CONSTITUTIONAL COURT OF SOUTH AFRICA

Democratic Alliance v Minister of Co-operative Governance and Traditional Alliance and Others

CCT 150/24

Date of hearing: 6 February 2025
Date of judgment: 27 February 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 27 February 2026 at 09h00 the Constitutional Court handed down a judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal concerning the constitutionality of section 27 of the Disaster Management Act (the DMA).

The applicant is the Democratic Alliance (the DA). The first respondent is the Minister of Co-operative Governance and Traditional Affairs (Minister). The second respondent is the Speaker of the National Assembly. The third respondent is the chairperson of the National Council of Provinces; and the fourth respondent is the President of the Republic of South Africa.

On 15 March 2020, the Minister declared a national state of disaster as a result of the COVID-19 pandemic. A national lockdown in South Africa commenced on 26 March 2020. Extensive regulations were implemented by the Minister using her powers under section 27 of the DMA during the lockdown; they placed restrictions on many constitutionally guaranteed rights and freedoms.

The DA instituted an urgent application in the High Court, Gauteng Division, Pretoria, challenging the constitutionality of section 27 of the DMA on three grounds: first, the section unconstitutionally delegates Parliament's legislative powers to the Executive; second, the section permits the creation of a de facto state of emergency without adequate parliamentary oversight; and third, the section does not enable Parliament to oversee executive action as required by the Constitution. The DA sought a temporary reading-in

to remedy the alleged unconstitutionality by granting Parliament the power to veto declarations and extensions of national states of disaster, as well as regulations and directives made under section 27.

The majority judgment of the High Court held that section 27 of the DMA is not unconstitutional and dismissed the DA's appeal. It found that there is a fundamental distinction between a state of emergency and a state of disaster, and that ordinary provisions for parliamentary oversight remain operative in a state of disaster. It also found that the Executive needs wide powers to realise the purpose of the DMA and that the DMA contains sufficient restraints on these powers.

The majority of the Supreme Court of Appeal dismissed the DA's appeal. It held that section 27 does not confer overly broad powers on the Minister and does not bring about a de facto state of emergency. It also found that the DA failed to provide evidence to support its assertion that the oversight mechanisms adopted by Parliament during the state of disaster were inadequate.

The issues that were to be decided by the Court were—

(a) whether the Court had jurisdiction to entertain the matter and, if so, whether leave to appeal should be granted;
(b) whether the matter was moot, considering that the COVID-19 pandemic had abated;
(c) whether section 27 of the DMA permitted for the creation of a *de facto* state of emergency;
(d) whether there was an impermissible delegation of legislative power to the Minister; and
(e) whether there was a breach of the doctrine of separation of powers.

There were two judgments penned in this matter. Both judgments found that the matter engaged the Court's jurisdiction, as the matter concerned the constitutionality of section 27 of the DMA, and both found that it was in the interests of justice to consider the application.

The first judgment was penned by Tshiqi J (with Dambuza AJ and Rogers J concurring). It would have upheld the appeal and declared section 27 of the DMA unconstitutional. The first judgement would have further suspended the declaration of invalidity for 24 months and ordered a reading-in to confer on the National Assembly the power to approve or disapprove regulations made by the Minister as an interim measure pending final remedial legislation.

The first judgment found that regulations issued under section 27 of the DMA may have similar effects on fundamental rights to those permitted under a state of emergency. While the Constitution expressly provides parliamentary oversight during a state of emergency, the DMA contains no specific mechanisms enabling the National Assembly to approve or disapprove regulations issued by the Minister in a state of disaster, even where those regulations may limit the rights enshrined in the Bill of Rights. Therefore, the first

judgment concluded that the unconstitutionality of section 27 was not a result of a state of disaster constituting a de facto state of emergency, but a result of the absence of adequate parliamentary oversight where significant intrusions on fundamental rights may arise.

The first judgment also held that section 27 would pass the threshold for constitutional validity if it explicitly required the National Assembly to supervise, approve and disapprove executive decisions, regulations and directions issued under section 27(2). The Constitution leaves it to the National Assembly to propose its own oversight mechanisms, and Parliament has broad powers to exercise effective supervision. On this basis, the first judgment found that it is not necessary for every statute to prescribe oversight procedures.

The first judgement further found that where the delegated powers relate to the exercise of substantive legislative functions, existing oversight mechanisms are insufficient. Although Parliament held Portfolio and Select Committee meetings and pursued formal parliamentary questions during the pandemic, these engagements do not indicate what consequences would follow if Parliament disagreed with the Minister. Moreover, there was no guarantee that similar practices would follow in future disasters. The first judgment therefore concluded that an effective mechanism would include a duty on the Minister to table regulations before the National Assembly and a power for the latter to approve or disapprove regulations, directions and any extension of a national state of disaster.

