CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 150/24

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Third Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent

Neutral citation:	*Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others* [2026] ZACC 8
Coram:	Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J
Judgments:	Tshiqi J (minority): [1] to [156] Theron J (majority): [157] to [228]
Heard on:	6 February 2025
Decided on:	27 February 2026
Summary:	Section 27 of the Disaster Management Act 57 of 2002 — constitutional challenge — parliamentary oversight — state of

emergency — national state of disaster — delegation of subordinate legislation — accountability and oversight

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ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

TSHIQI J (Dambuza AJ and Rogers J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal. The order flowed from an application by the applicant, the Democratic Alliance (DA), then an official opposition political party in the National Assembly in terms of section 57(2)(d) of the Constitution, where it sought an order declaring section 27 of the Disaster Management Act[1] (DMA) unconstitutional and invalid.

Parties

[2] The first respondent is the Minister of Co-operative Governance and Traditional Affairs (COGTA) (Minister), who is responsible for administering the DMA and is

[1] 57 of 2002.

empowered in terms of the impugned section 27 to declare a national disaster subject to the conditions in subsections 27(1) to (5).[2] The second respondent is the Speaker of the National Assembly. The third respondent is the Chairperson of the National Council of Provinces. The second and third respondents are cited in their official capacities because the application involves legislative and oversight powers of Parliament under the Constitution and the relief sought would involve the National Assembly. The second and third respondents will collectively be referred to as Parliament. The fourth respondent is the President of the Republic of South Africa (President). He is cited in his official capacity as the head of the National Executive under section 83(a) of the Constitution and because section 26(1) of the DMA provides that the National Executive is primarily responsible for the co-ordination and management of national disasters. No relief is sought against the third and fourth respondents.

Factual background

[3] The Severe Acute Respiratory Syndrome Coronavirus 2 is a strain of coronavirus that caused the coronavirus disease of 2019 (COVID-19). The first outbreak of COVID-19 was identified in Wuhan, in the Hubei Province in China, during December 2019. On 30 January 2020, the World Health Organization declared the outbreak a public health emergency of international concern and on 11 March 2020, declared it a pandemic. On 15 March 2020, the Minister issued a notice declaring a national state of disaster on account of the COVID-19 pandemic.[3] On 18 March 2020, the Minister made regulations embodying a national public health response to the pandemic (COVID-19 regulations). On 23 March 2020, the President announced a national lockdown in South Africa, commencing on 26 March 2020. On 25 March 2020, a day before the date announced by the President as the effective date of the lockdown, the Minister amended the COVID-19 regulations in order to bring about a nationwide lockdown. The purpose of the lockdown was stated to be in order

[2] See [7]. The current Minister is Mr Velenkosini Hlabisa. The Minister at the time of the COVID-19 pandemic was Dr Nkosazana Dlamini Zuma. For convenience, I shall thus, in discussing the powers of the Minister under the DMA, refer to "she" / "her".

[3] Declaration of a National State of Disaster, GN 313 *GG* 43096, 15 March 2020.

to curb the spread of the virus, which was resulting in the hospitalisation and death of many people in South Africa at an alarming rate.

[4] The lockdown regulations were extensive, and in some respects, placed unprecedented restrictions on many constitutionally guaranteed fundamental rights and freedoms. On 29 April 2020, the Minister published further COVID-19 regulations. These regulations were subsequently amended in order to ease the lockdown restrictions in line with alert levels forming part of a risk-adjusted strategy.[4] Thereafter, the Minister promulgated regulations as and when the need arose in accordance with the alert levels.

[5] As part of the regulations issued and implemented by the Minister, schools and care facilities were closed, people were prevented and prohibited from attending gatherings and there was a limitation on the sale, dispensing and transportation of liquor.[5] Some of the consequences of the Minister's response to the outbreak were that there was a restriction on the movement of persons and goods; people were confined to their places of residence; there was a prohibition of public transport unless restrictions imposed by the regulations were complied with;[6] and the sale of cooked, hot food was not allowed.[7] The Minister of Trade, Industry and Competition also implemented further directions, after consultation with the Minister, and those directions restricted the sale of certain items of clothing, footwear and bedding.[8]

[4] The risk-adjusted strategy, in summary, created five alert levels. Alert level 1 imposed minimal restrictions and would be implemented when the spread of the virus could be managed. Alert level 5, in contrast, was the most severe and would be implemented when the virus was spreading rapidly, at a rate which the health care system could not manage. The alert levels in between (levels 2, 3 and 4) imposed fewer restrictions than level 5 but more restrictions than level 1.

[5] Regulations Issued in Terms of Section 27(2) of the Disaster Management Act, 2002, GN 318 *GG* 43107, 18 March 2020.

[6] Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2), GN R.398 *GG* 43148, 25 March 2020.

[7] Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2), GN 471 *GG* 43240, 20 April 2020.

[8] Directions Regarding the Sale of Clothing, Footwear and Bedding During Alert Level 4 of the COVID-19 National State of Disaster, GN R.523 *GG* 43307, 12 May 2020.

[6] In the present matter, section 27 of the DMA is challenged because it permitted, and still permits, the exercise of these powers by the Minister. The DA's case is not that executive measures should be subject to examination by Parliament before they come into effect. Its case is that such measures should promptly be tabled in Parliament, that Parliament should then be entitled to approve or disapprove of the measures and, in the case that it disapproves, the measures lapse from the date of such disapproval (but not retroactively).

[7] Section 27 reads:

> "**Declaration of national state of disaster**
>
> (1) In the event of a national disaster, the Minister may, by notice in the *Gazette*, declare a national state of disaster if—
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> (a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or
>
> (b) other special circumstances warrant the declaration of a national state of disaster.
>
> (2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning—
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> (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
>
> (b) the release of personnel of a national organ of state for the rendering of emergency services;
>
> (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
>
> (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;

(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;

(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;

(g) the control and occupancy of premises in the disaster-stricken or threatened area;

(h) the provision, control or use of temporary emergency accommodation;

(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(k) the dissemination of information required for dealing with the disaster;

(l) emergency procurement procedures;

(m) the facilitation of response and post-disaster recovery and rehabilitation;

(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or

(o) steps to facilitate international assistance.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—

(a) assisting and protecting the public;

(b) providing relief to the public;

(c) protecting property;

(d) preventing or combating disruption; or

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

(4) Regulations made in terms of subsection (2) may include regulations prescribing penalties for any contravention of the regulations.

(5) A national state of disaster that has been declared in terms of subsection (1)—

(a) lapses three months after it has been declared;

(b) may be terminated by the Minister by notice in the *Gazette* before it lapses in terms of paragraph (a); and

(c) may be extended by the Minister by notice in the *Gazette* for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire."

Litigation history

DA's initial application for direct access to this Court

[8] The DA initially sought direct access to this Court. Direct access was refused on the basis that it was not in the interests of justice to hear the matter at that stage. The application was therefore not dismissed on the merits.

High Court

[9] After the dismissal of the application for direct access in this Court, the DA approached the High Court, Gauteng Division, Pretoria (High Court) on an urgent basis to seek an order that section 27 of the DMA is unconstitutional and invalid. It also sought an order remedying the constitutional invalidity by a reading-in. It proposed that a provision, styled as a new section 27(4A), be read in immediately after section 27(4) as follows:

"(a) A copy of any declaration of a national state of disaster and any regulation or direction made or issued under section 27(2) shall be laid upon the Table in Parliament by the Minister as soon as possible after the publication thereof.

(b) The National Assembly may at any time—

(i) by resolution disapprove of any such declaration, regulation or direction; or

(ii) by resolution make any recommendation to the Minister in connection with such declaration, regulation or direction.

(c) Any such declaration, regulation or direction shall cease to be of force and effect as from the date on which the National Assembly resolves under subsection (b)(i) to disapprove of such declaration, regulation or direction, to the extent to which it is so disapproved.

(d) The provisions of subsection (c) shall not derogate from the validity of anything done in terms of any such declaration, regulation or direction up to the date upon which it so ceased to be of force and effect, or from any right, privilege, obligation or liability acquired, accrued or incurred, as at the said date, under and by virtue of any such declaration, regulation or direction.

(e) The provisions of subsections (a) to (d) apply equally to an extension of a national state of disaster in terms of section 27(5)(c)."

[10] The matter was heard by a Full Court which produced a majority and a dissenting judgment. Both judgments agreed that the application was urgent. The Full Court in both judgments regarded the bases on which section 27 was challenged as that it—

(a) is an unconstitutional delegation of Parliament's legislative powers to the Executive and gives the Minister exceedingly broad powers to legislate over almost every aspect of the lives and businesses of South Africans;

(b) permits the creation of a situation resembling a state of emergency, but without the oversight role that section 37 of the Constitution requires for Parliament in an actual state of emergency; and

(c) does not enable the National Assembly to scrutinise and oversee executive action as is required by sections 42(3) and 55(2) of the Constitution.

[11] Regarding the first and second challenges, the majority (Musi JP with Windell J concurring) held that these challenges were not "stridently argued" nor "abandoned".[9] The majority, however, accepted that these two bases were decided by a Full Court of the same division in *Freedom Front Plus*[10] and that there was no basis to hold that *Freedom Front Plus* was wrongly decided. It therefore endorsed the following reasoning from *Freedom Front Plus*:

[9] *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 22311/2020 (24 March 2021) (High Court judgment) at para 18.

[10] *Freedom Front Plus v President of the Republic of South Africa* [2020] 3 All SA 762 (GP).

"The [Freedom Front Plus] made much of the fact that section 37 provides for parliamentary oversight where a state of emergency is declared. On the other hand, it says, the DMA places power in the hands of the executive and, in particular, the [Minister]. According to the [Freedom Front Plus], in this respect, the DMA ignores the fundamental constitutional prescript that the will of the people should be respected. The [Freedom Front Plus] points out that the current state of national disaster has been extended more than once without any parliamentary debate.

Once the fundamental distinction between a state of emergency and a state of disaster is understood, this complaint loses its force. It is because of the constitutional deviations that are permitted under a state of emergency that parliamentary oversight is expressly included in section 37. Where no such deviation is permitted, it is not necessary to make special provision for parliamentary oversight. That oversight is a normal component of our constitutional framework:

(a) Section 42(3) of the Constitution stipulates that one of the roles of the National Assembly is to scrutinise and oversee executive action.

(b) Section 55(2)(b)(i) tasks the National Assembly with providing mechanisms to maintain oversight of, among others, national executive authority.

(c) Section 92(2) provides that members of the executive are responsible individually and collectively to Parliament.

The national state of disaster does not render these provisions inoperable. The explanatory affidavit filed by the [Speaker of the National Assembly] and [Chairperson of the National Council of Provinces] records that during the current state of national disaster, parliamentary oversight has been exercised through the various portfolio committees of the National Assembly, as well as through the various select committees of the National Council of Provinces. The affidavit sets out details of the engagements that have taken place between these legislative bodies and members of the Executive. If the [Freedom Front Plus] is of the view that either Parliament or the Executive is not complying with its constitutional obligations in this regard, it may review that conduct. But that is a separate challenge. It does not make the DMA unconstitutional."[11]

[12] The majority then considered the third ground: that the section does not enable the National Assembly to scrutinise and oversee executive action as is required by

[11] High Court judgment above n 9 at para 19.

sections 42(3) and 55(2) of the Constitution. In this regard, it rejected the argument by the DA that section 27 of the DMA provides the Minister with unbridled powers which render the section unconstitutional.[12] The majority found that the Executive would need wide powers in order to realise the purposes of the DMA.[13] It held further that the DMA contains sufficient restraints on the Minister's power.[14] It also noted that the Minister may not declare a national state of disaster on a whim, as certain objective requirements must be present before the Minister does so:[15]

(a) There must be a disaster as defined in the DMA.[16]

(b) The National Disaster Management Centre (National Centre) must classify the disaster as a national disaster before the Minister may declare a national state of disaster.

(c) After the classification of a national disaster, the National Executive must deal with it in terms of existing legislation and contingency arrangements.

(d) The Minister may only declare a national state of disaster if existing legislation and contingency arrangements do not adequately provide for the National Executive to deal effectively with the disaster or when special circumstances[17] warrant the declaration of a national state of disaster.

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[12] Id at para 46.

[13] Id at para 47.

[14] Id at para 48.

[15] Id at para 49.

[16] Section 1 of the DMA defines "disaster" as—

> "a progressive or sudden, widespread or localised, natural or human-caused occurrence which—
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> (a) causes or threatens to cause—
>
> (i) death, injury or disease;
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> (ii) damage to property, infrastructure or the environment; or
>
> (iii) significant disruption of the life of a community; and
>
> (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources."

[17] The words "special circumstances" are not defined in the DMA. However, the High Court judgment above n 9 said at para 54 that:

> "[Special] circumstances [are those] that warrant immediate action beyond what is provided for in existing legislation or which are beyond the resource capacity of those affected by the disaster. The circumstances must be serious and widespread enough to call for special measures in order to mitigate the effects of,

(e) The Minister must consult another Cabinet Minister before making regulations or issuing directions that have an impact on that colleague's portfolio.

(f) The Minister's power to make regulations or issue directions or authorise the issuing of directions may only be exercised in pursuance of the positive purposes stated in section 27(3) of the DMA.

[13] The majority held that the DA was correct in its argument that the regulations give Cabinet members far-reaching legislative powers, which in many ways are less constrained than Parliament's powers. However, so held the majority, those powers only relate to COVID-19 matters, which are matters that demand a swift, integrated, necessary and effective response.[18]

[14] The majority concluded that although the DMA gives the Minister wide powers, the negative constraints, positive constraints, judicial review and parliamentary oversight measures ensure that the Minister's powers are sufficiently limited. Section 27 of the DMA was therefore held to withstand constitutional muster.[19] The dissenting judge (Matojane J) concluded that section 27 was unconstitutional. He said that he would have suspended the declaration of invalidity for two years.

Supreme Court of Appeal

[15] The Supreme Court of Appeal was also split in its judgment and order, in this case the split being four to one. It had to determine all three issues that came before the High Court. Regarding the DA's argument that section 27(2) granted the Minister "nearly unfettered regulatory powers", the majority (Molemela P, with Petse DP, Mbatha JA and Molefe JA concurring) held that the argument had no merit.[20] In this

prepare for and respond to the disaster, and, in the aftermath, to reconstruct the damage caused by the disaster."

[18] Id at para 74.

[19] Id at para 86.

[20] *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs* [2024] ZASCA 65; 2024 (5) SA 463 (SCA); 2024 (9) BCLR 1189 (SCA) (SCA judgment) at para 30.

regard, the majority relied on the findings of *British American Tobacco*,[21] where it was emphasised that all the powers specified in section 27(2) of the DMA must be exercised only to the extent that it is necessary for the stated purposes of the DMA and not according to the subjective beliefs of the Minister.[22]

[16] The majority held that section 27 of the DMA does not confer overly broad delegated powers on the Minister for the following reasons:

(a) The general scheme of the DMA reveals a requirement for the Minister to constantly engage with several role-players in her decision-making which indicates that her powers are part of a broader collaborative venture.

(b) The Minister can only exercise her powers once the disaster has been classified as a national disaster by the head of the National Centre.

(c) The Minister may only declare a national state of disaster by notice in the Gazette if "existing legislation and contingency arrangements do not adequately provide for the National Executive to deal effectively with the disaster" or if there are other special circumstances that warrant such declaration.[23]

(d) The DMA's stated purpose is to implement urgent measures to address the disaster. Parliament's slow procedures would therefore obstruct the achievement of this goal.

(e) The Minister must consult another Cabinet Minister before making regulations or issuing directions that have an impact on that colleague's portfolio.

(f) The declaration of a national state of disaster that is permissible under section 27 is for a relatively short period of time (three months).[24]

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[21] *Minister of Co-operative Governance and Traditional Affairs v British American Tobacco South Africa (Pty) Ltd* [2022] ZASCA 89; [2022] 3 All SA 332 (SCA).

[22] SCA judgment above n 20 at para 29.

[23] Section 27(1) of the DMA.

[24] Section 27(5)(a) of the DMA.

(g) The extension of the declaration of a national state of disaster is for one month at a time.[25] Such an extension would also have to be necessary in the context of the DMA.

(h) All the powers specified in section 27(2) of the DMA must be exercised only to the extent necessary for the stated purposes of the DMA and not according to the subjective beliefs of the Minister.

(i) Section 59 of the DMA provides that the Minister may make regulations if it is necessary to do so for the effective carrying out of the objects of the DMA.

(j) Subsections 27(2) and (3) do not assign to the Minister the power to pass, amend or repeal an Act of Parliament.

[17] Accordingly, the majority held that on these 10 factors, section 27 of the DMA does not constitute a delegation of plenary delegated powers.

[18] The majority considered the argument by the DA that section 27 of the DMA brings about a *de facto* (in fact) state of emergency. It held that such an argument was based on a misconception, because a state of emergency does not permit a blanket suspension of the constitutional order.[26]

[19] The majority next considered the question whether section 27 of the DMA permits the Executive to exercise powers without parliamentary oversight. The majority held that the DA failed to provide evidence to support its assertion that the mechanisms adopted by Parliament during the national state of disaster to hold the Executive accountable were inadequate.[27] Regarding the argument by the DA that the parliamentary committees "have no teeth", the majority held that the DA failed to take into account various provisions of the Constitution that serve to ensure that Parliament's

[25] Section 27(5)(c) of the DMA.

[26] SCA judgment above n 20 at para 60.

