and outbreaks that could have serious and fatal consequences'. I turn now to consider the factors of relevance to the justification enquiry, which I do against the backdrop of the evidence that I have outlined.

[130] The importance of the purpose of the limitations of fundamental rights is self-evident. The strict lockdown was principally intended to 'flatten the curve' – to slow the spread of Covid-19 in order to buy time for the health care system to expand its capacity, for the preparing and equipping of health care facilities with such necessary equipment as PPE and ventilators, and for intensifying testing and prevention programs. The lockdown brought with it the obvious drawback that economic activity, for the most part, ground to a halt. The level 4 regulations were aimed at allowing greater economic activity while, at the same time, keeping in place the lockdown, albeit in terms not as restrictive as before. The level 4 restrictions were part of a continuum from the strict lockdown regulations of level 5 to the relative normality of level 1. In other words, even if, in level 4, some activities could have been permitted but were not, their proscription was of a temporary nature and had to be seen as part of a phased risk-averse approach to re-opening the economy.

[131] The purposes of reg 16 and reg 28 was to keep the pandemic under control and to save lives, while at the same time allowing more social and economic activity than hitherto. The DMA anticipated that in the case of some disasters at least, drastic action would have to be taken. For this reason, it specifically empowered the making of far-reaching and invasive regulations, including 'the regulation of movement of persons',[131] and 'other steps'[132] if these measures were necessary for purposes, inter alia, of 'dealing with the destructive and other effects of the disaster'.[133]

[132] At its most basic, the purpose of the limitation of the fundamental right to freedom of movement and of trade, occupation and profession was the protection of the health and lives of the entire populace in the face of a pandemic that has cost thousands of lives and has infected hundreds of thousands of people. In a sense, there has been something akin to a trade-off: the rights to freedom of movement, to dignity and to pursue a livelihood were limited to prevent the spread of Covid-19 and that, in turn, protected the right to life of many thousands of people, who would have died had the disease had the opportunity to run unchecked through the country.[134]

[133] I turn now to the nature and the extent of the limitation of fundamental rights. The effect of reg 16 must be considered as a whole. It restricted everyone to their residences but then provided for a series of exceptions and exemptions. In this way, the main prohibition in reg 16(1) was made conditional in that it allowed for certain exemptions and exceptions from the blanket prohibition that was reg 16's starting point.

[134] Regulation 16(2) allowed for people to leave their homes in six circumstances. So, for instance, people could leave their homes to perform essential or permitted services, or to go to work if that work was permitted in terms of the list of economic activities contained in Table 1, and when their employers had issued permits to authorize them returning to work.

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[131] Section 27(2)*(f)*.
[132] Section 27(2)*(n)*.
[133] Section 27(3)*(e)*.
[134] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; 2007 (9) BCLR 958 (SCA) para 9.

[135] The exemptions from the prohibition are significant. They represent a sizable increase in social and economic activity under level 4 when compared to the activities permitted in terms of the lockdown regulations. A glance at the industries and activities which people were permitted to undertake and the nature of the work that people were permitted to perform outside of their residences reveals a broad range of economic activity. The same holds true for the right to leave home to purchase permitted goods and to obtain permitted services: the goods that could be purchased under level 4 increased, as did the services. With that came a commensurate increase in freedom of movement.

[136] The right to 'move children, as allowed' is also a significant improvement over the initial lockdown regulations. Under the level 4 regulations, children could be moved between co-holders of parental responsibilities and rights or caregivers, either within municipalities or even across municipal and provincial boundaries, under certain conditions.[135] Similarly, in terms of the lockdown regulations, no taking of exercise was permitted outside of a person's residence. In terms of the level 4 regulations, however, exercise was allowed outside of the residence, subject to conditions that I shall discuss further below.

[137] In much the same way, limited exceptions – permitted or essential services or security or medical emergencies – were allowed in respect of the curfew, and to movement of people across provincial, metropolitan or district municipal boundaries. These exceptions had the effect of ameliorating the harsh effects of the lockdown regulations. In other words, while reg 16(1) infringed the fundamental right to freedom of movement, regs 16(2), (3) and (4), by qualifying that infringement, reduced its impact.

[138] In the same way that reg 16 increased the sphere of peoples' freedom, compared to what had been in place before, reg 28 aimed at increased participation in the economic sphere. Following the strict lockdown in which the economy ground to a halt, the purpose of reg 28 was to enable a phased and controlled return to work and an economic start-up. It did so against the backdrop of ensuring, to the extent

[135] Regulation 17.

possible, that workplaces and places of business would not become sites of Covid-19 infections.