The first judgment concluded that it is not judicial overreach for this Court to grant a relief providing for an override power. In *EFF II*, this Court's majority judgment highlighted how its hands are not tied regarding an impermissible encroachment on the separation of powers. There, this Court found that it had a duty to ensure that Parliament fulfils its obligations. In discharging this duty, this Court does "no more than the Court fulfilling its constitutionally assigned duty". Similarly, the first judgment found that while Parliament should ensure that it reserves to itself the final authority over disaster regulations, how it does so will be left up to Parliament. The reading-in, according to the first judgment, was necessitated by the fact that the timing of a state of disaster is unpredictable. A declaration of constitutional invalidity without a reading-in in this matter would mean that in the unfortunate event of another state of disaster, there would be reliance on the DMA without the necessary power of parliamentary override.

On the doctrine of separation of powers, the first judgment held that the maintenance of the doctrine requires Parliament to retain the power to approve or disapprove decisions which it delegates. This is because in circumstances such as a state of disaster, there is a need to delegate parliamentary powers to respond to urgent situations swiftly and effectively. The first judgment emphasised that Parliament bears the ultimate duty over primary legislation within the confines of the Constitution. The Court, in *Nu Africa*, acknowledged that it is possible for Parliament to delegate legislative powers in appropriate circumstances but cautioned that there must be appropriate checks and balances.

The first judgment found that the existing constraints are inadequate. It held that a delegation of broad powers to the Minister in terms of the DMA was reasonable. It found that without ensuring that constraints to these broad powers are effective, however, there

would be a breach of the separation of powers. While regulations made by the Minister are capable of being challenged in court through review proceedings, including on an urgent basis, the first judgment pointed out that judicial review is often time-consuming and costly. By the time a matter had received judicial intervention, the possible infringement of constitutional rights may have dissipated. Crucially, judicial review caters for illegality.

The first judgment reasoned that section 27 of the DMA, like section 2 of the State of Emergency Act, permitted the Minister to encroach on fundamental rights in the Bill of Rights. Unless the National Assembly has the power to finally approve or disapprove the Executive's regulations, the conclusion reached by the first judgment is that section 27 resulted in a breach of the separation of powers, as the delegated power has no caveat. The first judgment held that the omission to include the manner in which, and extent to which, Parliament may intervene in the DMA rendered section 27 of the DMA inconsistent with the Constitution for offending the separation of powers.

The second judgment, penned by Theron J (with Goosen AJ, Kollapen J, Majiedt J, Mhlantla J and Opperman AJ concurring) held that granting Parliament what amounts to a veto power over subordinate legislation enacted pursuant to section 27 of the DMA would be engaging in judicial overreach. Furthermore, doing so would grant to Parliament powers that go beyond the bounds of section 37 of the Constitution. It would grant to the DA, through judicial decree, what the DA has not been able to secure through the constitutionally sanctioned legislative process.

The second judgment found that there are fundamental differences between a national state of disaster and a state of emergency. Although they share certain similarities, these do not warrant imposing any specific mechanisms in the State of Emergency Act, or section 37 of the Constitution, to section 27 of the DMA. First, the judicial prerequisites for declaring both states are fundamentally dissimilar. Moreover, while both allow for the limitation of constitutional rights, the nature of the limitation and the mechanisms available to address them are different. It found that a state of emergency permitted for the derogation of rights, in the sense of a generalised limitation of the operation of the Bill of Rights for the specific purpose of protecting the constitutional order. A national state of disaster, on the other hand, permits regulatory restrictions of a kind required to meet the objectives of combating the effects of a disaster. These are conceptually different mechanisms.

The second judgment explained that the interaction and distinction between "limitation" of constitutional rights (as provided for in section 36 of the Constitution) and "derogation" from such rights (as provided for in section 37(4) of the Constitution). Under ordinary circumstances, justification under section 36(1) provides the state with its only avenue to a constitutionally sanctioned limitation of rights in the Bill of Rights. In the singular circumstance where a state of emergency has been declared pursuant to section 37(1) of the Constitution, however, the state is provided with an alternative avenue to justify encroachments on constitutional rights: by showing that such encroachments, called derogations in section 37, are strictly required by the emergency. Thus, during a state of emergency, derogations from constitutional rights that would ordinarily be unjustifiable

under section 36(1) could pass constitutional muster if the state can show that such derogations are strictly required and that other secondary requirements of section 37(4) are met.