[27] Id at para 76.

oversight role is maintained.[28] The DA was further held to have failed to identify any shortcomings in Parliament's Oversight and Accountability Model (Model),[29] which is a document that came about after the recommendations of Parliament's task team comprising members of both Houses of Parliament.[30]

[20] The majority considered that none of the provisions of the DMA "purport to bar parliamentary supervision" and accordingly, the ordinary parliamentary oversight mechanisms remain intact and the exercise of powers by the Executive in terms of the DMA remains subject to this.[31] The Model, according to the majority, provides an array of remedies designed to ensure full accountability, including summoning members before the Portfolio Committees and disciplinary steps which may be taken against errant members.[32] The majority reasoned that "[a]ggrieved parties who choose not to invoke the available remedies cannot blame the DMA for their failure to do so".[33] The majority relied on this Court's judgment of *One Movement South Africa*,[34] which "acknowledged that section 102 of the Constitution makes provision for Members of Parliament to address Executive members' remissness in their execution of their constitutional mandate".[35]

[21] The majority held that the argument by the DA, that the constitutional validity of section 27(2) is an objective question and that the engagement between the Executive and Parliament does not mean that Parliament has put in place effective mechanisms to maintain oversight and accountability, simply failed to take into account that context is

[28] Id at paras 89-90.

[29] Parliament of the Republic of South Africa "Oversight and Accountability Model" (March 2009).

[30] SCA judgment n 20 at para 80.

[31] Id at para 81.

[32] Id at para 82.

[33] Id.

[34] *One Movement South Africa NPC v President of the Republic of South Africa* [2023] ZACC 42; 2024 (2) SA 148 (CC); 2024 (3) BCLR 364 (CC) at para 37.

[35] SCA judgment above n 20 at para 92.

an important part of the unitary interpretive exercise.[36] It further reasoned, in view of all of the parliamentary mechanisms for oversight and supervision, as well as the safeguards for public participation that are built in as constitutional imperatives, it was a classic example of putting form over substance to insist that these mechanisms would only be effective if they were expressly included in the DMA.[37]

[22] The majority concluded that—

> "the Minister's exercise of her regulation-making powers envisaged in the DMA in no way violates or erodes the constitutional imperatives of supervision and accountability prescribed in sections 42(3) and 55(2)(b)(i) of the Constitution, as the Executive remains accountable to Parliament even during a state of disaster; the Oversight and Accountability Model does not state otherwise."[38]

[23] The majority concluded that section 27 of the DMA passes constitutional muster and the appeal was dismissed with no order as to costs. Makgoka JA, in the dissent, would have upheld the appeal and replaced the Full Court's order with one substantially along the lines claimed by the DA.

This Court

Jurisdiction and leave to appeal

[24] The issue in this application concerns the constitutionality of section 27 of the DMA. Section 167(3)(b)(i) of the Constitution provides this Court with the power to decide constitutional matters. This Court therefore has the requisite jurisdiction.

[36] Id at para 85.

[37] Id at para 91.

[38] Id at para 86.

Is the matter moot?

[25] The DA launched this application on an urgent basis in the High Court during the peak of the COVID-19 pandemic, which raises the question whether the matter can be considered moot, seeing that the COVID-19 pandemic has abated.

[26] The national state of disaster was lifted almost two years after the matter was first heard. However, the DMA is legislation that caters for unexpected events that may result in the restriction of fundamental rights. It is not wise to assume that another disaster of the magnitude of COVID-19 is unlikely to occur and it is not helpful to speculate on the nature of a possible disaster. A prudent approach is to ensure that there is certainty in the law, in the event that another disaster eventuates. Furthermore, this Court has repeatedly held that mootness is not an absolute bar to the justiciability of an issue and it is in the Court's discretion to entertain even admittedly moot issues.[39] It is thus in the interests of justice to consider the application in order to determine the constitutionality of the provision.

[27] As was the case in the High Court and the Supreme Court of Appeal, the DA continues to challenge the constitutionality of section 27 of the DMA on the following three bases:

(a) It is an unconstitutional delegation of Parliament's legislative powers to the Executive. It gives the Minister exceedingly broad powers to legislate over almost every aspect of the lives and businesses of South Africans during a national state of disaster.

(b) It permits the creation of circumstances resembling a state of emergency, but without an empowering provision for the oversight role that section 37 of the Constitution requires for Parliament in an actual state of emergency.

[39] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union* [2018] ZACC 24; 2018 (11) BCLR 1411 (CC); 2019 (1) SA 73 (CC) at para 44; *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 8; and *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2019 (11) BCLR 1403 (CC); 2020 (1) SA 428 (CC) at para 17.

(c) It does not enable the National Assembly to scrutinise and oversee executive action as is required by sections 42(3) and 55(2) of the Constitution. It is accepted that there are several measures that provide for oversight and scrutiny by Parliament, but it is argued that these are not adequate or effective.

[28] The DA seeks to set aside the order of the Supreme Court of Appeal and replace it with an order declaring section 27 inconsistent with the Constitution. It also seeks an order for a temporary reading-in to remedy the unconstitutionality by granting the National Assembly the power to, among others, "veto" by resolution and, when appropriate, regulate extensions of such regulations. Additionally, it seeks an order for the National Assembly to exercise such powers on the directives made by the Minister during a national state of disaster under section 27 of the DMA. I find it helpful in this judgment to start with the second attack, and thereafter deal with the first and third attacks, as there is a lot of overlap between the first and third grounds and some of the submissions and reasoning apply to both.

Does section 27 of the DMA permit the creation of a de facto state of emergency?

DA's submissions

[29] The DA argues that the powers the Minister is able to exercise under section 27 are akin to those powers conferred in a state of emergency, as the Minister has the power to suspend and limit rights. This permits an unconstitutionally simulated state of emergency due to the suspension of the ordinary legal order.

[30] The DA highlights that the restrictions imposed on people in South Africa during the COVID-19 pandemic resulted in confinement to their homes; businesses being precluded from operating (especially bottle stores); gatherings being prohibited; curfews being imposed; and thousands of arrests. The DA argues that through section 27 of the DMA, the Minister is allowed to issue regulations that lead to a widespread suspension of the ordinary legal order.

[31] The DA contends that despite the similarities between the DMA and the State of Emergency Act,[40] the DMA lacks the safeguards imposed in section 37(2)(b) of the Constitution, enabling the National Assembly to have the final decision during a state of emergency. This section provides:

> "(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—
>
> . . .
>
> (b) for no more than 21 days from the date of the declaration, unless the *National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly*. Any subsequent extension must be by a resolution adopted *with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly*." (Emphasis added.)

[32] The italicised portions show, argues the DA, that the National Assembly has the power to make the final decision in a state of emergency, whereas section 27 does not confer to it such a power during a national state of disaster. The DA also refers to section 3 of the State of Emergency Act, which gives effect to section 37(2)(b) of the Constitution. It is desirable to quote the whole of sections 3 and 4 of the State of Emergency Act, particularly since the reading-in for which the DA argues is plainly modelled on these provisions:

> "3. Parliamentary supervision
>
> (1) A copy of any proclamation declaring a state of emergency and of any regulation, order, rule or bylaw made in pursuance of any such

[40] 64 of 1997.

declaration shall be laid upon the Table in Parliament by the President as soon as possible after the publication thereof.

(2) In addition to the powers conferred upon the National Assembly by section 37(2)(b) of the Constitution . . . , the National Assembly may—

(a) disapprove of any such regulation, order, rule or bylaw or of any provision thereof; or

(b) make any recommendation to the President in connection with any such proclamation, regulation, order, rule, bylaw or provision.

4. Lapsing of emergency regulations

(1) Any regulation, order, rule or bylaw made in pursuance of the declaration of a particular state of emergency, or any provision thereof, shall cease to be of force and effect—

(a) as from the date on which the proclamation declaring that state of emergency is withdrawn by the President under section 1(3);

(b) as from the date on which the National Assembly—

(i) resolves under section 37(2)(b) of the Constitution . . . not to extend the declaration of that state of emergency; or

(ii) resolves under section 3(2)(a) to disapprove of such regulation, order, rule, bylaw or provision, to the extent to which it is so disapproved; or

(c) as from the date on which the declaration of that state of emergency lapses as contemplated in the said section 37(2)(b), whichever is the earlier date.

(2) The provisions of subsection (1) shall not derogate from the validity of anything done in terms of any such regulation, order, rule, bylaw or provision up to the date upon which it so ceased to be of force and effect, or from any right, privilege, obligation or liability acquired, accrued or incurred, as at the said date, under and by virtue of any such regulation, order, rule, bylaw or provision."

[33] The DA argues that for the DMA to be consistent with the Constitution, it should contain powers similar to those conferred by section 3 of the State of Emergency Act and with the effects stated in section 4.

[34] The DA concedes that a state of emergency and a national state of disaster clearly have two different thresholds. However, the DA's argument is that section 27 of the DMA can achieve a similar outcome to that of a state of emergency. This is because, as the DA argues, during a national state of disaster, certain rights are suspended and therefore violated for the period of the disaster.

Minister and President's submissions

[35] The Minister and the President contend that there are fundamental differences between a state of emergency under section 37 of the Constitution and a national state of disaster under the DMA. First, there is a higher threshold in the case of a state of emergency than in a national state of disaster. A state of emergency can only be declared when the life of the nation is threatened due to a form of public emergency and if such a declaration is necessary to restore peace and order.[41] This is clearly a more onerous threshold to meet compared to a national state of disaster which may be declared if there is no existing legislation or contingency arrangement to effectively deal with the disaster or due to other special circumstances. Second, so argues the Minister and the President, the declaration of a state of emergency permits the assignment of plenary legislative powers to the Executive whereas a national state of disaster does not. Third, section 37(4) of the Constitution expressly permits emergency legislation that derogates from the Bill of Rights, if strictly required by the emergency, whereas there is no similar provision in the DMA.

[36] The Minister and the President argue that a national state of disaster merely permits the delegation of subordinate legislative powers to the Executive whereas a state

[41] Section 37(1) of the Constitution.

of emergency permits the Executive to cut across all existing laws and the Bill of Rights. The two sets of rules are therefore not comparable, it is argued.

Parliament's submissions

[37] Similar to the Minister, Parliament submits that a national state of disaster is not a *de facto* state of emergency and reiterates that the two are materially different. Parliament submits that a national state of disaster does not suspend the constitutional order, considering that the constitutional order remains protected and operational during a national state of disaster in the sense that the exercise of the powers under the DMA may be taken on review.

[38] Parliament distinguishes between a national state of disaster and a state of emergency by arguing that a state of emergency contemplates something more severe in magnitude than a national state of disaster. It is further submitted, save for those fundamental rights rendered non-derogable by virtue of section 37(5)(c) of the Constitution,[42] a derogation from the fundamental rights in the Bill of Rights during a state of emergency would not be justiciable in a court of law. Due to this, so argues Parliament, the Legislature saw it fit to incorporate the safeguards in sections 3 and 4 of the State of Emergency Act and this does not exist on the reasoning that a national state of disaster suspends or dilutes the constitutional order. As such, Parliament submits that the fact that the powers conferred by the DMA may result in a breach of rights, even as a result of abuse, is not a basis to invalidate the legislation as unconstitutional.

[42] Section 37(5)(c) provides that no Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise "any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table". The sections listed in the Table are sections 9, 10, 11, 12, 13, 28 and 35 of the Bill of Rights. In some cases, these rights are non-derogable in their entirety (sections 10 and 11). In the other cases, the non-derogation is partial.

Analysis

[39] At the outset, it is important to state that a national state of disaster is distinct from a state of emergency as they are regulated by different sets of legislation, and it is envisaged that they are utilised under different circumstances. But, a state of emergency and a national state of disaster are similar, to the extent that each encroaches on some of the basic fundamental rights, specifically those powers in subsections 27(2)(d) to (k) of the DMA.

[40] The impact of the regulations imposed during a national state of disaster, and the effects they have on the rights in the Bill of Rights, will depend on the nature of the disaster they seek to address. Some disasters have little impact on the Bill of Rights and may not create extraordinary circumstances. For instance, the regulations promulgated pursuant to the electricity-related state of disaster did not affect rights such as the right to freedom of movement and housing. What was impacted was the right to obtain and use electricity at certain times. By contrast, the impact of other national states of disaster such as the COVID-19 pandemic was far-reaching. It affected the rights to freedom of movement, housing and freedom of trade, occupation and profession. Therefore, a national state of disaster and a state of emergency are not the same but, depending on the severity of the disaster, may have similar effects on some of the rights in the Bill of Rights. It is unnecessary, and not possible, to conclude whether a state of emergency is more invasive than a national state of disaster since it will depend on the event in each scenario.

[41] Section 27(2) gives the Minister the power to make regulations or to authorise the issuing of directions on the following matters:

(a) subsection (d): the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;

(b) subsection (e): the regulation of traffic to, from or within the disaster-stricken or threatened area;

(c) subsection (f): the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;

(d) subsection (g): the control and occupancy of premises in the disaster-stricken or threatened area;

(e) subsection (h): the provision, control or use of temporary emergency accommodation;

(f) subsection (i): the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(g) subsection (j): the maintenance or installation of temporary lines of communication to, from or within the disaster area; and

(h) subsection (k): the dissemination of information required for dealing with the disaster.

[42] These powers undoubtedly have an impact on several provisions of the Bill of Rights. For instance, subsections 27(2)(d), (g) and (h) of the DMA may have an impact on section 26(3) of the Constitution, which states that no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. Subsections 27(2)(e) and (f) of the DMA may have an impact on section 21(3) of the Constitution, which states that every citizen has the right to enter, to remain in and to reside anywhere in the Republic.

[43] If there is a challenge on the basis of such a violation of rights, that will have to be justified in terms of section 36 of the Constitution. In the exercise of a section 36 limitation analysis, the courts will have to consider the ancillary rights which are being protected. For example, in a flood, evacuation provisions might impact the right to housing but they also protect the right to life. Section 36 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."

None of these factors are individually decisive. Nor are they exhaustive of the relevant factors to be considered. It is trite that such a consideration is done by a court exercising its review powers.

[44] Section 37(3) of the Constitution permits judicial intervention on specified grounds. It provides that a competent court may decide on the validity of a declaration of a state of emergency, any extension thereof and any legislation enacted or action taken in consequence of the declaration. In terms of section 37(4) of the Constitution, there may be a derogation from fundamental rights, but such derogation has to be "strictly required by the emergency".[43] So, if a litigant challenges an emergency law for derogating from fundamental rights, the government will have the burden of proving that the derogation is "strictly required by the emergency".

[45] Although there is a legislative distinction between a state of emergency and a national state of disaster, section 27 of the DMA has permitted the creation of circumstances where the limitation of rights entrenched in the Bill of Rights may have a far-reaching impact which leads to a conclusion that the effects of a national state of disaster, although not the same, may be similar to those of a state of emergency.

[46] The restriction of freedom of movement and assembly during the lockdown period has been described as being similar to that adopted by the apartheid government in the 1980s and 90s. To the exclusion of funerals, there was almost a total limitation on the right of assembly and freedom of movement during the lockdown. The curfews

[43] Section 37(4)(a) of the Constitution.

imposed during the level 4 lockdown, in particular, resembled the curfews imposed during a state of emergency under apartheid rule.[44]

[47] Similarly, in an effort to address overcrowding in a number of informal settlements across the country, thousands of residents were relocated from their homes in an attempt to slow down the spread of the virus.[45] Some of the residents opposed these relocations on the basis that they were reminiscent of Cape Town's District Six forced removals of over 60 000 residents carried out by the apartheid government in 1968, after the declaration of District Six as a whites-only area.[46]

[48] Sadly, the restrictions of movement during the lockdown had harsher effects on the poor, who were forced to remain cramped up in their small homes, making it difficult to comply with the regulations. Similar to a state of emergency during the apartheid era, the South African National Defence Force was deployed to support the South African Police Services to monitor and enforce restrictions during the lockdown. The consequence for non-compliance was a criminal sanction, which is once more a similar consequence to that adopted during a state of emergency.[47]

[49] The Chief Executive Officer of the South African Human Rights Commission described the lockdown restrictions as akin to those under a state of emergency and remarked on the reluctance to declare it a state of emergency, considering the country's association of a state of emergency with the apartheid regime.[48]

[50] An illustration that shows the extent of the limitation of rights during the COVID-19 pandemic can be made by referring to what the Supreme Court of Appeal

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[44] Nchodu *The Constitutionality of the Disaster Management Act and the Covid-19 Regulations Enacted Thereunder: Does This Regulatory Regime Contravene the Right to Just Administrative Action?* (LLM thesis, University of Cape Town, 2022) at 38.

[45] Staunton et al "Between a Rock and a Hard Place: COVID-19 and South Africa's Response" (2020) 7 *Journal of Law and the Biosciences* 1 at 6.

[46] Id.

[47] Nchodu above n 44 at 39.

[48] Id at 35.

said in *Esau*[49] concerning the regulations[50] made by the Minister in the exercise of her broad range of powers. Concerning the exercise regulation,[51] which permitted people to walk, run or cycle between the hours of 06h00 to 09h00 within five kilometres of their premises, the Court said:

> "I find that there is no rational explanation to justify them. 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."[52] (Footnote omitted.)

[51] Regarding the exclusion of hot cooked food from the list of essential goods that could be purchased,[53] the Court said:

> "The COGTA Minister's justification for this prohibition was that it was 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."[54]

[52] The Constitution provides for the involvement of the National Assembly during a state of emergency.[55] Section 3 of the State of Emergency Act gives effect to section 37(2)(b) of the Constitution and provides that the regulations shall be tabled

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[49] *Esau v Minister of Co-operative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA).

[50] Disaster Management Act, 2002: Regulations Issued in Terms of Section 27(2) of the Disaster Management Act, 2002, GN 480 *GG* 43258, 29 April 2020 (Regulations).

[51] Id at regulation 16(2)(f).

[52] *Esau* above n 49 at para 146.

[53] Regulations above n 50 at items 1 and 2 of Part E of Table 1, read with regulation 28(3).

