**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not reportable**

Case no: 104/2022

In the matter between:

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| **SOLIDARITEIT HELPENDE HAND NPC** | **FIRST APPELLANT** |
| **SOUTH AFRICAN NATIONAL CHRISTIAN FORUM** | **SECOND APPELLANT** |
| **MUSLIM LAWYERS ASSOCIATION** | **THIRD APPELLANT** |

and

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| **MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** | **RESPONDENT** |

**Neutral citation:** *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* (104/2022) [2023] ZASCA 35 (31 March 2023)

**Coram:** SALDULKER, NICHOLLS, MABINDLA-BOQWANA and WEINER JJA and OLSEN AJA

**Heard:** 14 March 2023

**Delivered:** 31 March 2023

**Summary:** Mootness – Disaster Management Act 57 of 2002 – lawfulness of regulations on religious gatherings – COVID-19 – national state of disaster – impugned regulations long since repealed and no longer in force before the adjudication of the matter in the high court and in the court of appeal – high court had no discretion to determine a matter which is moot – appeal moot – no need to deal with the merits.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Vally J, sitting as the court of first instance):

The appeal is dismissed with no order as to costs.

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**JUDGMENT**

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**Saldulker JA (Nicholls, Mabindla-Boqwana and Weiner JJA and Olsen AJA concurring):**

[1] At the hearing of this appeal, this Court granted an order that the appeal is dismissed with no order as to costs, with reasons to follow. These are the reasons.

[2] During March 2020, a novel contagious virus (SARS-CoV-2), which can cause the illness known as COVID-19, led to a global pandemic and was the biggest threat to public health faced by the world in the past century. It has since resulted in millions of deaths globally. With severe effects socially, economically and financially, it affected the lives of people all over the world, including in South Africa.

[3] Acting in terms of the Disaster Management Act 57 of 2002 (DMA),[1] a national state of disaster was declared by the Minister of Cooperative Governance and Traditional Affairs (the Minister). Regulations were published periodically in response to the dynamic threat to national health and safety presented by the outbreak and transmission of COVID-19.

[4] The Minister promulgated a series of regulations which imposed drastic measures that sought to combat the COVID-19 pandemic in South Africa. These

[1] Section 27 of the DMA.

included, inter alia: (a) imposing a national lockdown; (b) restricting the movements of members of the public; (c) imposing certain healthcare protocols, such as social distancing, the wearing of masks in public, and advisories to sanitise one's hands; and (d) imposing restrictions on public gatherings, which included religious or faith-based gatherings.

[5] Axiomatically, the national lockdown had a severe effect on human activity and movement. Every person – except those specifically excluded, such as those designated as performing 'essential services' – was confined to their place of residence; schools were closed; businesses, except those designated as providing essential services, were prohibited from operating; and social gatherings were prohibited. The period during which the national lockdown was its most restrictive lasted for 21 days. Thereafter, the Minister introduced a risk-adjusted approach, which comprised of various stages known as 'Alert Levels', with regulations of variable degrees of restrictiveness published from time to time to regulate the restrictions imposed under each level. The regulations severely limited movement for all people, including those attending faith-based institutions. The restrictions were gradually eased, subject to limits on the number of people gathering and the adherence to health and safety protocols. However, the restrictions on religious gatherings continued.

[6] In January 2021, Solidariteit Helpende Hand NPC, the South African National Christian Forum (SANCF), the Muslim Lawyers Association, and Freedom of Religion South Africa NPC[2], launched separate applications against the Minister, challenging the regulations concerning religious gatherings. The impugned regulations were:

(a) regulations 36(3) and 84(3) published under Government Notice number R1423 in *Government Gazette* number 44044 of 29 December 2020 (the December regulations);[3] and

(b) regulations 36(3) and 84(3) published under Government Notice R11 in *Government Gazette* number 44066 of 11 January 2021 (the January regulations).[4]

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[2] Freedom of Religion South Africa NPC has abandoned their appeal. There are only three appellants before this Court.