The second judgment explained that this was the fundamental difference between a national state of disaster and a state of emergency. Under the former, the state will still be required to justify each and every limitation of a constitutional right in terms of section 36(1). Its failure to do so, as occurred in numerous cases during the COVID-19 state of disaster, would result in the limitation being struck down. Under a state of emergency, on the other hand, even if legislation fails the section 36 enquiry, the state can still rely on section 37(4).

A declaration of a national state of disaster neither suspends the constitutional order nor dilutes it. All protections afforded by the constitutional order, including the Bill of Rights, remain operative. A national state of disaster permits the exercise of delegated power to promulgate subordinate legislation. A state of emergency, on the other hand, permits the Executive to cut across all existing laws and the Bill of Rights.

The second judgment further found that, under a national state of disaster, any limitation of rights renders the Minister's regulations subject to judicial review. The second judgment held that it would be unsound for the Court to reject judicial review as an effective remedy in matters such as this one. To dismiss judicial review of legislation or subordinate legislation for constitutional compliance as an ineffective remedy as compared to an override power by Parliament would be to mischaracterise the roles constitutionally assigned to the Legislature and the Judiciary. The separation of powers assigns to the courts the responsibility to assess whether governmental conduct is constitutional. The second judgement concluded that this was why judicial review remains a powerful mechanism in curbing constitutional violations.

On whether section 27 is overbroad by not giving Parliament a veto power over regulations enacted pursuant to a national state of disaster, the second judgment considered that the delegation of subordinate legislative powers is not contrary to our constitutional scheme, but necessary to give efficacy to Parliament's primary legislative power. It noted that this matter is not about a general complaint about overbroad delegation of legislative powers but about section 27's broad delegation of subordinate legislative power coupled with an alleged lack of appropriate parliamentary oversight. The second judgment found it clear from *EFF I* that a judicial enquiry is limited to determining whether the National Assembly fulfils its constitutional obligations. It is impermissible for courts to prescribe to the National Assembly how to perform its oversight functions.

The second judgment reasoned that there was no constitutional requirement for the DMA to specifically provide for parliamentary oversight. Parliamentary oversight is a normal and obligatory component of our constitutional framework in sections 42(3) and 55(2) of the Constitution. It is not exercised by sheer benevolence.

It found that the DMA does not interfere with Parliament's responsibility to exercise oversight over the Executive. It also does not authorise a state of emergency that suspends the constitutional order, including the oversight obligations of Parliament. The National Assembly has in fact established oversight mechanisms and it is not for the Court to second-guess the mechanisms that the National Assembly has established in this regard.

The second judgment further found that the question was not whether a parliamentary veto power would be a more effective oversight mechanism than those already established by the National Assembly. It reasoned that the antecedent question was whether the Constitution ever required Parliament to reserve a power of final approval over subordinate legislation for itself. The second judgment found that nothing in the Constitution pointed to such a requirement. Where the Constitution requires the National Assembly to have a veto power, it codifies such a power expressly. It held that this was understandable, as a veto power, in making executive power directly subject to parliamentary approval, was a drastic reversal of the constitutionally established separation of powers. A veto power would also give Parliament the power to directly interfere with the implementation of the DMA, which, as per section 85(2)(a), is the realm of the Executive.

Section 101(4) of Constitution expressly gives Parliament a discretionary power to enact a veto power for itself over subordinate legislation. Section 101(4) is set in clearly permissive language, which further suggests that the Constitution does not require Parliament's oversight role to take the form of a veto power.

Additionally, the second judgment found that Parliament's legislative powers allowed it to amend the DMA to place additional restrictions on the Minister's powers. Parliament could decide, within the confines of the Constitution, what mandate is to be given to the Executive, what powers the Executive is imbued with and what restrictions are to be placed on the exercise of that power. Parliament is given an oversight role over the Executive, but this role could not have been intended to require Parliament to take up the reins of the Executive itself. In other words, Parliament can include a veto power in legislation if it wishes to do so. It is simply that the Constitution does not prescribe such a veto power and it is up to Parliament to decide what form its oversight mechanisms take.

The Constitution does not require a veto power even in relation to the most far-reaching exercise of executive power under a state of emergency. Section 37 permits more dramatic and far-reaching delegations of legislative powers than the DMA. The Constitution, however, does not require the National Assembly to be vested with a power to veto subordinate legislation made by the Executive during a state of emergency. The DA's claim for the National Assembly to have a veto power in a national state of disaster demands more than what section 37 requires for a state of emergency.

The second judgment accordingly found that section 27 of the DMA was not unconstitutional for either creating a simulated state of emergency, or for not providing the National Assembly with a specific oversight power. It also found that there was no impermissible delegation of legislative power by Parliament to the Minister.

In conclusion, the second judgment held that the appeal had to be dismissed. It made no order as to costs.