[139] I shall conclude by considering the last two factors listed in s 36(1) together. Essentially, they boil down to the reasonableness of the infringement of fundamental rights by asking the questions whether there is a rational connection between the infringements and their purpose; and whether the means chosen were proportionate. When all is said and done, this is the heart of the limitation enquiry. As O'Regan J and Cameron AJ said in *S v Manamela and Another (Director-General of Justice Intervening)*,[136] the proper approach to the limitation enquiry is 'to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose'.

[140] The seriousness and the magnitude of the threat to life brought about by the pandemic cannot be exaggerated. It is not melodramatic to say that it posed, and continues to pose, the biggest threat to this country since the Spanish influenza pandemic of the immediate post-World War I years a century ago. It had the potential, and continues to have the potential, to cause devastation on a scale that, only a short while ago, people could not have begun to imagine. Drastic measures were required and an excess of caution was called for, especially given the limited knowledge about Covid-19, even among experts in the field of epidemiology.

[141] In these circumstances, the broad-based limitation of everyone's fundamental right to freedom of movement and of trade, occupation and profession was a rational response for the purposes articulated by the COGTA Minister when she provided for the initial lockdown. In her answering affidavit, she explained:

'At the time that South Africa implemented the lockdown, there was little established scientific information about how the virus is transmitted. The initial lockdown was a severe but effective measure to deal with any kind of infectious disease, regardless of how easily it may be spread.

[136] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) para 66. Although this was a minority judgment, the approach to the limitation enquiry was expressly approved by the majority. See para 34.

By restricting the movement of people outside of their homes, their contact with other people would be minimized so that [Covid-19] would have limited opportunities to move from host to host, as well as to spread between regions and provinces.'

[142] At the same time, an easing of those strict restrictions was envisaged as and when appropriate. But that easing came at a cost. Even though the COGTA Minister described level 4 as being 'largely a success', she said that it 'resulted in the increased spread of the virus, albeit within acceptable parameters'. By way of example, she said that an increase in the doubling rate of the disease was noted, from 15 days under level 5 to 12 days under level 4. By ameliorating the harshness of the lockdown and moving to level 4, the COGTA Minister sought to strike a balance 'between saving lives and saving livelihoods'. For the most part, I am satisfied that the means chosen – and the limitation of rights that those choices brought about – were objectively rational. They were also proportional in the sense that, in the circumstances, those means were necessary to deal with the exigencies faced by the country, struck appropriate balances between the adverse and beneficial effects of the response to the pandemic and were suitable for their intended purpose.

[143] I take a different view in relation to two of the regulations. They are, first, reg 16(2)*(f)*, which permits people to leave their home in order to exercise, subject to a number of conditions as to method, time and place; and secondly, items 1 and 2 of Part E of Table 1, read with reg 28(3), insofar as these items prohibit the over-the-counter sale of hot food.

The exercise regulation

[144] Regulation 16(2)*(f)* permitted limited forms of exercise, during a defined period, within a specified locality: people could only exercise by walking, running or cycling; they could only do so between 06h00 and 09h00; and they could only do so within five kilometres of their homes. I have already found that reg 16(2) limits the fundamental right to freedom of movement and to human dignity and that, generally speaking, the limitations that it imposed were justifiable. I am of the view, however, that reg 16(2)*(f)* is not capable of justification because it was not rational or proportional.

[145] The purpose of imposing a short period of time during which people could exercise was justified by the COGTA Minister solely on the basis of it being easier to police than a longer period. But, on the other side of the coin, the restriction undermined the very purpose of the movement regulations, namely to prevent people from congregating, and thus increasing the possibility of the spread of Covid-19 infections. Instead, reg 16(2)*(f)*, by imposing a three-hour window within which everyone could exercise, had the effect of concentrating people, particularly in densely populated areas or areas considered amenable for walking, running or cycling. In the founding affidavit, the point was made that because of the lateness of sunrise during autumn and winter in the Western Cape in particular, 'those wishing to exercise were deprived of the benefit of more than half of the allotted time, which only exacerbates the congestion on the streets during the final 90 minutes of the exercise period'.

[146] No attempt has been made to justify why only three forms of exercise were permitted. It is difficult to imagine a rational reason. Why, for instance, should a person not be permitted to exercise by canoeing or kayaking on a river or a dam? Why should a person not be permitted to exercise by swimming in a dam or river? Similarly, no reasons have been given to justify why people were restricted to taking exercise within five kilometres of their homes. Why should a person not be permitted to travel six kilometres from home to hike in the veld or up a mountain? In the absence of explanations for these limitations, I find that there is no rational explanation to justify them.[137] The result is that no rational connection has been established between the restrictions and their ostensible purpose. They are also disproportional because their necessity has not been demonstrated, and nor is it obvious or explained.[138]