[54] *Esau* above n 49 at para 152.

[55] Section 37(2)(b) of the Constitution.

before Parliament as soon as possible after promulgation. The National Assembly may disapprove of any such proclamation, regulation, order, rule or by-law or of any provision thereof or make any recommendation to the President in connection with any such proclamation, regulation, order, rule, by-law or provision. If the National Assembly disapproves of the measure in question, it lapses from the date of such disapproval, without retroactively invalidating things that happened prior to the date of disapproval. This ensures that the Executive can act swiftly to deal with an emergency and that there is legal certainty about the regime pending the National Assembly's decision, but that the National Assembly can step in and prospectively terminate the measure if it disapproves thereof.

[53] The Constitution also grants the powers to a court, during a state of emergency, to decide on the validity of the declaration, its extension and any legislation enacted in consequence of such a state of emergency. As stated, although there is no specific provision that gives a court such powers in the DMA, a limitation of the rights entrenched in the Bill of Rights is tested through review proceedings in a court of law.

[54] It is important to note that although the thresholds for a state of emergency and national state of disaster are different, there is a similarity in that section 27(3) of the DMA states that the powers conferred on the Minister may be exercised only to the extent that it is necessary for the purposes of dealing with the disaster. Section 37(4) of the Constitution states that any legislation enacted as a result of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency. In both of these scenarios, there may be a derogation from fundamental rights insofar as it is necessary (in a national state of disaster) or as strictly required (in a state of emergency). It would be on those bases that regulations would be challenged. I will address later the fact that there is no specific mention of the powers of the National Assembly to have the final decision herein, when I consider whether this omission of a specific reference means that the National Assembly cannot override the Minister if it disagrees with the regulations.

[55] The application by the DA is premised on the fact that there is no similar provision in the DMA, yet the DMA permits similar breaches of constitutional rights albeit, arguably, at a lower scale. I have already acknowledged that the threshold in a national state of disaster is, or may be, lower than that of a state of emergency, depending on the nature of the disaster. Although the thresholds may be different, what is of importance is that the impact on fundamental rights is similar, in the sense that section 27 of the DMA has the potential, like the State of Emergency Act, to permit a limitation of the basic fundamental rights entrenched in the Bill of Rights.

[56] Perhaps the lacuna in the DMA was as a consequence of the fact that the Legislature, when enacting the DMA, did not anticipate a national state of disaster of the magnitude of COVID-19. This thinking is more attractive when one compares the recent electricity-related state of disaster in South Africa with the national state of disaster during the COVID-19 pandemic.[56] The COVID-19 national state of disaster was also of a higher magnitude and had dire consequences compared to other disasters such as the riots that occurred in KwaZulu-Natal in July 2021. The other common disasters in several countries (including South Africa) are often climatic in nature, namely, flooding and wildfires.[57] This argument, however, was not advanced by the respondents and therefore I leave it at that.

[57] What the COVID-19 pandemic and resultant national state of disaster reveal is that there may be very severe disasters which, in the opinion of the Executive, call for extreme measures and significant limitations on fundamental rights. The DMA, as it stands, permits such far-reaching measures without reserving to the National Assembly or Parliament a right to override regulations promulgated by the Minister. I

[56] The classification of a state of disaster due to the impact of the electricity supply was made on 9 February 2023. See Classification of National Disaster: Impact of Severe Electricity Supply Constraint, GN 48009 *GG* 3019, 9 February 2023.

[57] See, for example, Classification of a National Disaster in Terms of Section 23 of the Disaster Management Act (Act No. 57 of 2002): Impact of Severe Weather in the Country, GN 52015, *GG* 5813, 30 January 2025; Classification of a National Disaster in Terms of Section 23 of the Disaster Management Act (Act No. 57 of 2002): Impact of Floods Due to Inclement Weather, GN 48036, *GG* 3035, 13 February 2023; Declaration of a National State of Disaster, GN 41493 *GG* 210, 13 March 2018.

acknowledge that there are various pieces of legislation which permit a delegation of broad and extensive powers. However, the DMA is special legislation which is implemented in extraordinary times when there is a sudden disruption to a community or nation by, usually, an unexpected disaster. Quite similar to the safeguards required in a state of emergency, it is appropriate to expect that such safeguards are needed in a national state of disaster.

[58] Although I have dealt with the similarities and differences between a national state of disaster and a state of emergency, I hold the view that it does not matter that a national state of disaster in terms of the DMA may seem less draconian than a state of emergency in terms of section 37 of the Constitution. As I have said, the focus in both instances should be on the safeguards to deal with the effects on the fundamental rights limited by either scenario. Accordingly, it is not my conclusion that the unconstitutionality in the provision is as a result of a national state of disaster constituting a *de facto* state of emergency, as submitted by the DA.

[59] The point, instead, is that the DMA does not have a specific provision providing for approval or disapproval of regulations made during a national state of disaster by the National Assembly in circumstances where the powers of the Minister may result in a significant intrusion on the constitutionally protected rights of the citizens of South Africa.

Is there an impermissible delegation of legislative power to the Minister?

[60] Before I deal with whether this power for approval and disapproval should be spelled out expressly in the DMA, it is necessary to deal with the DA's submission that the powers granted to the Executive constitute an impermissible delegation of legislative powers because they are extremely broad and may potentially limit the basic rights of South Africans due to the intrusive nature thereof. In the process of dealing with this enquiry, I will consider whether there are any constraints or limitations to the powers exercised by the Executive. I adopt this approach because it is not disputed that the Minister has broad powers that are delegated to her during a national state of

disaster. The bone of contention is whether delegating such powers is constitutionally impermissible because it breaches the doctrine of separation of powers.

[61] The DA argues that this is the consequence when the Minister exercises such powers, whilst the Minister and Parliament submit that the powers may be broad but there are adequate limitations that are applicable to the Minister when she exercises these powers. Parliament argues that such constraints immunise the relevant provisions of the DMA. Because it is not disputed that the Minister has broad delegated powers, the real question here is whether the limitations advanced by the respondents are sufficient to restrain the Minister from usurping the powers of the National Assembly.

DA's submissions

[62] The DA submits that section 27 has delegated Parliament's legislative power to the Executive but has not provided any appropriate mechanism for accountability to Parliament. It argues that if there is a lack of accountability to Parliament, there is a lack of accountability to the people of South Africa, who are represented by Parliament.

[63] The DA further submits that the powers conferred on the Minister in section 27 of the DMA fail to strike a proper constitutional balance between Parliament and the Executive due to the vast powers afforded to the Executive. It argues that the vastness of the powers delegated by section 27 and the unconstitutionality thereof are understood when analysing two main principles:

(a) The ability of Parliament to delegate legislative powers is limited by, amongst others, the principle of the separation of powers.[58] This is due to the fact that Parliament is elected by the people and thus bears the responsibility of making laws which contribute towards upholding

[58] Counsel for the DA referred to *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* [2001] ZACC 10; 2001 (11) BCLR 1126 (CC); 2002 (1) SA 447 (CC) at para 19 which states that determining whether or not delegated legislation has gone too far depends on context. See also *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council*) which includes a list of factors at para 206, used to determine the extent to which Parliament may delegate its law-making function.

democracy. Delegating too much of its powers may lead to important decisions being made without parliamentary scrutiny.

(b) There are the limitations placed by the Constitution in a state of emergency. The DA submits that contrary to a national state of disaster in section 27 of the DMA, a state of emergency in section 37 of the Constitution has the necessary safeguards to allow the Executive to respond to an emergency, which includes the declaration and continued existence of any state of emergency, but that this is subject to parliamentary control.

[64] Furthermore, the DA cites the following factors as proof that the powers of the Minister conferred by section 27(2) are broad and intrusive:

(a) The Minister's powers as stipulated in paragraphs (a) to (m) of section 27(2) apply to the whole country during a national state of disaster.

(b) The power in paragraph (n) is broadly worded because it enables the Minister to take any other steps necessary to prevent the escalation of the disaster.

(c) Although the section does not give the Minister the power to pass, amend or repeal an Act of Parliament, the Minister is allowed to suspend or limit the rights conferred in terms of other Acts of Parliament. She is thus unrestrained by all other statutes apart from the DMA in making section 27 regulations.

(d) Since section 27(4) provides that regulations made under section 27(2) may include "regulations prescribing penalties for any contravention of the regulations", the Minister may make it a crime to contravene a section 27 regulation.

(e) Lastly, whilst the power is delegated to the Minister, she is permitted to sub-delegate the power to anyone else.

[65] The DA argues that for instance, during the COVID-19 lockdown, the Minister enacted regulations that restricted many fundamental freedoms, some of which were clouded with a good measure of irrationality, yet Parliament did not have residual power to set these aside.

[66] The DA argues further that this unrestrained power extends to other Acts of Parliament. For instance, the Minister in terms of section 27(2)(i) may suspend or limit the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area. In doing so, she would be legislating in an arena regulated by the Liquor Act[59] and therefore within the portfolio of another Minister. To restate, section 27(2) provides the Minister with powers to delegate to others the power to make subordinate legislation under section 27(2) in the sense that she may, after consulting with the responsible Cabinet member, make regulations, issue directions or authorise the issue of directions. Section 27(4) provides the Minister with powers to make it a crime to contravene section 27 regulations.

[67] The DA acknowledges that the Minister may act in good faith in exercising the section 27(2) powers and that she, in fact, probably acted in good faith during the COVID-19 pandemic. The DA submits, however, that the good faith of the Minister is irrelevant when assessing the constitutionality of the provision of an Act. In this regard, the DA refers to *South African Association of Personal Injury Lawyers*,[60] where it was held:

> "I have no doubt that in accepting the appointment the first respondent acted in what he perceived to be the national interest. The fact, however, that all involved acted in good faith and in what they perceived to be the interests of the country does not make lawful, legislation or conduct that is inconsistent with the separation of powers required by the Constitution."[61]

[59] 59 of 2003.

[60] *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) BCLR 77 (CC); 2001 (1) SA 883 (CC).

[61] Id at para 36.

[68] In response to the respondents' contention that the Minister exercises the delegated powers subject to the constraints contained in the DMA, the DA contends that when considering whether the delegation of power is impermissible or not, one must look at the sufficiency of the constraints. It submits that the constraints are insufficient. It accepts that the Minister's powers are constrained insofar as they relate to the requirement that the Minister should consult with another Cabinet member prior to making decisions or regulations. It is also prepared to accept that those constraints include oversight and scrutiny by Parliament, including internal procedures within their scope for the exercise of its constitutional duty in accordance with the Rules of the National Assembly, and as informed by the Model. The criticism is the fact that in the absence of an overriding power of control, such as exists in the case of a state of emergency, it is the decision of the Minister, as a member of the Executive, that will prevail, in the event of disagreement between the National Assembly and the Minister.

[69] The DA contends that we should look at the factors in *Nu Africa*[62] to determine whether a delegation constitutes an affront to the Constitution. The factors are: the scope of the delegation; the subject matter to which it relates; the degree of delegation; and the sufficiency of the constraints.[63] It also emphasises that there is no justification analysis in terms of section 36 of the Constitution when there is a breach of the separation of powers.

[70] The DA accepts the respondents' contention that the regulations can be challenged through review in court, but argues that this should not be the only solution as judicial review is a slow and expensive process. It argues that the weakness and delays in this review process can be illustrated by the fact that the regulations to manage the COVID-19 pandemic were made at the peak of the pandemic around 2020 and we are still dealing with a case challenging them five years later. Furthermore, the DA

[62] *NU Africa Duty Free Shops (Pty) Ltd v Minister of Finance* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC).

[63] Id at para 95.

contends that section 27 decisions will invariably be determined through rule 53[64] applications, and that under *Plascon-Evans*,[65] factual disputes will generally be decided in favour of the Executive,[66] as a party bringing a challenge will inevitably be an applicant in those proceedings.

Minister and President's submissions

[71] The Minister and the President contend that the Minister's powers are actually far more restricted than the DA has argued. They submit that the power to determine whether a national disaster has occurred is vested in the National Centre in terms of subsections 23(1)(b), (6) and (7), and the decisions of the National Centre are beyond the Minister's control. Additionally, the Minister and the President submit that in terms of section 26(2)(b), it is the National Executive that must deal with the national disaster, and which is responsible for the management of the disaster. Therefore, the Minister is accountable to the National Executive when exercising the conferred powers.

[72] The Minister and the President also submit that although the Minister may augment existing laws after consulting the responsible Cabinet member, and only if necessary, the Minister cannot repeal or amend them. The Minister and the President further submit that the Minister's powers are not exempt from any limitation imposed by the Constitution, and even if they satisfy the requirements for a limitation under section 36 of the Constitution, the disaster regulations are still subject to judicial review under the Promotion of Administrative Justice Act[67] (PAJA) considering that they pertain to the exercise of public power.

[73] The Minister and the President further submit that there is a difference between the delegation of subordinate legislative powers, which are subject to the enabling Acts

[64] Uniform Rules of Court.

[65] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623.

[66] Id at 634-5.

[67] 3 of 2000.

of Parliament (as seen in this case), and the assignment of plenary legislative powers which enable the holder to pass, amend and repeal Acts of Parliament, which the Minister does not have the power to do in this instance.[68]

Parliament's submissions

[74] Parliament contends that the majority in the High Court and the Supreme Court of Appeal were correct in dismissing the DA's contentions. It contends that the DA's reliance on *Nu Africa* to substantiate its argument that the Minister's regulation-making powers must be subject to the approval of Parliament is incorrect since *Nu Africa* did not turn on just one of several factors that determine whether the delegations in issue are constitutionally compliant or not.

[75] Parliament refers to *Van Rooyen*[69] to submit that this Court has made it clear that legislation will not be considered invalid or unconstitutional just on the basis that the powers conferred may be abused.[70] Furthermore, even if there is an abuse of power, the remedy lies in judicial review or constitutional control and not the complete abrogation of the legislation.

[76] Parliament submits that there is no impermissible delegation of legislative powers as there are sufficient constraints in the DMA to render the delegated powers in section 27 constitutionally permissible. In that regard, Parliament makes the following points:

(a) The general scheme of the DMA reveals a requirement for the Minister to constantly engage with several role-players in her decision making. The exercise of the powers is clearly collaborative. The discretion of the Minister is sufficiently guided by other provisions of the DMA.

[68] An example given in the Minister and the President's submissions is that the Minister limiting when pubs close may limit rights but does not amend or repeal any Act of Parliament.

[69] *Van Rooyen v S* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).

[70] See id at paras 37-8.

(b) The Minister can only exercise her powers once the disaster has been classified as a national disaster by the head of the National Centre, whom she has appointed.

(c) The Minister is not given carte blanche to declare a national state of disaster. She can only do so if existing legislation and contingency arrangements do not adequately provide for the National Executive to deal effectively with the disaster or if there are other special circumstances that warrant such a declaration.

(d) The DMA's stated purpose is to implement urgent measures to address the disaster, which requires rapid and effective interventions.

(e) The Minister must consult Cabinet colleagues before making regulations or issuing directions that impact another Cabinet member's portfolio.

(f) The declaration of a national state of disaster under section 27 is for a relatively short period of time.

(g) The extension of the declaration of a national state of disaster is for one month at a time. It must be for the same purpose as the initial declaration and meet the "necessary" test.

(h) All the powers specified in section 27(2), must be exercised only to the extent necessary for the stated purposes of the Act and not for the subjective beliefs of the Minister.

(i) Section 59 of the DMA provides that the Minister may make regulations on matters that are necessary to prescribe for the effective carrying out of the objects of the DMA. Those regulations must not be inconsistent with the provisions of the DMA.

(j) Subsections 27(2) and (3) do not assign plenary powers to the Minister to pass, amend or repeal any legislation.

[77] Parliament submits that it is evident from the litigation challenging the Minister's decision during the COVID-19 pandemic that those who were affected by the exercise of the power knew which avenues to use in order to seek relief.

[78] It further argues that the DMA expressly provides for rapid and effective interventions to deal with the disaster and that the Legislature's procedures would hinder the swiftness required by the Act.

Is there a breach of the doctrine of separation of powers as argued by the DA?

[79] It is not disputed that the powers conferred on the Minister are very broad and that some of those powers intrude into the parameters of the powers of the Legislature and other members of the Executive. It is also accepted, as argued by the respondents, that section 27 of the DMA does enable the National Assembly to scrutinise and oversee executive action as required by sections 42(3) and 55(2) of the Constitution, and that there are limitations or constraints available in the DMA and the Model. It has not been suggested by the respondents that it would be consistent with the doctrine of separation of powers to assign such potentially drastic law-making powers to the Executive in the ordinary course. The argument is that such assignment is justified by the need for swift action in the face of disasters.

[80] The real question, then, is whether the power to oversee and scrutinise the powers of the Minister can be said to amount to the necessary constraints to provide for effective or adequate oversight mechanisms for the wide-ranging powers granted to the Minister in section 27. The criticism is that all these several measures of oversight are such that the National Assembly, as a representative of the people in the country, is not afforded the right to have a say on whether to approve or disapprove regulations made during a national state of disaster. The starting point for this enquiry is to have a closer look at the present mechanisms.

[81] Sections 42(3) and 55(2) of the Constitution oblige the National Assembly to scrutinise and maintain oversight of executive action as reiterated in *EFF I*[71] and *II*.[72] Section 92(3) provides that members of the Cabinet must provide Parliament with full and regular reports concerning matters under their control. The criticism by the DA is that although the Minister submits a yearly report to Parliament on the activities of the National Centre,[73] given the breadth of the powers provided by section 27, the reporting obligation is insufficient. The DA submits that section 27 would pass the threshold for constitutional validity if it explicitly required the National Assembly to supervise, approve and disapprove the Executive's decisions, regulations and directions issued in terms of section 27(2). I am attracted to this argument.