[3] Regulations 36(3) and 84(3) of the December regulations provide as follows:
'All social gatherings, including faith-based gatherings are prohibited for two weeks, after which this provision will be reviewed.'

[4] Regulations 36(3) and 84(3) prohibited faith-based gatherings indefinitely.

[7] Under the December regulations, all faith-based gatherings were prohibited for two weeks, while the January regulations contained a blanket ban for an indefinite period.

[8] The appellants each sought an order for interim relief and a review to set aside the impugned regulations in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The appellants contended that the ban on religious gatherings infringed upon their constitutional rights, and could not be justified and was irrational. The separate applications were subsequently consolidated into one application, and adjudicated as such in the Gauteng Division of the High Court, Johannesburg (the high court).

[9] Before the application was heard in the high court, the Minister amended the January regulations and promulgated new regulations, dated 1 February 2021.[5] These lifted the ban on religious gatherings, albeit with restrictions on the number of attendees, provided that there was adherence to social distancing and health protocols.[6] These changes reflected the reduction of COVID-19 case numbers and related infections, hospital admissions and fatalities. Subsequent thereto, the Minister promulgated further relaxations of restrictions on attendees at faith-based gatherings, subject to health protocols and social distancing.

[10] In the high court, Vally J dismissed the application on the basis that the matter was moot, because the ban on religious gatherings had been lifted before the matter was heard by the high court.[7] The high court held that the declaratory order sought would have no practical effect and would merely be of academic interest.

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[5] National State of Disaster Regulations, GN R69, *Government Gazette* 44130, 1 February 2021.

[6] Chapter 7 (within which reg 84(3) was contained) was deleted. Regulation 36 was amended as below. Regulation 36(3)*(a)* stated that:

'Gatherings at faith-based institutions, are permitted but limited to 50 persons or less for indoor venues and 100 persons or less for outdoor venues and if the venue is too small to hold the prescribed number of persons observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used: Provided that all health protocols and social distancing measures are adhered to as provided for in directions issued by the Cabinet member responsible for cooperative governance and traditional affairs: Provided further that there is strict adherence to the hours of curfew as provided for in regulation 33(1).'

[7] The matter was heard on 22, 23 and 24 November 2021, and judgment was delivered on 13 December 2021.

Nevertheless, the high court went on to decide the question of whether subordinate legislation made by the executive constituted administrative action in terms of s 1 of PAJA. The high court held that such law-making was indeed executive action. The high court did not deal with the merits of the application brought by the appellants, and did not pronounce on whether the impugned regulations infringed upon the appellants' rights. It is unnecessary to pronounce on the PAJA issue, as it became irrelevant once the court decided that the matter was moot.

[11] It is important to highlight that by the time the appeal came before us, all of the regulations promulgated in terms of the DMA to combat the effects of the COVID-19 pandemic had been repealed. The appellants, nevertheless, contended that when the matter served before the high court, it was not moot and the high court was enjoined to deal with the merits. Additionally, the appellants contended that, even though the regulations were now no longer in place, it was in the interests of justice for this Court to determine their constitutionality. Before us it was argued that this was, inter alia, because the implementation of the regulations still had an effect on those who were arrested by the South African Police Service (SAPS) at the time, some of whom may want to institute claims for damages in the future. I will revert later to this subject. For the purposes of this appeal and for the reasons given later in this judgment, this Court did not require the appellants to deal with the merits, as the issue of mootness was dispositive of this appeal. This appeal is with the leave of the court below.

[12] The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties.[8] This usually occurs where there is no longer an existing or live controversy between the parties.[9] A court should refrain from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect;[10] one of the reasons for that rule being that a court's purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted

[8] Section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013; *A B and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC).
[9] *Pridwin* para 50.
[10] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 21 fn 18.

away on abstract questions of law.[11] In *President of the Republic of South Africa v Democratic Alliance*,[12] the Constitutional Court cautioned that 'courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now'.

[13] However, this principle is not an absolute bar against deciding moot matters. An appeal court has a discretion to decide a matter even if it has become academic or moot in circumstances where 'the interests of justice require that it be decided'.[13] In *Independent Electoral Commission v Langeberg Municipality*,[14] the Constitutional Court held as follows:

'This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.'

[14] It is so that the courts, in a number of cases, have dealt with the merits of an appeal, notwithstanding the mootness of the dispute between the parties. Those cases involved legal issues 'of public importance . . . that would affect matters in the future and on which the adjudication of this court was required'.[15]

[15] As previously stated, the main relief sought by the appellants in the high court was for the setting aside of the impugned regulations. Having regard to the fact that the impugned regulations were long since repealed and no longer in force before the

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[11] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; 2018 (11) BCLR 1411 (CC); 2019 (1) SA 73 (CC) para 43.
[12] *President of the Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35; 2019 (11) BCLR 1403 (CC); 2020 (1) SA 428 (CC) para 35.
[13] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) para 32.
[14] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 11.
[15] *Centre for Child Law v The Governing Body of Hoërskool Fochville and Another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 14. See also *MEC for Education, KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) para 32.

matter came before the high court, there was nothing to set aside. There was no live issue for that court to adjudicate upon.[16]

[16] The appellants conceded that the impugned regulations have been repealed and thus are no longer in operation. However, the appellants urged this Court to decide that it was in the interests of justice that the appeal be entertained. Even though the national state of disaster may have been lifted, the appellants contended that the Minister's powers under the DMA ought not to escape scrutiny. The impugned regulations, they contended, had forbidden the practice of worship with the threat of criminal sanction, including the possibility of incarceration. In support of this submission they relied upon the fact that the contravention of the impugned regulations had given rise to criminal liability. The appellants claim that at least 400 000 people (this figure was not verified by any evidence except that tendered from the bar by the counsel for SANCF, who had obtained this number from 'a Google search') had been arrested as a result of attending faith-based gatherings during the lockdown period, and the outcomes of the cases were still being determined in the lower courts. Therefore, the appellants urged this Court to hear the matter, as this Court's decision on the lawfulness of the impugned regulations would affect the rights of those accused persons, and may prevent further and costly litigation related to the prosecution of those persons.

[17] This Court is in effect being asked to regard the appellants as litigants claiming *locus standi* under s 38*(c)* of the Constitution,[17] as they approach the court asking for relief to the advantage of a group or class of persons, namely, those either charged with or convicted of breaches of the impugned regulations. The aim would be to mount

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[16] At the time of the hearing 22-24 November 2021, the following regulations were in effect (in terms of Alert Level 1 of the lockdown). Regulation 69(4) of the regulations published under Government Notice number R959 in *Government Gazette* number 45253 of 30 September 2021. It stated: 'All – (i) faith-based or religious gatherings; and (ii) social, political and cultural gatherings; are permitted but limited to 750 persons or less for indoor venues and 2000 persons or less for outdoor venues and if the venue is too small to hold the prescribed number of persons observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used, subject to strict adherence to all health protocols and social distancing measures'.

[17] Section 38*(c)* of the Constitution provides:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

. . .

*(c)* anyone acting as a member of, or in the interest of, a group or class of persons'

a collateral challenge to the constitutionality and lawfulness of the regulations, an issue which in the ordinary course would be raised by each individual concerned in the correct forum in the first instance. That is not the case presented by the appellants in their founding papers; and if it had been, it would have been obvious that the National Prosecution Authority, if not also the Minister of Justice, would have been necessary parties. As to the related submission, that a decision by this Court would assist such persons in prosecuting claims for damages, there is the additional consideration that no attempt has been made to establish the existence of any viable cause of action for such relief. In any such action, a question which would arise immediately would be, whether either the arrest or prosecution, could be held to be wrongful, given that at the material time, the impugned regulations were enforceable, and would remain so until either repealed or set aside.

[18] It must be borne in mind that s 16(2)*(a)*(i) of the Superior Courts Act confers a discretion on a court of appeal to hear an appeal notwithstanding mootness. Therefore, when a court of first instance has determined that the subject matter of litigation has ceased to exist before judgment, it has no jurisdiction to entertain the merits of the matter. Only an appeal court has a discretion to hear an appeal notwithstanding mootness. In the matter of *Minister of Justice and Correctional Services v Estate Late Stransham-Ford*,[18] this Court said:

'The appeal court's jurisdiction was exercised because "a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required". The high court is not vested with similar powers. Its function is to determine cases that present live issues for determination.

. . .

If a cause of action ceases to exist before judgment in the court of first instance, there is no longer a claim before the court for its adjudication.'

[19] In a recent judgment, *Minister of Tourism v Afriforum NPC*,[19] dated 8 February 2023, and also dealing with the effects of the COVID-19 pandemic, the Constitutional Court stated as follows:

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[18] *Minister of Justice and Correctional Services and Others v Estate Late Stransham-Ford* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) paras 25 and 26.

[19] *Minister of Tourism and Others v Afriforum NPC and Another* [2023] ZACC 7 (CC) para 23.

‘A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court’s decision or which would be resolved by a court’s decision. A case is also moot when a court’s decision would be of academic interest only.’

[20] There is no discrete issue before us. In the circumstances, it was not necessary to go into the merits of the matter. To adjudicate on the circumstances that gave rise to the limitation on the right to freedom of religion that no longer exist would be to do so in a vacuum. Therefore, if the court were to decide on the validity of the limitation, there would be no effect other than a mere declaration that the limitation was either valid or not. Such a declarator would in all likelihood have no effect on future regulations introduced either to combat another strain of COVID-19 or the emergence of a new pandemic, because those regulations would be fact-specific to circumstances present during that relevant time. As a result, this Court’s decision in respect of the impugned regulations based on the current facts would have no effect, as there are no regulations in place at the present moment. This Court in *Estate Late Stransham-Ford* said the following:

‘Dealing with the situation where events subsequent to the commencement of litigation resulted in there no longer being an issue for determination, Ackermann J said in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others*:

“A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.”

At the time that Fabricius J delivered his judgment there was no longer an existing controversy for him to pronounce upon. The case was no longer justiciable.’

[21] In view of the aforegoing, the high court was correct in finding that the matter was moot. Its findings are unassailable. Even if it was wrong at the time, as things stand, the regulations are no longer in place. The national state of disaster has been terminated. For all of the above reasons, there is no real purpose to be served by entertaining this appeal. Thus, this Court made an order dismissing the appeal on 14

March 2023. In accordance with the *Biowatch* principle,[20] this Court made no order as to costs.

[22] In the result, the following order was made:

The appeal is dismissed with no order as to costs.

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H K SALDULKER

JUDGE OF APPEAL

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

Appearances

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|---|---|
| For the first appellant: | M J Engelbrecht SC |
| Instructed by: | Hurter Spies Inc, Pretoria |
| | Handre Conradie Inc, Bloemfontein |
| For the second appellant: | A C Botha SC (with R Crompton, S J Martin) |
| Instructed by: | NLA Legal Inc, Sandton |
| | Handre Conradie Inc, Bloemfontein |
| For the third appellant: | M Karolia |
| Instructed by: | Mahmood Mia Attorneys, Johannesburg |
| | Handre Conradie Inc, Bloemfontein |
| For the respondent: | S J R Mogagabe SC (with I Tshoma, N Kekana and Z Buthelezi) |
| Instructed by: | State Attorney, Johannesburg |
| | State Attorney, Bloemfontein |