[147] In conclusion, the infringements of fundamental rights brought about by reg 16(2)*(f)* have not been justified in terms of s 36(1) of the Constitution. That being so, reg 16(2)*(f)* is 'otherwise unconstitutional' in terms of s 6(2)*(i)* of the PAJA. It is also irrational in terms of s 6(2)*(f)*(ii) and unreasonable for want of proportionality in terms of s 6(2)*(h)*.[139] Regulation 16(2)*(f)* will be declared to be invalid to the extent of its

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[137] *Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128 (GNP) at 141E; *Medirite (Pty) Ltd v South African Pharmacy Council and Another* [2015] ZASCA 27 paras 14-15.
[138] *Medirite (Pty) Ltd v South African Pharmacy Council and Another* (note 137) paras 21-22.
[139] *Medirite (Pty) Ltd v South African Pharmacy Council and Another* (note 137) paras 20-23; *Ehrlich v Minister of Correctional Services and Another* 2009 (2) SA 373 (ECG) para 43; *South African Reserve*

inconsistency with the Constitution. It will be necessary to alter the order of the court below to that extent.

The hot food prohibition

[148] The real target of the appellants' attack on reg 28 appears, in fact, to be directed at Part E of Table 1, read with reg 28(3), which deals with the permissions and prohibitions applicable to the wholesale and retail trade, including stores, spaza shops, e-commerce and informal trading. To a large extent, they question why some economic activities are included, while others are not. For the most part, that question has been answered by the COGTA Minister and the Minister of Trade, Industry and Competition. One issue – the prohibition on the selling of hot food over the counter – remains to be dealt with.

[149] Item 1 of Part E of Table 1 had, under level 5, specifically prohibited the selling of hot food at, for instance, supermarkets. This was a controversial and potentially unreasonable restriction on the freedom of shopkeepers to sell any food products, and of consumers to make choices as to how their money would be spent.

[150] When the COGTA Minister called for representations prior to making the level 4 regulations, her guidelines did not contain the prohibition on selling hot food in item 1. Item 2, however, allowed for the selling of hot food, but provided that hot food could be sold 'only for home delivery'.

[151] The level 4 regulations took this form. Reg 28(3) provided that retail stores 'selling goods as provided for [in] Table 1' were 'prohibited from selling other goods that are not permitted in terms of Table 1'. Item 1 and 2 of Part E of Table 1 (headed 'PERMISSIONS AND PROHIBITIONS') read:

'1. Food products including non-alcoholic beverages and animals food.

2. The sale of hot cooked food, only for home delivery.'

Bank v Public Protector and Others 2017 (6) SA 198 (GP) paras 55-57. See too Clive Plasket 'Disproportionality – the Hidden Ground of Review: *Medirite (Pty) Ltd v South African Pharmacy Council & Another*' (2019) 136 *SALJ* 15.

The effect was that, while a supermarket could sell, to in-store customers, a salad or a cold pie, it could not sell a hot piece of chicken or a hot pie. The latter items could only be sold if they are delivered to the customer's home.

[152] The COGTA Minister's justification for this prohibition was that it aimed at preventing people in shops from standing at a counter waiting for the preparation of a hot meal. It seems to me that this explanation is not objectively rational. The prohibition, furthermore, is not proportional to the mischief that the COGTA Minister sought to avoid. It is arbitrary in the extreme to draw a distinction, to put it at its crudest, between a hot piece of chicken and a cold piece of chicken. It is premised on the idea that hot food will be prepared while customers wait, whereas often hot food has been pre-prepared and all that is required is for the food to be handed to the customer, in the same way that cold food would be. If the intention of the prohibition was to prevent people waiting while their hot meals were prepared, items 1 and 2 are not tailored to the avoidance of the identified mischief. In the result, items 1 and 2 of Part E of Table 1, read with reg 28(3) have not been justified and are 'otherwise unconstitutional', in terms of s 6(2)*(i)* of the PAJA, as well as irrational in terms of s 6(2)*(f)*(ii) and disproportional, and hence unreasonable, in terms of s 6(2)*(h)*. A declarator to this effect will be made, and to this extent too, the order of the court below will be amended.

The clothing directions

[153] The appellants attack the validity of a direction made by the Minister of Trade, Industry and Competition in respect of what clothing could be sold under level 4. I shall deal with this issue but briefly.

[154] Item 15 of Part E of Table 1, when read with reg 28(3), permitted the sale of '[w]inter clothing, footwear, bedding and heaters and the components and fabrics required to manufacture these'. On 12 May 2020, the Minister issued a notice entitled 'Directions regarding the sale of clothing, footwear and bedding during alert level 4 of the Covid-19 national state of disaster'.[140] He purported to issue the direction in terms of reg 4(10)*(a)* of the level 4 regulations. This regulation provides:

[140] GN 523, *GG* 43307 of 12 May 2020.