[82] I am also willing to accept that this Court has held that the Constitution leaves it up to the National Assembly to propose its own mechanisms on the oversight of the Executive. I consider this further below. The oversight mechanisms that the National Assembly exercises are stipulated in the following legislative provisions:

(a) Section 42(3) of the Constitution imposes the National Assembly's oversight duty and section 55(2) gives content to the duty of oversight.

(b) Section 56 of the Constitution vests wide powers in the National Assembly and its committees to call people to account.

(c) Subsections 92(2) and (3) of the Constitution provide that members of the Cabinet are accountable individually and collectively to Parliament for the exercise of their powers and functions, and members of the Cabinet have a duty to provide Parliament with full and regular reports concerning matters under their control.

(d) Section 102 of the Constitution allows the National Assembly to force the entire Cabinet, including the President, to resign as a result of passing a motion of no confidence.

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[71] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 93 and 95.

[72] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) at para 149.

[73] Section 24(2) of the DMA.

(e) The National Assembly has established internal procedures for exercising its constitutional duty of oversight. These are set out in the Rules of the National Assembly, as informed by the Model, which entail overseeing the effective management of government departments to ensure, amongst other things, a better quality of life for all the people of South Africa.

(f) Section 13(b) read with section 17(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act[74] renders it contempt of Parliament to defy Parliament.

(g) Section 57(1) of the Constitution makes provision for Parliament to determine and control its processes. They form part of our overarching constitutional order and do not need to be repeated in every statute in order to be applicable to executive functions under that statute.

(h) Section 57(2) of the Constitution requires that Parliament's rules and orders make provision for the establishment, powers and functioning of committees. Parliament has discretion to determine these with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(i) Parliament has the Model in terms of which it conducts oversight of the various organs of state, including members of the Executive, through committees.

[83] Parliament has broad powers and obligations to exercise its supervisory powers. Accordingly, there is no need for every Act of Parliament to stipulate those powers. Parliament has demonstrated how it had been exercising oversight over the Executive during the COVID-19 pandemic in respect of various Portfolio and Select Committees vis-à-vis each Minister being accountable to those committees. In supporting its claim for the oversight measures exercised by Parliament during the pandemic, Parliament, before the High Court, submitted the following examples:

[74] 4 of 2004.

(a) Minister of Health/National Department of Health: The Minister of Health held two briefings on 10 April 2020 and 27 April 2020 to provide an update on COVID-19 related matters.

(b) Minister of COGTA: The Minister was requested by the Portfolio Committee on COGTA to discuss the consequences of the regulations. A meeting was subsequently held on 21 April 2020, and on 23 April 2020 the Minister provided a written response to the questions raised by the Portfolio Committee on COGTA. The Minister was further requested to answer questions regarding the stimulus package to municipalities on 23 April 2020. On 28 April 2020, the South African Local Government Association provided a briefing to the same Portfolio Committee[75] on the consequences of COVID-19 response measures insofar as they pertained to municipal governance.

(c) Minister of Human Settlements, Water and Sanitation: The Minister of Human Settlements, Water and Sanitation briefed its Portfolio Committee[76] on the impact of COVID-19 on issues pertaining to water access and supply on 21 April 2020.

(d) Minister of Higher Education, Science and Technology: On 21 April 2020, the Minister of Higher Education, Science and Technology briefed its Portfolio Committee[77] regarding the impact of the COVID-19 pandemic on universities.

(e) Minister of Employment and Labour: The Minister of Employment and Labour briefed its Portfolio Committee[78] on 22 April 2020 regarding his Department's plans to process Unemployment Insurance Fund and Compensation Fund claims, inspections conducted during the extended lockdown period and details with respect to the different programs that

[75]Including the Select Committee on COGTA.

[76] Including the Select Committee on COGTA, Water and Sanitation and Human Settlements.

[77] Including the Select Committee on Education and Technology, Sport, Arts and Culture.

[78] Including the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour.

the Executive was implementing to assist the vulnerable during the lockdown.

(f) Minister of Trade, Industry and Competition: On 1 May 2020, a briefing to its Joint Portfolio and Select Committees was held by the Department of Trade, Industry and Competition (DTIC) regarding the Government's response to the potential negative impact of COVID-19 on the economy and the measures considered to mitigate against it. On 19 May 2020, the Competition Commission briefed the Portfolio Committee on Trade and Industry[79] regarding the impact of COVID-19 on the economy. On the same date, the National Consumer Commission also addressed the same Portfolio Committee on, amongst others, the complaints that it received around excessive pricing. On 28 May 2020, the DTIC provided a report to its Portfolio Committee on the technical infrastructure entities' contributions to Government's COVID-19 response. On 1 June 2020, the International Trade Administration Commission of South Africa reported to the Portfolio Committee[80] on its contribution to the Government's response to COVID-19.

(g) Minister of Defence and Military Veterans: On 22 April 2020, the Minister of Defence and Military Veterans briefed the Joint Committee on Defence on various matters such as the repatriation of South African citizens from the Hubei Province and issues surrounding the deployment of the South African National Defence Force in the combat of the spread of COVID-19.

(h) Minister of Social Development: On 23 April 2020, the Minister of Social Development briefed its Portfolio Committee[81] on matters relating to the Department's performance in responding to the COVID-19 pandemic as well as its financial report. In June 2020, the Department provided a

[79] Including the Select Committee on Economic Development, Small Business Development, Tourism, Employment and Labour.

[80] Id.

[81] Including the Select Committee on Health and Social Services.

presentation to its Portfolio Committee regarding the implementation of social grants impacted by COVID-19.

(i) National Treasury and the South African Revenue Service: On 22 April 2020, the National Treasury and the South African Revenue Service briefed the Portfolio and Select Committees on Finance, relating to the 2020 Draft Disaster Management Tax Relief Bill and the 2020 Draft Disaster Management Tax Relief Administration Bill.

(j) Minister of Home Affairs: On 28 April 2020, the Minister of Home Affairs briefed its Portfolio Committee[82] on matters concerning the movement of refugees from the Cape Town Central Business District and an update on service provision during the COVID-19 lockdown.

(k) Department of Small Business Development: On 28 April 2020, the Department of Small Business Development briefed its Portfolio Committee[83] on matters concerning interventions for small enterprises impacted by the COVID-19 pandemic during the lockdown.

(l) Minister of Basic Education: On 29 April 2020, the Minister of Basic Education provided a briefing to its Portfolio Committee[84] regarding the impact and status of schooling during the COVID-19 lockdown.

(m) Minister of Police: On 29 April 2020, the Minister of Police briefed its Portfolio Committee[85] on the report prepared by the Minister of Police and Independent Police Investigative Directorate on the state of disaster.

(n) Minister of Justice and Correctional Services: On 29 April 2020, the Minister of Justice and Correctional Services briefed its Portfolio Committee[86] regarding measures taken by the Ministry of Justice and Correctional Services to deal with the COVID-19 pandemic. On 1 May 2020, the same Portfolio and Select Committees invited the

[82] Including the Select Committee on Security and Justice.

[83] Including the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour.

[84] Including the Select Committee on Education and Technology, Sport, Arts and Culture.

[85] Including the Select Committee on Security and Justice.

[86] Id.

Minister to a virtual meeting. On 4 May 2020, a virtual meeting was held to discuss concerns caused by the COVID-19 pandemic.

(o) Minister of Transport: On 30 April 2020, the Minister of Transport briefed its Portfolio Committee[87] on matters concerning the implementation of COVID-19 regulations. A further presentation was provided by the Department of Transport to its Portfolio Committee on 20 May 2020, regarding access to the relief fund.

(p) Minister of Public Works and Infrastructure: On 4 May 2020, the Committees[88] had a meeting where an array of topics regarding the Executive's response to COVID-19 was discussed.

[84] In addition to the above, Parliament provided numerous examples of Members of Parliament who tabled questions to the different Cabinet members for written replies, in accordance with the Rules of the National Assembly. Parliament submitted that the examples it had provided indicate that there is sufficient parliamentary oversight over the Executive during a national state of disaster. The DA, in response, contended that whatever consultations and engagements took place in respect of the regulations were not required by the DMA and, considering the breadth of the powers conferred to the Minister, it is constitutionally required that the DMA provides Parliament with the power to approve or disapprove the regulations enacted by the Minister.

[85] It should not, and cannot, be disputed that Parliament exercised its oversight and accountability duties. That is not the question before this Court. The question is whether the oversight measures mentioned by the respondents are sufficient in the context of the DMA, in circumstances where the delegated powers relate to the exercise of substantive legislative functions as opposed to the administrative implementation of legislation. In considering the measures implemented by Parliament, I find that the

[87] Including its Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure.

[88] The Portfolio Committee on Public Works and Infrastructure and the Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure.

oversight measures are not sufficient in this context. The various meetings and engagements held by the respective Ministers to the parliamentary committees do not indicate what would be the outcome if the parliamentary committees or Parliament in its entirety disagreed with the Minister. In some instances, it is alleged that the Minister did not respond to certain requests when asked to account for certain regulations. What is clear is that oversight alone cannot be achieved by the utilisation of the mechanisms in the Model. Oversight alone, when the subject-matter is as drastic as a national state of disaster, requires further safeguards.

[86] It must also be highlighted that the DMA does not mandate the engagements to be had by the Minister for Parliament's approval. The actions of the Minister during the COVID-19 pandemic cannot be conclusive that the same engagements will follow when the next national state of disaster occurs. It is appropriate for further measures to be provided in the DMA, in order for it to be applicable whenever necessary during a national state of disaster. As it stands, there is nothing permitting Parliament to have a final say.

[87] An effective mechanism would include, at least:

(a) a duty by the relevant Minister to table any regulations made or directions issued before the National Assembly promptly and as soon as possible after the regulations and directions are made; and

(b) a power for the National Assembly to approve or disapprove any such regulations or directions, as well as any extension of a national state of disaster.

[88] The importance of requiring a further, effective mechanism over delegated legislation is not a foreign concept in our law. There is an obligation for the National Assembly to hold members of the Executive accountable and to put effective mechanisms in place while maintaining oversight of their exercise of executive

authority.[89] The main objective of tabling regulations in Parliament is to report to Parliament which ensures accountability and openness of government.[90] The Interpretation Act,[91] which remains applicable pending post-Constitution amendment, requires that a list of rules or regulations are submitted to Parliament within 14 days after the publication of the rules or regulations in the Gazette.[92] Although this is intended to be the default position regarding tabling of rules and regulations, it is recognised that legislation after 1994 requires that draft regulations or rules must first be tabled in Parliament prior to publication in the Gazette.[93] The Interpretation Act is applicable to the interpretation of every law in force at or after the commencement of the Interpretation Act and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of that law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.[94] If legislation does not express the manner in which, and the extent to which, the regulations or rules should be tabled before Parliament, the Interpretation Act finds application. This, at the very least, indicates the intention for Parliament to be informed of the actions of the Executive.

[89] After the introduction of the constitutional dispensation, the Joint Rules Committee created a Joint Subcommittee on Delegated Legislation (Subcommittee) which had the purpose of investigating and providing recommendations for the regulation of Parliament's delegated legislation.[95] At the request of the National Assembly, Professor Hugh Corder of the University of Cape Town compiled

[89] *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) (*United Democratic Movement*) at para 40.

[90] Parliament of the Republic of South Africa "Guide to Tabling of Papers in Parliament" (July 2025) at para 2.8 (Guide to Tabling).

[91] 33 of 1957.

[92] Id at section 17.

[93] Guide to Tabling above n 90 at para 6.8.3.

[94] Interpretation Act above n 91 at section 1.

[95] Joint Rules of Parliament (1999) at section 86(a).

a report (Corder Report) for the Subcommittee's consideration which included the following findings:

(a) The act of tabling delegated legislation in Parliament provides the basis for any form of scrutiny and it should be a general obligation on the lawmakers.[96]

(b) A further form of scrutiny by Parliament should occur but it should not unduly hamper the lawful pursuits of the executive government.[97]

(c) Parliament should retain the power to disapprove a part or the whole of delegated legislation.[98]

(d) The scrutiny mechanisms imposed should not provide the final word on questions of legal validity but rather raise concerns about possible shortcomings in this respect.[99]

[90] In October 2002, the Subcommittee presented its Interim Report to the Joint Rules Committee where it proposed the creation of an interim mechanism for the scrutiny of delegated legislation. In the report, the Subcommittee recommended that legislation be passed which sets out the norms and standards on the manner in which delegated legislation will be tabled or approved and that the provisions of section 17 of the Interpretation Act be reinforced, at least with respect to tabling.[100] Despite the Corder Report and the recommendation made by the Subcommittee over 20 years ago, the findings made in the reports have not been adopted into legislation.

[91] As will be evidenced below, the adoption of the findings in the Corder Report are at the discretion of Parliament. However, the unconstitutionality in the failure to ascribe powers of approval or disapproval to Parliament in the context of this matter is a result of the special and extraordinary nature of the implementation of the DMA.

[96] Corder *Final Report on Methods for Scrutiny of Legislation by Parliament* (March 1999) at C2.

[97] Id.

[98] Id at D1.

[99] Id at E1-2.

[100] Parliament of the Republic of South Africa *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation* (October 2002) (*Interim Report*) at 3 and 16.

Under normal circumstances, the discretion will remain with Parliament. It must be kept in mind that the discretion of Parliament does not mean that this Court's hands are tied and that it cannot hold that there is unconstitutionality because of the absence of Parliament's power to act.[101] It is necessary to consider whether this Court's intervention in the affairs of Parliament constitutes judicial overreach.

Is it a breach of the doctrine of separation of powers for this Court to grant relief providing for a power to override?

[92] In *EFF I*, this Court held:

> "It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give it, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. *Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations*. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the 'vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government'."[102] (Emphasis added.)

[93] I accept that this is the general position our courts take. The intrusion by this Court into the affairs of Parliament would normally run afoul of the principle of separation of powers. The internal arrangements, proceedings and procedures of the National Assembly are protected by section 57(1) of the Constitution.[103]

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[101] See, for example, *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at para 90 and *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 61.

[102] *EFF I* above n 71 at para 93.

[103] Section 57 of the Constitution states:

> "(1) The National Assembly may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and

[94] This Court goes on to state, however:

> "At the same time, and mindful of the vital strictures of their powers, [courts] must be on high alert against impermissible encroachment on the powers of the other arms of government."[104]

[95] In *EFF II*, the majority judgment highlights that this Court's hands are not tied where there is an impermissible encroachment on the principle of separation of powers. In an expansion of *EFF I*, the majority judgment in *EFF II* found that the National Assembly had failed to fulfil its implicit constitutional obligation under section 89(1) to make rules creating a specifically tailored process for impeachment.[105] Relying on *Doctors for Life*,[106] it was found that this Court has a responsibility to ensure that Parliament fulfils its obligations.[107] This did not constitute judicial overreach. The majority judgment justified the interference into internal parliamentary affairs by stating that the order did not constitute a breach of the separation of powers since it did "no more than the Court fulfilling its constitutionally assigned duty".[108] As a result of the National Assembly's failure to create rules to regulate the removal of the President in terms of section 89(1) of the Constitution, the impugned provision was found to be invalid. Accordingly, the National Assembly was ordered to make the required rules to remedy the defect in the provision.

[96] It is incorrect to state that if this Court were to decide the matter in favour of the DA, this Court would not be giving effect to its own jurisprudence, as suggested by the

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(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

[104] *EFF I* above n 71 at para 93.

[105] *EFF II* above n 72 at paras 212 and 214.

[106] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 38.

[107] *EFF II* above n 72 at para 217.

[108] Id at para 220.

second judgment, which I have had the benefit of reading.[109] It is important to keep in mind that the Court is not saying how Parliament should ensure that it reserves to itself the final decision-making power in respect of disaster regulations. This judgment simply says that it should reserve the power to have the last say because of the nature and extent of the delegated power. How it does that, will be left up to Parliament. Such a reservation of power is not an impermissible intrusion into the executive branch – it instead is a reservation which is in favour of Parliament regarding a function which would ordinarily lie with it. The reading-in is necessitated by the fact that the timing of a national 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 national state of disaster, there would be reliance on the DMA without the necessary power of parliamentary override.

[97] It is necessary to quote the response of the majority judgment in *EFF II* to the suggestion that its outcome constitutes judicial overreach. Jafta J stated:

> "Conceptually it is difficult to appreciate how the interpretation and application of a provision in the Constitution by a court may amount to judicial overreach. The Constitution itself mandates courts to interpret and enforce its provisions. The discharge of this judicial function cannot amount to overreach whether one agrees or disagrees with a judgment that construes and applies the Constitution in a particular way. A disagreement with a particular interpretation of the Constitution cannot sustain the suggestion in question."[110]

[98] There is a duty for Parliament to ensure that there is a limit to the risk of unconstitutionality in its legislation. Within the confines of the separation of powers, this Court, as the final arbiter of the constitutionality of any law from Parliament, must declare such conduct as unconstitutional if it is determined to be so.

[109] See the second judgment at [157].

[110] *EFF II* above n 72 at para 219.

[99] In *Glenister*,[111] this Court stated the following regarding the courts' role in upholding the Constitution:

> "In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers."[112] (Footnote omitted.)

[100] The question is whether Parliament has acted in accordance with, and within the limits of, the Constitution in the delegation of its law-making powers in relation to the DMA. If it is found that it did, then this Court would have no basis to interfere with the internal arrangement and affairs of Parliament. It is necessary to consider if the failure to include the powers to approve or disapprove in the DMA amounts to an act inconsistent with the Constitution. If so, this Court is obligated to declare such an act as unconstitutional.

Is there a need to include powers to approve or disapprove in order to maintain the separation of powers?

[101] Legislation such as the DMA is necessary as it aims to provide an integrated and coordinated disaster management policy in South Africa. Its key objectives include: preventing or reducing the risk of disasters; mitigating the severity of disasters; emergency preparedness; and rapid and effective response to disasters and post-disaster recovery. In circumstances such as a national state of disaster, there is a need to delegate powers by the National Assembly in order to deal with the disaster swiftly and

[111] *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

[112] Id at para 33.

effectively without first requiring the tabling of regulations dealing with urgent situations before Parliament, especially if life is threatened. But it should always be remembered that Parliament bears the ultimate responsibility for primary legislation, as long as it stays within the confines of the Constitution.

[102] In this matter, we have drawn comparisons between the State of Emergency Act and the DMA but there are other instances of legislation that provide a power to approve and/or disapprove for Parliament. For example, the Protected Disclosures Act[113] states that regulations related to the issuance of practical guidelines which explain the provisions and procedures of that Act, must be submitted to and approved by Parliament before publication.[114] The PAJA expressly provides Parliament with the power to approve regulations made under that Act, before publication.[115]

[103] As stated above, it is also trite that, although the principle of separation of powers recognises the functional independence of branches of government, there is a desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping each other's powers. But our courts have long recognised that no constitutional scheme can reflect a complete separation of powers.

[104] This Court in *Nu Africa* said that it is precisely because ours is not a system of complete separation that there needed to be a focus on what constitutes constitutionally permissible confluence.[116] This is exactly the challenge in this matter. The powers of the Minister are broad. They are not powers of a kind that could in the ordinary course be delegated by Parliament to the Executive. The respondents all say that they are sufficiently constrained, such that there is no breach of the separation of powers, bearing in mind the imperative of swift responses to disasters. The DA, by contrast, says that

[113] 26 of 2000.

[114] Id at section 10(4)(b).

[115] Section 10(4) of the PAJA.

[116] *Nu Africa* above n 62 at para 76.

the powers are impermissibly broad in the absence of more significant parliamentary control than presently exists.

[105] In *Nu Africa*, this Court highlighted the established principle that Parliament is entitled to delegate subordinate regulatory authority to other bodies and that this category of legislation is usually in the form of rules or regulations.[117] It also highlighted that the delegation of authority to make subordinate legislation within the framework of a statute which permits delegation is permissible but that what is generally frowned upon is assigning plenary legislative powers to another body.[118] The rationale for this rejection, continued this Court, is that it is contrary to the Constitution insofar as it violates the separation of powers.[119]

[106] This Court in *Nu Africa*, relying on *First Certification*,[120] acknowledged that it is possible for Parliament to delegate its legislative powers in appropriate circumstances, but cautioned that there must be checks and balances in order to prevent the usurpation of powers of one arm of government by another.[121] In this matter, I have already explored the constraints which are held to ensure that there are checks and balances to prevent usurpation by the Minister. But the question that remains concerns their adequacy and effectiveness.

[107] This Court in *Nu Africa* referred to a separate concurring judgment in *Executive Council*,[122] where the following factors were identified as those to be taken into account in determining permissible limits of delegation of law-making authority from Parliament to the Executive. In that matter it was held—

[117] Id at para 78.

[118] Id at para 81.

[119] Id.

[120] *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).

[121] *Nu Africa* above n 62 at para 75; id at para 109.

[122] *Executive Council* above n 58.

"the courts should balance various interactive factors including but not limited to:

'(a) The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;

(b) The public importance and constitutional significance of the measure – the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;

(c) The shortness of the time period involved;

(d) The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

(e) The extent to which the subject-matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

(f) Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.'"[123]

[108] Importantly, this Court in *Nu Africa* highlighted that in *Executive Council*, the President was required to submit the proclamation to Parliament within a certain period.[124]

[109] It is not contentious that during a national disaster there is a need to act urgently and effectively and that Parliament may not always be the place to pass legislation to deal with such a disaster promptly. There is no way, in those instances, that legislation can predetermine the powers and specific decisions which must be made in order to deal with a specific kind and magnitude of a particular national disaster. Each disaster would require a different approach in order to deal with the needs of the country's inhabitants to reduce the adverse effects of the disaster.

[110] It is because of this, that I find it reasonable to provide the Minister with the broad range of powers conferred in terms of the DMA. But there is a need to ensure that constraints to this broad range of powers are effective, otherwise there is a breach of the doctrine of separation of powers. During debate in this Court, counsel for the

[123] *Nu Africa* above n 62 at para 90, quoting *Executive Council* above n 58 at para 206.

[124] *Nu Africa* id at para 91.

DA agreed that it is not the DA's case that all regulations must start in Parliament before they can be given effect. As I understand the argument, the DA contends that, even after the regulations have been made, Parliament must be granted an opportunity to consider them, and possibly "veto" them, or have a final decision, if this is necessary.

[111] The factors listed in *Nu Africa* and in *Executive Council* are helpful in the enquiry on whether there is indeed an impermissible delegation of power that leads to a breach of the separation of powers. The factors can be applied as follows in this matter.

(i) Scope and degree of the delegation

[112] The powers conferred to the Minister, as has already been mentioned, are extremely wide. In particular, section 27(2)(n) of the DMA is so expansive that it empowers the Minister to take any other steps necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster. These powers entail the making of regulations that may have the effect of limiting the rights entrenched in the Bill of Rights and the Minister is also provided with a broad range of powers to suspend or limit rights conferred in terms of other Acts of Parliament. The Minister is also granted powers to delegate certain functions to other members of the Executive in the sense that the Minister can authorise the issuance of directions. The Minister can prescribe penalties for contravention of regulations.

(ii) The public importance and constitutional significance of the measure

[113] I agree that the more a measure touches on questions of broad public importance and controversy, the greater the need will be for scrutiny. The national state of disaster affects the public at large and has the potential to materially limit the rights enshrined in the Constitution, and rights in other legislation. Meanwhile its objects and purpose to protect the public are also very relevant. There must be a balancing exercise.

(iii) Subject matter to which it relates

[114] The delegation of powers to the Minister is only applicable when a national state of disaster is declared and is subject to the prerequisites for the declaration of such disaster. The Minister cannot act outside of the provisions in the DMA. This is, in a way, a limitation on the powers of the Minister.

(iv) The shortness of the period

[115] It is envisaged that the delegation lasts for a short duration and may be extended for short periods if the national state of disaster continues. The duration therefore is as long as it is necessary. It is not a delegation that can continue *ad infinitum* (forever), but by way of repeated extensions, it may still last for a lengthy period if the disaster itself lasts for a long time.

(v) The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made

[116] The oversight and accountability measures by Parliament have already been identified. It is not disputed by the DA that Parliament was involved in consultations and engagements through parliamentary committees during the pandemic. What is in dispute, is whether the oversight measures mentioned by the respondents are sufficient, in circumstances where the delegated powers relate to the exercise of substantive legislative functions as opposed to the administrative implementation of legislation. Importantly, what is considered under this factor is the degree to which Parliament exercises its control. The oversight measures mentioned by the respondents do not constitute control, as Parliament does not have the final say regarding the regulations passed by the Minister. As stated above, I find that in terms of the DMA, the oversight measures imposed are insufficient and Parliament does not have control over the delegated legislative powers.

(vi) Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated

[117] Under sections 43 and 44 of the Constitution, the national legislative authority is vested in Parliament. Section 44(1)(a)(iii) of the Constitution particularly empowers the National Assembly to assign its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government. It is accepted that the delegation of regulation-making powers to the Minister is consequently expressly contemplated in the Constitution.

[118] Considering the above factors, I agree that there are constraints on the Minister's powers but that they are inadequate, considering the wide powers delegated to the Minister and the consequences of the powers on the Bill of Rights, other legislation and other members of the Executive.

[119] The constraints encourage debate, scrutiny, accountability and oversight. There is also the avenue of taking the exercise of the powers by the Minister on review. I start by analysing the review powers of the courts.

[120] I agree that the regulations by the Minister are capable of being challenged in court by means of an application for review. There were some challenges of this kind in relation to executive action taken in response to the COVID-19 pandemic.[125] But it is not disputed that, generally, reviews take some time to finalise, and in such proceedings the applicant is confronted by the *Plascon-Evans* rule in relation to factual disputes. Even if the review application is heard on an urgent basis, there may be one or two appeals. Although the present case is not a review, it nevertheless gives some indication of how long a case may take to finalise. The national state of disaster was declared on 15 March 2020. The DA launched its application on 18 May 2020. More than five years later, the powers of the Minister concerning that disaster are still the

[125] See, for example, *Esau* above n 49.

subject of the present appeal (which is a second appeal, the case having previously served before the Supreme Court of Appeal).

[121] I accept that a review can be brought as a matter of urgency, as was done in *Freedom Front Plus*. However, in most cases, such as *Esau* and *British American Tobacco*, the challenge to regulations may be subject to appeals to higher courts, which are time consuming and costly for the litigants involved. This is a clear illustration of the delays in proceedings for these kinds of challenges. It must also be kept in mind that a national state of disaster can vary in the duration for which it lasts. There are disasters which may be declared for a long period, such as the COVID-19 pandemic. However, it is possible that another, such as a flood-related disaster, could last for a shorter period such as a month. In such a circumstance, the possible infringement of constitutional rights may become moot by the time the matter receives judicial intervention. An example of this scenario can be seen in *Esau*, where the Court stated the following:

> "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. 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."[126]

[122] This, coupled with the number of people who can be impacted by regulations issued in a national state of disaster, is a clear indication that the comparison of a national state of disaster to any other constitutional issue where a person seeks to assert their constitutional right is inappropriate. There is a derogation from human rights on a substantial level, as a result of the Minister's broad powers in the DMA. If the inhabitants of South Africa are reliant primarily on the review process, it means that

[126] Id at para 157.

people will have to wait for their rights to be vindicated, if it is not rendered moot at some point.

[123] However, there is a more principled answer to reliance on judicial review as an effective constraint. In order for a review to succeed, the applicant must show that the impugned conduct of the Executive was unlawful. However, in the context of the doctrine of separation of powers, the question is not whether the Executive acted unlawfully but whether the Executive rather than Parliament should have the final say on disaster regulations. The Minister might not commit a reviewable illegality in promulgating disaster regulations, given the broad nature of the Minister's powers in terms of section 27(2) of the DMA. Review plainly would not be a remedy in such a case, yet the problem remains: should the Executive be the final repository of such wide powers? Review caters for illegality. It does not cater for differences of opinion on matters vitally affecting the country's inhabitants. The thrust of the DA's case is that ultimately it is the opinion of Parliament rather than the opinion of the Executive that should be decisive. The DA's case in the present proceedings is not that any of the disaster regulations or directives suffered from reviewable irregularities but that the Executive should not have had the final say in their continued operation.

[124] The question that then arises is, as stated, regarding the sufficiency of the other constraints in the Act and the degree to which the National Assembly is able to exercise control as a public forum in which issues can be properly debated and decisions democratically made.[127] This also raises the question whether Parliament has the power to express a final say on the decisions and regulations of the Minister.

[125] For instance, the Model emphasises the value of public participation and refers to available interventions at the instance of members of the public. It further records that parliamentary committees are established as instruments of the Houses of Parliament in terms of the Constitution, legislation, the Joint Rules, Rules of the

[127] See [16] for the constraints in terms of the DMA.

National Council of Provinces, Rules of the National Assembly and resolutions of the Houses, which are regarded as the engine rooms of Parliament.[128]

[126] I hold that the present constraints are not effective or adequate because none of them entitle Parliament to overrule the Executive. These do not make it necessary for Parliament to indicate its approval or disapproval of the regulations made in terms of the DMA. During a state of emergency for instance, section 37(2) of the Constitution provides that any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective for no more than 21 days from the date of declaration unless the National Assembly resolves to extend the declaration. Parliament thus plays a crucial supervisory role because the National Assembly decides whether to extend the state of emergency or not. There is no such requirement in the DMA and the National Assembly is not afforded the opportunity to approve or disapprove the regulations.

[127] It is also necessary for such powers to be expressly stated. As already noted, section 27 of the DMA, similarly to section 2 of the State of Emergency Act, permits the Minister to encroach on several fundamental rights contained in the Bill of Rights. Section 3 of the State of Emergency Act specifically grants Parliament the power to disapprove of emergency regulations or make recommendations to the President. Section 4 of the State of Emergency Act provides for the lapsing of such regulations in the event that the National Assembly disapproves them. The effect of the declaration of a state of emergency is similar to that of the declaration of a national state of disaster, insofar as the effect relates to the derogation from fundamental rights. Unless the National Assembly has the power to finally approve or disapprove the Executive's regulations, the inescapable conclusion would be that section 27 results in a breach of the separation of powers between the Executive and the Legislature, as the Minister is provided with an impermissible delegation of power with no caveat and no solution on how the decision can be subject to a final say by Parliament.

[128] See [82] for the legislative provisions which illustrate the National Assembly's oversight mechanisms.

[128] My view is that section 27 of the DMA must be understood in the context of the doctrine of separation of powers. As already stated, it is comparable legislation to the State of Emergency Act in that the Minister is granted very broad legislative powers that permit the creation of a position akin to a state of emergency. Ordinarily, the assignment of such broad legislative powers to the Executive could, in certain instances such as in this matter, offend the doctrine of separation of powers. It may be unavoidable in cases of disaster and emergency for the Executive to have the interim power to act swiftly. In the same way, and in order to render this departure from the separation of powers constitutionally legitimate, it may be necessary to have a balanced departure from the separation of powers in favour of Parliament. Parliament's ordinary functions of oversight and scrutiny do not entitle it to act in place of the Executive. Ordinarily, the Executive on the one hand and Parliament on the other must "stay in their own lanes".

[129] Section 37(3) of the Constitution, on the other hand, specifically provides that a competent court may decide on the validity of a declaration of a state of emergency, any extension thereof, and any legislation enacted or other action taken in consequence of the declaration of a state of emergency. Section 37(2) also stipulates that the state of emergency may only be effective for 21 days unless the National Assembly resolves to extend it. It also grants the National Assembly the power to vote on any subsequent extensions of the state of emergency. Section 3(2)(a) of the State of Emergency Act provides the National Assembly with the power to disapprove the regulations while section 4 provides that the regulations lapse prospectively if disapproved.

[130] In a state of emergency, the Legislature has spelt out the powers of the courts and the National Assembly. In a national state of disaster, the Legislature has neither excluded the powers nor spelt them out. Just as the assignment of very wide legislative powers to the Executive has to be contained in an Act of Parliament (and can be challenged for constitutional consistency), so the balancing power of Parliament to intervene in the work of the Executive must be contained in legislation (so that it too

can be challenged for constitutional consistency). In the absence of legislation permitting Parliament to override measures issued by the Executive, Parliament would be acting unconstitutionally by trying to do so, because such conduct would be contrary to the separation of powers and would thus need a specific legislative source to justify the departure.

[131] The value of the statutory source is this: the statute in question (here, the DMA) spells out the legislative assignment to the Executive and should, in my view, spell out Parliament's power to override the Executive. This conveys to the public at large that in Parliament's view it may, notwithstanding ordinary principles of separation of powers: (a) assign these wide legislative powers to the Executive; and (b) retain a power to override the Executive. It is not in every piece of legislation that this would be constitutionally permissible, so Parliament needs to clearly identify the cases in which it operates. In all other "ordinary" cases, Parliament cannot – consistently with the separation of powers – override the Executive. Nor is it desirable to leave everyone guessing as to whether, in relation to a particular statute, this override power is or is not appropriate. Parliament must apply its mind to it and enact it. Parliament has done so in the case of states of emergency, the PAJA and the Protected Disclosures Act. Similarly, it should also have done so for national states of disaster.

[132] To be clear, this judgment does not hold that all regulations must be subject to a "veto" power. I accept that such a measure for all regulations, as recommended in the Corder Report, has not been adopted by Parliament.[129] Whether it should be is a question left to Parliament. What is before this Court is whether, in the context of the DMA, when there is a delegation of wide legislative powers, there should be an incorporation of a power to approve or disapprove the regulations that may impact fundamental rights. The finding that it should include such a power flows from the analysis set out in *Nu Africa* which has been done after considering, amongst others, the control, or lack thereof, which Parliament has with respect to the regulations passed

[129] See [89] to [91] above.

during a national state of disaster.[130] In the circumstance of all other regulations, a court will have to apply the test set out in *Nu Africa* to the facts before it.

[133] Perhaps it is the usage of the word "oversight" that creates confusion as to when Parliament should have the power to approve or disapprove regulations. This power falls outside of the routine oversight measures required by sections 42(3) and 55(2) of the Constitution. In circumstances where the Executive is provided with a wide range of legislative powers which have an impact on fundamental rights, what will constitute a balancing power to ensure that there is a permissible delegation of power, is to allow Parliament to have a final say. This measure is a judicial statement based on the Constitution regarding the necessary preconditions when there is an assignment of wide legislative powers to the Executive – it is not a judicial intrusion into the domain of Parliament's discretion on how to exercise its routine oversight functions in terms of sections 42(3) and 55(2) of the Constitution.

[134] There is a distinction to be made between the delegation of legislative power for making regulations for the purpose of the administrative implementation of an Act of Parliament and the delegation of legislative power for the purpose of making substantive laws akin to those usually made by Parliament. In the case of the former, the ordinary oversight measures imposed by sections 42(3) and 55(2) of the Constitution might not raise questions regarding the separation of powers. In that case, it might be an unconstitutional intrusion to state that Parliament can override the Executive. In contrast, in the case of the latter, legislative power cannot be fully delegated to the Executive since the primary function lies with Parliament. It would constitute an unconstitutional transfer of legislative power for Parliament to fully delegate this power without appropriate safeguards. In circumstances such as this case, there cannot be a full delegation of power transferred to the Executive when there could be a limitation of fundamental rights. Parliament must, in such circumstances, set out the scope of delegation and still ensure, within such legislation, that the legislative

[130] See the analysis at [111] to [118] above.

boundaries prescribed by the Constitution are not exceeded. This obligation on Parliament to ensure that legislation does not exceed constitutional boundaries is fundamentally different from the routine oversight function exercised by parliamentary committees.

[135] The second judgment states that the challenge was that section 27 of the DMA is unconstitutional since it does not contain effective oversight mechanisms and the DA does not contend that sections 55(2) and 57 of the Constitution require a "veto" power or power of approval.[131] The second judgment goes further to categorise the correct question before this Court as whether the Constitution requires such a "veto" power.[132] Even if it was found that the power to approve or disapprove constitutes an oversight measure, which I do not find, as much as a "veto" power cannot be sourced in sections 55(2) and 57, all the oversight and accountability mechanisms are not expressly set out either. The Model lists a variety of mechanisms which may be used for oversight and accountability measures, including the establishment of an oversight committee that can recommend the investigation of specific problems that it has identified.[133] There is nothing in the Model to suggest that the implementation of the National Assembly's power to approve or disapprove in legislation cannot be a mechanism to ensure effective oversight. In any event, as expressed above, the power of Parliament to approve or disapprove falls outside of the scope of the routine oversight measures.

[136] It has already been accepted that certain legislation incorporates such safeguards. If it is, indeed, decided that there is no need to expressly provide further safeguards in legislation in order for there to be effective oversight, it raises the question of why it is ever appropriate to include these safeguards in general.

[137] The unconstitutionality of the provision, I find, is sourced from the breach of the separation of powers. In this regard, the omission to include the manner in which, and

[131] See the second judgment at [204].

[132] Id at [206].

[133] Model above n 29 at 45.

extent to which, Parliament may intervene in the DMA leads me to a conclusion that the impugned section is inconsistent with the Constitution.

Section 101(4) of the Constitution

[138] There was another point raised by the Court *mero motu* (of its own accord) during the hearing of the matter and on which counsel for the parties were asked to file supplementary written submissions after the hearing: the applicability of section 101(4) of the Constitution. Subsections 101(3) and (4) provide that:

> "(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.
>
> (4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
>
> (a) tabled in Parliament; and
>
> (b) approved by Parliament."

[139] The DA submits that section 101(4) empowers Parliament to overturn any decision taken by the Executive, provided Parliament is granted such a power by legislation. The DA submits that under appropriate circumstances, Parliament is under a duty to build a parliamentary "veto" into legislation and in this case, Parliament was constitutionally required to exercise its section 101(4) power to build a "veto" into the DMA. The Minister and the President submit that section 101(4) is purely permissive and does not impose any duty on Parliament. The Minister and the President submit that the purpose of section 101(4) is not clear but it seems merely to say that subordinate legislation may be made subject to parliamentary approval.

[140] Section 101 regulates instruments of delegated legislation made by the Executive through a delegation of Parliament's law-making authority, in a provision which permits this delegation. The Constitution acknowledges the need to safeguard the delegation of legislation by providing for national legislation to specify the manner and extent to which instruments such as regulations must be tabled and approved by

Parliament.[134] The applicability or not of section 101(4) was, as stated, raised by this Court *mero motu* and it was clear during argument that none of the parties had thought of advancing any argument along these lines. However, this Court is not only entitled but obliged to raise a point of law which is apparent on the papers.[135] Although the applicability of this section was raised, it does not take the determination of the issues that arise any further.

Other jurisdictions

[141] That the DMA should have incorporated a provision which expressly provides the manner and extent of Parliament's intervention is supported by law in other jurisdictions. This is how the various jurisdictions work.

Australia

[142] The Legislation Act[136] regulates oversight over delegated legislation. The Parliament of Australia ultimately retains authority over delegated legislation and has the power of disallowance. The delegated legislation is subject to parliamentary scrutiny and to the Parliament's "veto" power.[137] In the circumstance where the provisions of the existing enabling Act are different to the Legislation Act, the Legislation Act may override the provisions of the enabling Act.[138] What is required in terms of the Legislation Act, is that the rule-maker for a legislative instrument or a notifiable instrument must lodge the instrument for registration as a notifiable instrument as soon as practicable after it is made.[139] The rule-maker is required to lodge an initial explanatory statement[140] for the instrument for registration as soon as

[134] Section 101(4) of the Constitution.

[135] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (1) BLLR 1 (CC); 2009 (2) SA 204 (CC) at para 68.

[136] 139 of 2003.

[137] "Legislation" in Elder (ed) *House of Representatives Practice – Parliament of Australia* 7 ed (Department of the House of Representatives, Canberra 2018) (House of Representatives Practice) at 409.

[138] Id.

[139] Legislation Act above n 136 at subsections 15G (1) and (3).

[140] An initial explanatory statement is defined as follows:

practicable.[141] The legislative instrument is not enforceable by or against any person unless the instrument is registered as a legislative instrument.[142] Within six days after the registration of the instrument, the Office of Parliamentary Counsel must arrange for a copy of each registered legislative instrument to be delivered to each House of the Parliament.[143] If this is not attended to timeously, the legislative instrument is immediately repealed after the last day of the prescribed time.[144]

[143] Thereafter, the House of the Parliament is empowered to disallow the legislative instrument within 15 sitting days of that House.[145] In the interim, and until disallowed, the legislative instrument is effective, but an Act may provide that it does not come into effect until the disallowance period has expired.[146] It is noteworthy that the Legislation Act provides for the sun-setting of legislative instruments, which entails that after the 10th anniversary of the instrument's registration, the instrument is repealed, with provisions for certain exceptions.[147]

"An initial explanatory statement, or a replacement explanatory statement, for a legislative instrument must:

(a) be approved by the rule-maker; and

(b) explain the purpose and operation of the instrument; and

(c) if any documents are incorporated in the instrument by reference—contain a description of the incorporated documents and indicate how they may be obtained; and

(d) if consultation was undertaken under section 17 before the instrument was made—contain a description of the nature of that consultation; and

(e) if no such consultation was undertaken—explain why no such consultation was undertaken; and

(f) if the instrument is a disallowable legislative instrument—contain a statement of compatibility prepared under subsection 9(1) of the Human Rights (Parliamentary Scrutiny) Act 2011; and

(g) contain such other information as is prescribed by regulation."

[141] Legislation Act above n 136 at section 15G(4).

[142] Id at section 15K(1).

[143] Id at section 38(1).

[144] Id at section 38(3).

[145] Id at section 42. See also section 44 which provides for the legislative instruments that are not subject to disallowance.

[146] House of Representatives Practice above n 137 at 410.

[147] Legislation Act above n 136 at section 50.

[144] In the alternative to disallowance, delegated legislation may come into force only through explicit approval by the House of Parliament. However, certain authors express the view that this is not common practice.[148]

Zambia

[145] The Interpretation and General Provisions Act[149] regulates the process regarding statutory instruments. Section 22 of this Act stipulates that all rules, regulations and by-laws shall be laid before the National Assembly of Zambia as soon as they are made, and that the National Assembly has the power to pass a resolution that the instrument be annulled within 21 days thereafter.[150] The annulment of the instruments will not affect the validity of any actions taken under the instrument prior to the annulment.[151]

[146] It must be noted that Zambia's legislative authority vests in, and is exercised by, Parliament.[152] However, Parliament is empowered to delegate authority to make statutory instruments to another person.[153]

[147] Insofar as oversight and scrutiny of the delegated legislation is concerned, the Committee on Legislation and International Agreements performs the function of scrutinising statutory instruments where Parliament has delegated powers to another person, to ensure that the power to make such instruments has been properly exercised by the person or authority.[154]

[148] House of Representatives Practice above n 137 at 413.

[149] 1964, Chapter 2.

[150] Id at section 22(1).

[151] Id.

[152] Constitution of Zambia (Amendment) Act 2 of 2016 at section 62(2).

[153] Id at section 67(1).

[154] National Assembly of Zambia Standing Orders, 2024 at section 204(2)(a)(ii).

Kenya

[148] The Statutory Instruments Act[155] regulates the operation of statutory instruments made directly or indirectly under any Act of the Kenyan Parliament or other written legislation.[156] Part of the purpose of the Act is to improve mechanisms for parliamentary scrutiny of statutory instruments.[157] The process for scrutiny of statutory instruments requires that within seven sitting days after the publication of the instrument, a copy of the statutory instrument is transmitted to the responsible clerk for tabling before the relevant House of Parliament.[158] In the event that the statutory instrument is not laid before the relevant House of Parliament within the prescribed time period, the statutory instrument will cease to have effect immediately after the last day for it to be tabled.[159] However, this does not affect the validity of any act done before the instrument becomes void.[160]

[149] Upon tabling the statutory instrument before the relevant House of Parliament, the instrument will be referred to the Committee on Delegated Legislation or any other committee established for the purpose of reviewing and scrutinising statutory instruments (Committee).[161] The Committee is permitted to exempt certain statutory instruments from scrutiny if the Committee decides that it is not reasonably practical due to the number of regulations in that class.[162] Subsequent thereto, the Committee will either make a report to Parliament with a resolution that the statutory instrument be revoked or the House of Parliament will approve the statutory instrument within 28 sitting days.[163]

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[155] 23 of 2013, as amended by the Statute Law (Miscellaneous Amendments) Act 25 of 2015.

[156] Id at section 3(1).

[157] Id at section 4(d).

[158] Id at section 11(1).

[159] Id at section 11(4).

[160] Id.

[161] Id at section 12(1).

[162] Id at section 14.

[163] Id at subsections 15(1) and (2).

Conclusion on these other jurisdictions

[150] What can be deduced from the comparative analysis above, is that many jurisdictions have included a provision in their legislation which expressly empowers Parliament to overrule the Executive after it issues regulations during, for example, a national state of disaster. The requirement is that such regulations be tabled before Parliament as soon as possible.

Conclusion and relief

[151] It must follow that section 27 of the DMA is unconstitutional as it grants untrammelled legislative powers to the Executive without incorporating effective parliamentary safeguards. In terms of section 172(1) of the Constitution, this Court must declare any law or conduct that is inconsistent with the Constitution as invalid to the extent of that inconsistency and may make any order that is just and equitable.

[152] In determining just and equitable relief, it must be kept in mind that, generally, disasters are unprecedented and they occur unexpectedly. An order of declaration of invalidity without an interim remedy would be inappropriate should such disaster occur. It is my view that in the interim, a reading-in which provides the National Assembly with the power to approve or disapprove will cure the identified defects pending final remedial legislation by Parliament. This is not to usurp the powers of Parliament. This Court said in *Doctors for Life*:

> "The primary duty of the courts in this country is to uphold the Constitution and the law 'which they must apply impartially and without fear, favour or prejudice'. And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as

> required by the principle of separation of powers, on the other hand."[164] (Footnote omitted.)

[153] In the circumstances, it would have been appropriate for this Court to make an order for interim relief during the 24-month period of suspension of the declaration of invalidity.

[154] The DA has asked for a reading-in which provides the National Assembly with the power to approve or disapprove any declaration, regulation or direction. The focus of this judgment and the arguments during the proceedings was limited to the powers of the Minister to make regulations that are not subjected to parliamentary intervention. The challenge to the power of the Minister to declare the national state of disaster was wisely not pursued. Accordingly, this judgment is limited to the powers of the National Assembly in Parliament to approve or disapprove regulations and directions which may be made by the Minister.

Costs and order

[155] The conclusion reached would have meant that the DA is successful and should be awarded its costs.

[156] If I had carried the majority, I would have made the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
    a. "It is declared that section 27 of the Disaster Management Act 57 of 2002 (DMA) is invalid and inconsistent with the Constitution to the extent that it does not empower the

[164] *Doctors for Life* above n 106 at para 70.

National Assembly to either approve or disapprove the regulations promulgated by the Minister.

b. The declaration of invalidity is suspended for 24 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.

c. Pending the coming into force of any remedial legislation as contemplated in paragraph 3(b), the impugned provision shall be read as if a new section 27(4A) has been added immediately after section 27(4), reading as follows:

‘**27(4A)**

(a) A copy of any declaration of a national state of disaster and any regulation or direction made or issued under section 27(2) shall be laid upon the Table in Parliament by the Minister as soon as possible after the publication thereof.

(b) The National Assembly may at any time—

(i) by resolution disapprove of any such regulation or direction; or

(ii) by resolution make any recommendation to the Minister in connection with such regulation or direction.

(c) Any such regulation or direction shall cease to be of force and effect as from the date on which the National Assembly resolves under subsection (b)(i) to disapprove of such regulation or direction, to the extent to which it is so disapproved.

(d) The provisions of subsection (c) shall not derogate from the validity of anything done in terms of any such regulation or direction up to the date upon which it so ceased to be of force and effect, or from any right, privilege, obligation or

liability acquired, accrued or incurred, as at the said date, under and by virtue of any such regulation or direction.

(e) The provisions of subsections (a) to (d) apply equally to an extension of a national state of disaster in terms of section 27(5)(c).'

d. No declaration of a state of disaster, no extension thereof and no regulation or direction made under section 27 of the DMA prior to the date of this order are invalidated only by virtue of the order above."

8. The respondents shall be jointly and severally liable for the applicant's costs in the High Court, the Supreme Court of Appeal and this Court, including the costs of two counsel where so employed.

THERON J (Goosen AJ, Kollapen J, Majiedt J, Mhlantla J and Opperman AJ concurring):

> "It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give it, for the purpose of holding the executive accountable and fulfilling its oversight role of the executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon."[165]

Introduction

[157] This statement by this Court in *EFF I*, a leading case on parliamentary oversight, clearly sets out the ambit of judicial authority in an enquiry related to the oversight role exercised by the National Assembly in holding the Executive accountable. This Court,

[165] *EFF I* above n 71 at para 93.

were it to decide this matter in favour of the DA and grant to Parliament what amounts to a veto power over subordinate legislation enacted pursuant to section 27 of the DMA, would be engaging in judicial overreach. This Court would also not be giving effect to its own jurisprudence. Furthermore, it would grant to Parliament powers that go beyond the bounds of section 37 of the Constitution. Perhaps most importantly, it would grant to the DA, through judicial decree, what it (the DA) has not been able to secure through the constitutionally sanctioned legislative process.[166]

[158] The DA contends that section 27 of the DMA violates the Constitution in three respects. First, it constitutes an impermissible delegation of legislative power by Parliament to the Minister. Second, it permits the creation of a *simulated* state of emergency of the kind contemplated by section 37 of the Constitution without the safeguards provided in section 37 and in sections 3 and 4 of the State of Emergency Act. Third, it fails to enable the National Assembly to scrutinise and oversee executive action as required by sections 42(3) and 55(2) of the Constitution. In this regard, it contends that the DMA does not contain any appropriate mechanism to ensure that the National Assembly is able to fulfil this role.

[159] The DA made it clear, in its founding papers, that it did not quibble with the scope of the powers delegated to the Minister under the DMA. It merely contended that, given the scope of the powers delegated to the Minister, the DMA failed to incorporate appropriate oversight measures. The DA emphasised the ambit of its case in its replying affidavit in the High Court as follows:

> "First, the applicant's case has never been that, as a matter of fact, Parliament has been completely supine during the pandemic. It is that section 27(2) of the DMA gives the COGTA Minister more power than the Constitution permits – because it amounts to an impermissible delegation of legislative power and an abdication of Parliament's oversight role, and because it permits a simulated state of emergency. If this is true, it

[166] As referred to by the first judgment at [89] to [90], the National Assembly's Joint Rules Committee convened a Subcommittee on Delegated Legislation, which recommended the enactment of powers for Parliament to approve or disapprove subordinate legislation. See Corder above n 96 at F 4.1.3 and *Interim Report* above n 100 at 8.

> is true regardless of how many meetings Parliament has had and how many questions have been raised by members of Parliament."

[160] The DA proposed reading-in relief that would remedy the unconstitutionality by granting the National Assembly power to veto, by resolution, a declaration of a national state of disaster, extensions of it, as well as any regulations promulgated under section 27. The DA's reading-in relief sought to legislatively recast section 27 of the DMA to match the framework of section 37 of the Constitution, along the lines provided in the State of Emergency Act.

[161] The Full Court, by majority, rejected the DA's contentions and dismissed the application. The Supreme Court of Appeal, also by majority, dismissed an appeal by the DA. The minority in the Supreme Court of Appeal would have upheld the appeal on the limited ground based on an alleged simulated state of emergency. In my view, the majority judgments in the High Court and the Supreme Court of Appeal were correct in dismissing the DA's contentions.

A state of disaster is not a simulated state of emergency

[162] The DA argues that the DMA permits an unconstitutional, simulated state of emergency that falls foul of section 37 of the Constitution. The central contention by the DA is that a national state of disaster, like a state of emergency, suspends the constitutional order. The Full Court dismissed this contention in *Freedom Front Plus*.[167] It said the following about a state of emergency:

> "In other words, in the direst circumstances, where the life of the nation, and the constitutional order itself may be under threat, it may be necessary in the short term to suspend the normal constitutional protections in order, ultimately, to restore the constitutional state. It is for this reason that some modern constitutions permit the suspension or derogation from fundamental rights during states of emergency. It is undoubtedly an extraordinary constitutional measure, and not one that is intended to be

[167] *Freedom Front Plus* above n 10.

> used lightly. This is why the jurisdictional requirements under section 37(1) are so strict."[168]

[163] The hallmark of section 37 of the Constitution is that it permits curtailment of the Bill of Rights.[169] This Court put it as follows in *First Certification*:

> "[Section] 37 envisages national legislation authorising the temporary and partial curtailment of the Bill of Rights in limited circumstances and subject to detailed conditions. In principle there can be no objection to such authorisation. Partial curtailment of the Bill of Rights during a genuine national emergency is not inherently inconsistent with 'universally accepted fundamental human rights, freedoms and civil liberties'. Nor can it be said that the safeguards provided by [section] 37 against possible legislative or executive abuse of emergency powers are inadequate."[170]

[164] In my view there are fundamental differences between a national state of disaster and a state of emergency. Although there are certain similarities between the two states (discussed below), these do not, without more, warrant any specific mechanisms found in the State of Emergency Act, or section 37 of the Constitution, to be imported into section 27 of the DMA.

[165] Section 37 creates a unique limitation of the protections otherwise provided by the Bill of Rights. It requires the adoption of legislation authorising temporary and partial curtailment of the Bill of Rights.[171]

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[168] Id at para 62.

[169] *First Certification* above n 120 at para 91 and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24; 1997 (1) BCLR 1 (CC); 1997 (2) SA 97 (CC) at para 28.

[170] *First Certification* id at para 91.

[171] Id. See also the justification of section 37 provided by Fritz "States of Emergency" in Woolman et al (eds) *Constitutional Law of South Africa* Service 5 (2013) at 61-4 to 61-5, on the basis that:

> "[O]bservation of the rights and protections provided by modern constitutions in situations of emergency can prevent the government from responding efficiently and energetically to enemies or to events that would destroy those rights and, perhaps, even the constitutional order itself. . . . The placement of [section 37] in the Bill of Rights indicates that it follows the orthodox justification offered for emergency regimes – that it is intended to allow for threats to the nation to be addressed in such a way that the constitutional state is returned to its normal functioning."

[166] States of emergency have played a particularly infamous role in South African history, and in our pre-democratic past they were closely connected to serious violations of human rights.[172] The protection of the courts was largely unavailable to the populace under these states of emergency.[173] Given this particular context, it is no surprise that section 37 of the Constitution sets a particularly high threshold for a state of emergency to be declared. It also provides clear mechanisms by which declarations of states of emergency, and any legislation enacted under them, can be challenged, as well as strict limits on which, and to what extent, there could be a derogation from constitutional rights under a state of emergency.

[167] The first judgment, which I have had the benefit of reading, recognises the difference in jurisdictional requirements (or "thresholds") that need to be established before a state of emergency or a national state of disaster may respectively be declared.[174] It finds however that, despite the difference in thresholds, the two states may have similar effects, given that both allow limitations of the Bill of Rights that have a far-reaching impact.[175] It should be noted that neither a state of emergency nor a national state of disaster allows for violations of human rights. Such a conception is anathema to a constitutional order premised upon the recognition and protection of human rights. But even to the extent that both states allow for the limitation of constitutional rights,[176] the nature of the limitation and the mechanisms available to address them are different. A state of emergency permits the derogation from 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.

[172] Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 816.

[173] Id at 817.

[174] See the first judgment at [54].

[175] Id at [45] and [127].

[176] Id at [45].

[168] There are fundamental differences between a state of emergency under section 37 and a national state of disaster under the DMA. A disaster as defined is not a state of emergency.[177] Whereas a state of emergency may encompass a disaster, it is clear from section 37 that a state of emergency contemplates something more severe in magnitude. A disaster is comparatively of a lesser magnitude in that it must only exceed the ability of those affected by the disaster to cope with its effects using only their own resources. Section 2(1) makes it clear that the DMA does not apply to an occurrence falling within the definition of "disaster" in section 1 if, and from the date on which, a state of emergency is declared in terms of the State of Emergency Act. Section 26(2) of the DMA requires the National Executive to deal with a national state of disaster declared in terms of section 27(1) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2). The DMA does not permit the Minister to amend primary legislation or suspend rights granted by such primary legislation.[178] Courts retain the power to invalidate and remedy any alleged breaches of such rights, including all the rights in the Bill of Rights.

[169] The threshold requirement for a state of emergency is, by contrast, much higher than for a national state of disaster. Section 27(1) of the DMA permits the Minister to declare a national state of disaster if existing legislation and contingency arrangements do not adequately provide for the National Executive to deal effectively with a disaster or other special circumstances warrant the declaration. Section 37(1) of the Constitution provides that a state of emergency may be declared only in terms of an Act of Parliament and only when two conditions are present: the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to restore peace and order.

[177] See above n 16.

[178] *British American Tobacco* above n 21 at para 97.

[170] The magnitude of the occurrence that justifies the declaration of a state of emergency must threaten the very life of the nation. It must also be necessary to declare a state of emergency to restore peace and order. It is not just to assist and protect the public, provide relief to the public, protect property, prevent and combat disruption or deal with destructive and other effects of the disaster, as section 27(3) of the DMA makes clear. The jurisdictional factors that must be present before either one is declared are fundamentally different.

[171] The declaration of a state of emergency permits the assignment of plenary legislative powers to the Executive. The declaration of a national state of disaster does not. Section 37(4) expressly permits emergency legislation that derogates from the Bill of Rights. This power is strictly circumscribed. The principle that the Executive may make legislation that cuts across the Bill of Rights is truly exceptional and not comparable to any delegation of subordinate legislative power under the DMA.

[172] The reason the threshold for the declaration of a state of emergency is so much higher is because such a declaration permits the state to derogate from the Bill of Rights in a unique, constitutionally sanctioned manner. This is a point that could be easily missed, as has happened here. Section 37(4) allows for the derogation from certain constitutional rights by way of "legislation enacted in consequence of a declaration of a state of emergency". Such derogation is only constitutionally permitted to the extent that—

> "(a) the derogation is strictly required by the emergency; and
>
> (b) the legislation—
>
> (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
>
> (ii) conforms to subsection (5); and
>
> (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted."

[173] Section 37(2)(b) requires a National Assembly resolution for any extension of a state of emergency beyond 21 days. It is significant, however, that section 37 does not confer any power on the National Assembly to veto emergency regulations. Such a veto is only established by sections 3(2)(a) and 4(1)(b)(ii) of the State of Emergency Act. But it is a legislative addition to section 37. The Constitution does not require such a veto. This is significant because it means that the DA seeks restrictions to be imposed on disaster regulations that go beyond the constitutional restrictions on emergency regulations.

[174] It is important to explain 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). As is trite, any right in the Bill of Rights may ordinarily be limited only in the circumstances outlined in section 36(1) of the Constitution. Any limitation of a constitutional right will, if challenged in court, have to pass the justification analysis set out in section 36(1), which has been extensively developed by this Court and the lower courts. Justification under section 36(1) provides the state with its only avenue to a constitutionally sanctioned limitation of rights in the Bill of Rights.

[175] The exception to the general rule is when a state of emergency has been declared in terms of section 37(1) of the Constitution. In that singular circumstance, the state is provided with an alternative avenue to justify encroachment on constitutional rights, in other words by showing that such encroachment (called a derogation in section 37) is strictly required by the emergency.

[176] The wording of section 37(4) places four discrete requirements on the derogation from rights by legislation enacted. In paragraph (a), the derogation must be strictly required by the emergency. This threshold confers a heightened obligation on Parliament to ensure that rights are only derogated from as a matter of necessity. Conjunctively, paragraph (b) requires that even when there is a derogation from rights by legislation, the legislation must be consistent with South Africa's international law

obligations, conform to subsection (5) and be accessible to the public by way of publication in the Gazette. Compared with section 36(1), which requires limitations to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors", and placing a bar on any limitation inconsistent with section 36(1), there is clearly a heightened standard on the state to justify limitations in the ordinary course.

[177] Thus, during a state of emergency, a limitation of constitutional rights that would ordinarily be unjustifiable under section 36(1) could still pass constitutional muster if the state can show that such derogation is strictly required by the emergency (and the other secondary requirements of section 37(4) are met).

[178] The contention that the requirements under section 37(4) provide a more difficult burden for the state to meet than the requirements under section 36 of the Constitution, cannot be accepted. This contention is unsound for two important reasons.

[179] First, the enquiries are highly dependent on the particular impugned legislation and how it relates to the particular facts of the matter. In some instances, it might well be easier to show that a derogation is strictly required by an emergency, than to justify it using the factors set out in section 36(1). Section 37(4) provides a clear standard against which to measure the derogation, while a section 36(1) enquiry is a more multifaceted enquiry, the outcome of which is more difficult to reliably predict. That is not to say section 37(4) provides a lower threshold than section 36(1) – it just does not necessarily provide a higher one.

[180] But more importantly, even if the section 37(4) requirements on their own provide a higher threshold for the state to meet than the section 36 analysis, this does not mean that the state has less leeway in a state of emergency than under normal circumstances. This is almost self-evident – the entire purpose of section 37 is to allow the state to limit rights in a manner that it would not be able to limit under the normal

ordinary constitutional order.[179] This is done by providing the state with an additional "ground of justification" to rely on, i.e. that the emergency strictly requires such derogation.

[181] This is the fundamental difference between a national state of disaster and a state of emergency. Under a national state of disaster, the state will be required to justify each and every limitation of a constitutional right in terms of section 36(1), failing which such limitation would be struck down as being unconstitutional. This of course happened in numerous cases under the COVID-19 state of disaster.[180] Under a state of emergency on the other hand, even if legislation failed the section 36 enquiry, the state could still rely on section 37(4). Section 37(4) is simply not available to the state under section 27 of the DMA.

[182] I accept that there might be similarities between the measures implemented by the state in states of emergency and measures implemented by the state in states of disaster, and that measures under either state are likely to seek to limit constitutional rights. But this is an aspect that they share with many statutes that delegate regulation-making power to the Executive.[181] In *Van Rooyen*, this Court held:

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[179] Fritz above n 171 at 61-21.

[180] See for example *Minister of Co-operative Governance and Traditional Affairs v De Beer* [2021] ZASCA 95; [2021] 3 All SA 723 (SCA); *British American Tobacco* above n 21; *Esau* above n 49; and *Helen Suzman Foundation v Speaker of the National Assembly*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 32858/2020 (5 October 2020) (*HSF*). That not all of the challenges in this regard were successful is no indictment of the mechanisms provided by section 36(1) of the Constitution, or an indication that the threshold is too easy to meet. Section 36(1) of course allows the possibility that not all limitations of rights are unconstitutional. The threshold it sets is, by definition, the threshold calibrated by the Constitution.

[181] There are numerous examples of regulation-making power that could, conceptually, be used to limit constitutional rights. For example section 44(1)(aA) of the National Environmental Management Act 107 of 1998 empowers the relevant Minister to "make regulations . . . prohibiting, restricting or controlling activities which are likely to have a detrimental effect on the environment". Section 31(1)(d) of the Animal Diseases Act 35 of 1984 empowers the relevant Minister to "make regulations . . . prescribing, in general, any matter which the Minister deems expedient or necessary for the achievement of the purposes of this Act, the generality of this paragraph not being restricted by the provisions of the other paragraphs of this subsection". Section 91(1) of the Defence Act 42 of 2002 allows the President, during a state of national defence, to "make such regulations as are necessary or expedient to deal with any circumstances which have arisen or are likely to arise as a result of the state of national defence". I do not venture to comment on the constitutionality of any such provisions or regulations, but cite these examples merely to illustrate that regulatory provisions often entail possible or even probable limitation of rights.

> "Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute."[182] (Footnote omitted.)

[183] There remains a qualitative difference in that during a national state of disaster, all such measures are subject to a higher standard – the unencumbered limits set by the Bill of Rights. A state of emergency is not characterised only by possible far-reaching limitations, but also clothes such limitations with constitutional protection not available under normal circumstances.

[184] A declaration of a national state of disaster does not suspend the constitutional order nor dilute it. The constitutional order and all the protections that are afforded, including by the Bill of Rights, remain operational and effective during a national state of disaster. 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.

Judicial review

[185] A declaration of a national state of disaster does not relieve the Executive or the Minister of any of the limitations imposed by the Constitution generally and the Bill of Rights in particular. The Court in *HSF* highlighted this constraint.[183] Any

[182] *Van Rooyen* above n 69 at para 37.

[183] *HSF* above n 180 at paras 69-70:

> "It is also important to point out that the regulation making power in the DMA is subject to the scrutiny and compliance with the Constitution and that the State does not enjoy carte blanche to regulate as it pleases. Where the effect of the regulatory regime is to effect a limitation on rights, such a limitation must meet the test set out in the Constitution failing which the Courts may strike down the limitation as unconstitutional. Again, it is not the case for the Applicant that the limitation of rights that has occurred is in conflict with the Constitution.
>
> In addition to the limitation test, section 27(3) of the DMA provides that the powers of the Minister may only be exercised to the extent that it is necessary to assist the public, provide relief to it, protect property and the like. Section 27(3) therefore provides a further limitation and layer of scrutiny and compliance to the exercise of the regulatory powers of the Minister."

limitation of a fundamental right passes constitutional muster only if it satisfies the requirements for limitation under section 36 of the Constitution. The Supreme Court of Appeal reiterated what it had already emphasised in *British American Tobacco*:

> "At the outset, the approach to a justification analysis under section 36 of the Constitution in a time of national crisis such the COVID-19 pandemic, as stated in *Esau*, bears repetition: '[T]he 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.'"[184]

[186] Any limitation of rights renders the Minister's regulations subject to judicial review. It would be unsound for this Court to reject judicial review as an effective remedy in matters such as the one under consideration.[185] The first judgment does so and points to the delay occasioned by judicial review and the fact that, even where review proceedings are brought on an urgent basis, the appellate process might further delay finality of review proceedings.[186] The first judgment also points to the fact that applicants in review proceedings are confronted with the *Plascon-Evans* rule with regard to factual disputes.[187] But these aspects are not unique to challenges to alleged rights infringements under section 27 of the DMA – they are features of any application brought to challenge alleged constitutional rights infringements. I see no reason why judicial review to challenge possible infringements under section 27 of the DMA must be held to be ineffective, where it is an effective remedy in other cases of limitations of constitutional rights. Reliance on urgency also offers no distinguishing factor in this case – alleged constitutional infringements often need to be urgently confronted, and our courts have developed rules regulating urgent proceedings that cater for such instances. The *Plascon-Evans* rule is also a feature of all such applications. Interim relief, which can only be appealed in limited circumstances, is also an option.

[184] SCA judgment above n 20 at para 35.

[185] See the first judgment at [120] to [123].

[186] Id at [120] to [121].

[187] Id at [120].

[187] More fundamentally, to dismiss judicial review of legislation or subordinate legislation for constitutional compliance as an ineffective remedy as compared to an override power by Parliament, seems to me to mischaracterise the roles assigned to the Legislature and the Judiciary by the Constitution. The separation of powers assigns to the courts the responsibility to determine whether legislation or executive conduct complies with the Constitution. This is why judicial review remains such a powerful mechanism in curbing constitutional violations.

[188] Another reason given for the lack of effectiveness of judicial review as a remedy by the first judgment is that, while review for unlawfulness might address instances where the Minister acts without authorisation, it does not address whether the Minister should have the power in the first place.[188] This reasoning is misplaced. Judicial review is not confined to challenges to the lawfulness of the impugned regulations – it can be aimed at unjustified limitations of constitutional rights.[189] It is true that judicial review of any specific regulation could not be used to call into question whether the Minister should have the regulation-making power in the first place. But that is not the context in which judicial review was raised by the respondents in this case. The respondents argue, and I agree with them, that the existence of judicial review as an effective remedy is relevant to whether the Constitution requires Parliament to reserve the function of review for itself, in the form of a veto power. And in this case, judicial review remains an effective remedy to challenge subordinate legislation that has been validly enacted, where it unjustifiably limits constitutional rights. Unlawfulness also remains a powerful ground of review when a court is asked to determine whether the jurisdictional facts for a *declaration* of a national state of disaster are met. That is an objective enquiry, which precedes any lawful exercise of the Minister's regulation-making powers.

[188] Id at [123].

[189] *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 24.

Is section 27 overbroad by not affording Parliament a veto?

[189] Section 42(3) of the Constitution imposes the National Assembly's oversight duty:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and *by scrutinizing and overseeing executive action.*" (Emphasis added.)

[190] Section 55(2) of the Constitution gives content to it as follows:

> "The National Assembly must provide for mechanisms—
>
> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> (b) to maintain oversight of—
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state."

[191] This Court has held that the delegation of subordinate legislative powers is not contrary to our constitutional scheme, but in fact necessary to give efficacy to the primary legislative power of Parliament.[190] In this matter, we are not dealing with a general complaint about overbroad delegation of legislative powers. The DA in fact accepts that the Executive requires broad powers to deal with the unforeseen and possibly widespread consequences of a disaster. The DA's complaint is that section 27's broad delegation of subordinate legislative power is coupled with the lack of appropriate oversight powers being reserved for Parliament. The first judgment accordingly characterises the "real question" in this case as whether the mechanisms available to Parliament or the National Assembly to oversee and scrutinise the

[190] *Executive Council* above n 58 at para 62.

Minister's exercise of their powers under section 27 represent "effective or adequate oversight mechanisms".[191]

[192] Section 55(2) of the Constitution does not prescribe to the National Assembly what oversight mechanisms to employ. It leaves it entirely within the discretion of the National Assembly, within constitutional parameters.[192] It certainly does not require the National Assembly to include specific mechanisms in individual pieces of legislation. We should not lose sight of this Court's jurisprudence to the effect that it is for the National Assembly to determine the form that its mechanisms of oversight take.[193]

[193] In *EFF I*, this Court explained:

> "[T]he Constitution neither gives details on how the National Assembly is to discharge the duty to hold the executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation. To determine, whether the National Assembly has fulfilled or breached its obligation, will therefore entail a resolution of very crucial political issues. And it is an exercise that trenches on sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly's constitutional power or discretion."[194]

[194] This Court further held:

> "Both sections 42(3) and 55(2) do not define the strictures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given the leeway to determine how best to carry out its constitutional mandate."[195]

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[191] See the first judgment at [80]:

> "The real question, then, is whether the power to oversee and scrutinise the powers of the Minister can be said to amount to the necessary constraints to provide for effective or adequate oversight mechanisms for the wide-ranging powers granted to the Minister in section 27."

[192] *EFF I* above n 71 at paras 43, 87, 90 and 93.

[193] Id at para 87.

[194] Id at para 43.

[195] Id at para 87.

[195] As quoted above, it held further:

> "*It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give it, for the purpose of holding the executive accountable and fulfilling its oversight role of the executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly.* Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon."[196] (Emphasis added.)

[196] It is clear from *EFF I* that a judicial enquiry is limited to determining whether what the National Assembly does amounts to a fulfilment of its constitutional obligations. It is impermissible for courts to prescribe to the National Assembly how to perform this function.

[197] It must be noted that there is 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. As this Court said in *United Democratic Movement*, "[t]hose who represent the people in Parliament have thus been given the constitutional responsibility of ensuring that Members of the Executive honour their obligations to the people".[197]

[198] The minority in the Supreme Court of Appeal was incorrect when it suggested that the oversight actually exercised during the COVID-19 pandemic occurred merely out of the goodwill of Parliament. It overlooked that Parliament was constitutionally

[196] Id at para 93.

[197] *United Democratic Movement* above n 89 at para 37.

obliged to exercise oversight over the Executive, as it did. The minority said the following in this regard:

> "That may be so, and it is commendable. But it is not an answer to the question of whether section 27 is constitutionally valid. As mentioned, the constitutional validity of section 27(2) is an objective enquiry. It is not dependent on whether the engagements held in respect of a particular disaster were adequate or not. The fact is that those engagements are neither required by the DMA nor are there mandatory legislative mechanisms in place for them to occur. They occurred out of the goodwill of Parliament and its sense of duty."[198]

[199] The DMA does not interfere with this responsibility of Parliament 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.

[200] The National Assembly's powers of oversight of the Executive entitle and oblige it to hold the Executive to the fulfilment of their constitutional and statutory duties. This Court has made it plain again and again.[199] It said for instance that the National Assembly was obliged to "ensure that constitutional and statutory obligations are properly executed";[200] "to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector";[201] and to ensure that the President "complies with the remedial action taken against him".[202]

[201] It follows that the National Assembly's oversight powers do not entitle it, without more, to veto or overturn any decision taken by the Executive in the lawful exercise of its powers. This Court made this clear in *EFF I* in its condemnation of a decision of the National Assembly to overturn a report of the Public Protector. This

[198] SCA judgment above n 20 at para 164.

[199] *EFF I* above n 71 at paras 22, 97 and 104.

[200] Id at para 22.

[201] Id at para 97.

[202] Id at para 104.

Court described the resolution as an attempt by the National Assembly to take the law into its own hands, resort to self-help and flout its obligations.[203]

[202] The National Assembly has in fact established such mechanisms, as detailed in the first judgment.[204] The first judgment accepts that these mechanisms were in fact extensively used by Parliament during the COVID-19 pandemic and it did so in terms of mechanisms it determined or established in terms of sections 55(2) and 57 of the Constitution.[205] As we held in *EFF I*, it is not for this Court to second-guess the mechanisms that the National Assembly has established in this regard.

[203] The first judgment takes issue with the manner in which some of the oversight mechanisms were used during the COVID-19 pandemic.[206] It should be borne in mind that, in this matter, we are not asked to determine whether the National Assembly "in substance and in reality" failed to exercise its oversight role.[207] If that had been the case, the challenge would have been directed at the National Assembly and not section 27 of the DMA. In this matter, this Court is called upon to decide whether section 27 of the DMA *generally* (and not as it relates specifically to the COVID-19 disaster) does not provide for the constitutionally required oversight mechanisms.

[204] The DA did not challenge the oversight mechanisms determined by the National Assembly in terms of sections 55(2) and 57 of the Constitution as unconstitutional because they do not contain a veto power or power of prior approval by Parliament. The challenge was that section 27 of the DMA is unconstitutional because it does not contain oversight mechanisms, which include such a veto power or power of prior approval. The Constitution does not require that effective oversight by

[203] Id at paras 98-9.

[204] See the first judgment at [82].

[205] Id at [82] to [83].

[206] Id at [85].

[207] *EFF I* above n 71 at para 93.

Parliament must include a veto power or a power of prior approval in respect of administrative law-making powers.

[205] The first judgment concludes that the mechanisms established by the National Assembly are not sufficient, and that, in order for the mechanisms to be effective, any regulations made by the Minister under section 27 would need to be subject to the National Assembly's retrospective approval (what is in effect a parliamentary veto power).[208] It concludes that the constraints in section 27 "are not effective or adequate because none of them entitle Parliament to overrule the Executive".[209]

[206] In my view, this conclusion misses a crucial step. The question is not whether a parliamentary veto power is desirable, or whether it would be a more effective oversight mechanism than those already established by the National Assembly. The antecedent question this Court is required to answer is whether the Constitution ever requires Parliament to reserve a power of final approval over subordinate legislation for itself.

[207] There is nothing in the Constitution that points to a requirement that the National Assembly has a veto power over subordinate legislation or executive action. Where the Constitution requires the National Assembly to have a veto power, it codifies such a power expressly (for example in section 37(2)(b)).[210] This is understandable, as a veto power, in making executive power directly subject to parliamentary approval, is a drastic reversal of the constitutionally established separation of powers.[211]

[208] There are several important factors, on the other hand, that point away from an obligation on the Legislature to expressly provide for a veto power for itself. First, as

[208] See the first judgment at [86], [96] and [126].

[209] Id at [126].

[210] The veto power in section 37(2)(b) of the Constitution is of course a veto power of the *declaration* of a state of emergency, and not over legislation or regulations enacted pursuant to a state of emergency.

[211] See for example this Court's comment in *EFF I* above n 71 at paras 98-9, in relation to Parliament's usurpation of the Public Protector's constitutionally ordained role.

per section 85(2)(a) of the Constitution, the President (along with the Cabinet) exercises the executive authority by, inter alia, "implementing national legislation except where the Constitution or an Act of Parliament provides otherwise". A veto power would 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, unless expressly provided for in the Constitution or national legislation. A veto power goes beyond mere "oversight" – it effectively takes control over the executive function.

[209] Second, the Constitution expressly provides Parliament with a discretionary power to enact a veto power for itself over subordinate legislation. Section 101(4) of the Constitution allows Parliament to enact legislation which would require subordinate legislation to be tabled in and approved by Parliament. Section 101(4) is set in very clearly permissive language – Parliament *may* enact such legislation, but it is not required to do so. In my view, the fact that this power is discretionary points to the fact that the Constitution, including section 55(2) thereof, does not envision Parliament's oversight role to necessarily take the form of a veto power over subordinate legislation.

[210] Third, Parliament's legislative powers allow it to amend the DMA itself in order to either place additional restrictions on the Minister's powers, or to reserve for itself a veto power over declarations of a national state of disaster, and the subordinate legislation pursuant to such a declaration. Parliament's legislative powers are considerable – they allow Parliament to 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 never have been intended to require Parliament to take up the reins of the Executive itself.

[211] Fourth, 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 the delegation of legislative power far more dramatic and far-reaching than the DMA. Section 37(2) requires a National Assembly resolution to extend a state of

emergency beyond its initial life of 21 days. It does so precisely because, unlike a national state of disaster, a state of emergency may suspend the protection afforded in the Bill of Rights. Section 37(4) of the Constitution expressly permits Parliament to enact legislation which suspends the Bill of Rights when a state of emergency is declared. The only provisions of the Bill of Rights which may not be suspended under a state of emergency are those listed in the table of non-derogable rights. The Constitution 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 section 37 requires for a state of emergency.

[212] If Parliament is required to include a veto power for itself in order to effectively oversee the powers it delegates to the Executive, it seems to me to endanger all legislation that delegates regulation-making powers to the Executive. Many Acts of Parliament confer broad regulation-making powers on Ministers and other functionaries, covering all manner of areas affecting the public and, in some cases, limiting rights, for example in health, immigration, environmental management and transport legislation. These delegations would, if the DA's reasoning were correct and were carried forward, potentially extend to various pieces of delegated legislation conferring wide regulatory powers on the Executive. I can find no principle in the first judgment that provides any guidance to Parliament on when a veto power will be required to be included in a statute. The first judgment in fact acknowledges this, stating that it is not "desirable to leave everyone guessing as to whether, in relation to a particular statute, this override power is or is not appropriate".[212] It seems to me that the first judgment does exactly that – it leaves one uncertain when such a veto power is constitutionally required.

[212] See the first judgment at [131].

[213] *Nu Africa*[213] does not support the conclusion that Parliament is required to reserve a veto power for itself in the DMA. *Nu Africa* was firstly concerned with the delegation by Parliament of plenary powers and not regulatory powers. This distinction is important because plenary powers would allow the Executive to directly interfere or countermand previous acts of Parliament. Chaskalson P, in *Executive Council*, explained this distinction as follows:

> "I pointed out why it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the Executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the Executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists by necessary implication from the terms of the Constitution could be subversive of the "manner and form" provisions of sections 59, 60 and 61."[214]

[214] There is nothing in the DMA to suggest that the regulations made under it may override or amend primary legislation. I agree with the Supreme Court of Appeal in *British American Tobacco* that section 27 of the DMA "do[es] not assign to the Minister plenary legislative power: it does not grant the Minister the power to pass, amend or repeal an Act of Parliament".[215] What is more, sections 27(2) and (3) provide a "clear and binding framework for the exercise of the powers".[216] Regulations under the DMA are restrained by the limits set by primary legislation.

[215] Whether the regulations enacted during the COVID-19 pandemic attempted to override or amend primary legislation is not the issue with which we are seized in this case. It suffices to say that any regulations that attempted to amend or repeal primary legislation would be susceptible to judicial review on those grounds. We are instead concerned with section 27 of the DMA and that section delegates power to make

[213] *Nu Africa* above n 62.

[214] *Executive Council* above n 58 at para 62.

[215] *British American Tobacco* above n 21 at para 97.

[216] Id quoting *Smit v Minister of Justice and Correctional Services* [2020] ZACC 29; 2021 (1) SACR 482 (CC); 2021 (3) BCLR 219 (CC) at para 36.

subordinate legislation within the framework set by the DMA, not plenary power. It is thus distinguishable from *Nu Africa*.

[216] The first judgment distinguishes between powers "for making regulations for the purpose of the administrative implementation of an Act of Parliament and the delegation of legislative power for the purpose of making substantive laws".[217] With regard to the making of regulations, where implementation ends and substantive law begins is at best a fluid distinction and at worst a distinction without a difference. Regulation-making often requires administrators to "make" substantive law. As Chaskalson P stated in *Executive Council*, it is perfectly permissible in our constitutional scheme for Parliament to delegate such powers.[218]

[217] There is however another reason *Nu Africa* is unhelpful for the proposition that Parliament is in some circumstances constitutionally required to enact a veto power for itself. In *Nu Africa*, Parliament had in fact enacted such a veto power and the Court found the veto power to be one of the reasons why the plenary power elsewhere delegated was not constitutionally impermissible. It is qualitatively different, on the one hand to say that a veto power may save plenary powers from unconstitutionality, where Parliament has enacted for itself such a veto power and on the other hand to find that the Constitution requires Parliament to do so. *Nu Africa* is not authority for the latter proposition.

[218] I should add that none of the above arguments mean that Parliament could not include a veto power in legislation, including the DMA, if it wished to do so. It is not my view that a veto power could not be an example of an effective oversight mechanism, but merely that (a) the Constitution does not prescribe such a veto power and (b) it is up to Parliament to decide what form its oversight mechanisms take. The fact that a veto power has been included in the State of Emergency Act, and other

[217] See the first judgment at [134].

[218] *Executive Council* above n 58 at paras 51 and 62.

legislation such as the PAJA and the Protected Disclosures Act, takes the DA's case no further – in those cases Parliament exercised its legislative powers to enact a veto power as an oversight mechanism. The power was not mandated by either the Constitution or the courts.

[219] The DA's argument relies heavily on the supposed similarity between a national state of disaster and a state of emergency to find that the oversight mechanisms available to Parliament in a state of emergency should also be available to it under a national state of disaster. As shown above however, there is an important qualitative difference between a state of emergency (and the legislation that can be enacted pursuant to one) and a national state of disaster (and any other non-state of emergency legislation). A state of emergency is a unique constitutional creature, which allows singular derogation from constitutional rights and conversely requires singular oversight mechanisms.

[220] The first judgment places reliance on section 17 of the Interpretation Act for the proposition that "draft regulations or rules must first be tabled in Parliament prior to publication in the Gazette".[219] In my view, this reliance is unfounded and does not support the first judgment's conclusions. Section 17 of the Interpretation Act states:

> "When the President, a Minister or the Premier or a member of the Executive Council of a province is by any law authorized to make rules or regulations for any purpose in such law stated, notwithstanding the provisions of any law to the contrary, a list of the proclamations, government notices and provincial notices under which such rules or regulations were published in the *Gazette* during the period covered in the list, stating in each case the number, date and title of the proclamation, government notice or provincial notice and the number and date of the *Gazette* in which it was published, shall be submitted to Parliament or the provincial legislature concerned, as the case may be, within fourteen days after the publication of the rules or regulations in the *Gazette*."

[219] See the first judgment at [88].

[221] Three features of this provision point to why reliance on the Interpretation Act to conclude that Parliament should be required to approve regulations is misplaced. First, the section contains no mention of any approval of rules and regulations, but merely that they should be submitted to Parliament. Second, the section does not require the rules and regulations themselves to be tabled, but only that a list of the proclamations including the number, date and title of each proclamation be submitted to Parliament. It can hardly be required of Parliament to approve or veto regulations where it is not a requirement that the regulations themselves be tabled there. Third, the rules and regulations have to be tabled 14 days *after* publication in the Gazette. It would be incongruous to conclude that the section requires approval of such regulations by Parliament if such approval is always to happen after their publication. The Guide to Tabling referred to by the first judgment[220] takes this argument no further, as it mandates rules and regulations to be tabled prior to publication, *only where such prior tabling is required by other legislation* (for example, regulations under the PAJA).

[222] For these reasons, I find that section 27 of the DMA is not unconstitutional for either creating a simulated state of emergency, or for not providing the National Assembly with specific oversight power. There is also no impermissible delegation of legislative power by Parliament to the Minister, as contended by the DA.

[223] Although not necessary for the purpose of this judgment, I pause to make a few remarks about remedy. The reading-in remedy is inappropriate for a number of reasons. If the remedy is intended to cure the complaint about lack of effective oversight, appropriate relief should only be aimed at curing that which is unconstitutional about section 27. This must be done by creating parliamentary oversight over the Minister's legislative powers and no more. Such oversight does not require veto powers by Parliament. If the remedy is intended to cure the complaint about failure to have constraints or guidelines for the exercise of the delegated powers, the remedy sought must be aimed at remedying this complaint. In this regard, Parliament remains the

[220] Id at n 90. See also Guide to Tabling above n 90 at para 6.8.3.

appropriate body to decide on the appropriate cure because it has a range of rational options with which to cure the problem. The order sought would be an intrusion into the legislative authority of Parliament and would breach the separation of powers.[221]

[224] This Court held in *National Coalition*[222] and confirmed in *Nandutu*[223] that it is not appropriate to employ the remedy of reading-in, unless the court can define with sufficient precision how the unconstitutional law has to be amended in order to comply with the Constitution. It also held in *Dawood*[224] and reiterated in *Nandutu*[225] that where there is a range of legislative possibilities by which the unconstitutional law could be cured, the court should leave it to the legislature to do so.

[225] The first judgment argues that it is not prescribing "how Parliament should ensure that it reserves to itself the final decision-making power in respect of disaster regulations".[226] It says that its reading-in is simply a temporary remedy. But, in terms of *EFF I*, even to say that Parliament must reserve the final decision or power to override for itself, in whatever manner it deems fit, is overstepping the constitutional bounds of the separation of powers. It *is* prescribing to Parliament what mechanism must be implemented, and this is a step this Court should not take absent clear guidance from the Constitution that an override power is necessary. The Constitution contains no such guidance, as discussed above.

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[221] I note that there have only been two national states of disaster which were non-environmental, being the COVID-19 pandemic and the brief national state of disaster relating to load-shedding. Even if this Court were to suspend a declaration of invalidity to allow Parliament time to find a sufficient alternative mechanism of oversight, it is unlikely that a situation of comparable magnitude to the COVID-19 pandemic and out of the ordinary operation of the DMA would arise. This is a further reason why there is no need for a reading-in.

[222] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (2) BCLR 39 (CC) at para 75.

[223] *Nandutu v Minister of Home Affairs* [2019] ZACC 24; 2019 (5) SA 325 (CC); 2019 (8) BCLR 938 (CC) at para 86.

[224] *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 63-4.

[225] *Nandutu* above n 223 at para 89.

[226] See the first judgment at [96].

[226] Even if this Court were to find that section 27 is unconstitutional, it should be left to Parliament to cure the defect because the cure is not obvious. It should be left to Parliament to choose the appropriate cure. Parliament may consider whether it is feasible to narrow the powers vested in the Minister by circumscribing with greater precision what a national disaster is; when a national state of disaster may be declared; the requirements with which the disaster regulations must comply; and the requirements for any extension of the national state of disaster. This Court emphasised in *EFF I* that it is for the National Assembly and not the courts to determine how to perform its functions of oversight over the Executive.[227]

[227] In conclusion, the appeal must be dismissed. I am however satisfied that the DA enjoys protection against costs in terms of *Biowatch*,[228] and make no order as to costs.

Order

[228] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

[227] *EFF I* above n 71 at para 93.

[228] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 24.

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