'Any Cabinet member may issue and vary directions, as required, within his or her mandate, to address, prevent and combat the spread of COVID-19 and its impact on matters relevant to their portfolio, from time to time, as may be required, including –
(a) disseminating information required for dealing with the national state of disaster.'

[155] In direction 2 of the directions, he said that his purpose was 'to provide direction on the type of clothing, footwear and bedding which may be sold by retailers during Alert Level 4 in terms of Part E of Table 1 of the Regulations'. The appellants challenged the validity of the directions as a whole on the basis that the Minister had no power, in terms of reg 4(10*(a)*, to issue directions concerning what clothing, footwear and bedding could be sold: the directions had no connection with the purpose of that regulation, namely the dissemination of information in order to 'prevent and combat the spread of COVID-19'.

[156] Some of the direction purportedly given to retailers appears, with all due respect, to have been clouded with a good measure of irrationality. For instance, the Minister directed that 'short sleeved knit tops' could be sold where they were 'promoted and displayed as worn under cardigans and knitwear';[141] that 'short sleeved t-shirts' could be sold where they were 'promoted and displayed as under garments for warmth';[142] that 'crop bottoms worn with boots and leggings' could be sold; and that 'shirts, either short- or long-sleeved' could be sold where they were 'displayed and promoted to be worn under jackets, coats and/or knitwear'.

[157] In my view, it is not necessary to decide on the validity of the clothing directions. Direction 4 provided that they only remained in force for the duration of level 4. They thus ceased to be of force or effect on 31 May 2020 when level 4 ended and the country was moved to level 3. Soon after this, the Minister issued a notice in which he advised the public that the clothing directions had expired and were no longer in force.[143] I can see no practical purpose in deciding the merits of the challenge and take the view that the court below was correct in concluding that it was moot.

[141] Direction 3.7.10.
[142] Direction 3.7.11.
[143] GN 667 in *GG* 43432 of 11 June 2020.

Conclusion and order

[158] In summary, I have found that, when the NCCC took a policy decision that was given legal effect by the COGTA Minister, it was legally entitled to do so, and that, in any event, that policy decision was moot and therefore not justiciable; the challenge to the level 4 regulations based on improper purpose was not properly raised; the level 4 regulations were made in a procedurally fair manner, alternatively, they were made in terms of a rational decision-making process; the COGTA Minister applied her mind to the representations that she received from members of the public; the specific movement and economic activity regulations that were challenged were, with two exceptions, reasonable and justifiable limitations of fundamental rights; and the challenge to the clothing directions made by the Minister of Trade, Industry and Competition was moot and did not, on this account, have to be decided.

[159] I also found that reg 16(2)*(f)* of the level 4 regulations was invalid to the extent that it permitted only three forms of exercise to be taken, during a limited period in a specific location; and that items 1 and 2 of Part E of Table 1, read with reg 28(3) of the level 4 regulations, were invalid to the extent that they prohibited the over-the-counter sale of hot food.

[160] For the most part, the appellants' appeal has failed. The success that they have achieved is extremely limited. It cannot be said that they have achieved substantial success. They are accordingly not entitled to costs. In line with the *Biowatch* principle,[144] however, no costs order will be made against them.

[161] The order of the court below must be amended to reflect the partial success achieved by the appellants. I accordingly make the following order:

1. The appeal is dismissed, save to the limited extent set out in paragraph 2 below.

2. The order of the court below is amended to read:

'1. Save for the relief granted in paragraph 2 below, the application is dismissed.

2. It is declared that:

(a) regulation 16(2)*(f)* of the regulations promulgated in GN 480, *Government Gazette* 43258 of 29 April 2020 (the level 4 regulations) is invalid to the extent that it limited: the taking of

[144] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

exercise to three means, namely walking, running and cycling; the time during which exercise could be taken to the hours between 06h00 and 09h00; and the location for taking exercise to a radius of five kilometres from a person's residence; and

(b) items 1 and 2 of Part E of Table 1, read with reg 28(3), of the level 4 regulations are invalid to the extent that they prohibited the sale of hot cooked food, otherwise than for delivery to a person's home.'

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C Plasket

Judge of Appeal

APPEARANCES

For the first to seventh appellants:	A Katz SC and K Perumalsamy Instructed by: Ashersons Attorneys, Cape Town Webbers Attorneys, Bloemfontein
For the eighth appellant:	N Arendse SC and E Richards Instructed by: Ashersons Attorneys, Cape Town Webbers Attorneys, Bloemfontein
For the respondents:	M T K Moerane SC, N H Maenetje SC, N Muvanga and D Watson Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein