IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

Reportable:	**YES**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No.: 22311/2020

In the matter between: -

THE DEMOCRATIC ALLIANCE Applicant

and

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS 1st Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY 2nd Respondent

THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES 3rd Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 4th Respondent

Coram: MUSI, JP *et* MATOJANE *et* WINDELL JJ

Heard: 08 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. It has been released to SAFLII. The date and time for hand-down is deemed to be 24 March 2021, 10h00.

Summary: Constitutional law – Section 27 of the Disaster Management Act 57 of 2002 – Consistent with the Constitution and thus valid.

JUDGMENT

MUSI JP (WINDELL J concurring)

[1] This case concerns two interrelated constitutional issues. First, the constitutionality of section 27 of the Disaster Management Act[1] (Act). Second, the sufficiency of Parliament's oversight over the Executive in instances where the former has delegated broad legislative powers to the latter.

[2] The Severe Acute Respiratory Syndrome Coronavirus 2 is a strain of the coronavirus that causes coronavirus disease 2019 (COVID-19). This virus and its variants are responsible for the untold devastation of lives and livelihoods. It spread like a wildfire affecting almost every country in the world. Governments were forced to take immediate measures to curb its rapid spread. This country also had to gird its loins by utilising legislative and other means in an endeavour to limit its spread and destruction.

[3] An outbreak of COVID-19 was first identified in Wuhan, in the Hubei Province in China, during December 2019. The World Health Organization declared the outbreak a public health emergency of international concern on 30 January 2020, and declared it a pandemic on 11 March 2020.

[4] On 5 March 2020, the first COVID-19 case was confirmed in South Africa. Ten days later, on 15 March 2020, the Minister of Cooperative Governance and Traditional Affairs (COGTA) (First Respondent or Minister) declared a national state of disaster due to the COVID-19 outbreak in South Africa. This was done because the magnitude and severity of the outbreak created

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[1] Act 57 of 2002.

extraordinary, exceptional and urgent circumstances that required a wide-ranging swift and effective response.

[5] On 23 March 2020, the Fourth Respondent (President) announced a national lockdown in South Africa, commencing on 26 March 2020. By then, there were 402 confirmed cases of COVID-19 infections in South Africa.

[6] On 25 March 2020, the Minister published lockdown regulations that were amended a day later. The lockdown regulations were extensive, and in some respects, they placed unprecedented restrictions on many constitutionally guaranteed fundamental rights and freedoms. On 29 April 2020, the Minister published the disaster management regulations. These regulations were subsequently amended in order to ease the lockdown restrictions in line with the alert levels in the risk-adjusted strategy. The Minister thereafter promulgated regulations as and when the need arose in accordance with the alert levels or the easing of restrictions.

[7] The Democratic Alliance (Applicant) was of the view that section 27 of the Act is unconstitutional. On 18 May 2020 it approached this Court, on an urgent basis, essentially seeking an order that section 27 be declared unconstitutional and invalid. It sought the following relief:

> ‘1. Condonation is granted for the applicant’s non-compliance with the prescribed forms, time periods and service requirements and leave is granted for this application to be heard as one of urgency in terms of Uniform Rule 6(12).
>
> 2. Section 27 of the Disaster Management Act 57 of 2002 (‘**the Act**’) is declared to be unconstitutional and invalid.
>
> 3. In order to remedy this unconstitutionality, and with effect from the date of the order, section 27 of the Act is ordered to be read as if a new section 27(4A) has been added immediately after section 27(4), reading 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).”

4. The first respondent is directed to table before the National Assembly within three days of this order:

4.1 the declaration of the national state of disaster in GN 313 *GG* 43096 of 15 March 2020;

4.2 the regulations issued in terms of section 27(2) of the Act published in GNR 480 *GG* 43258 of 29 April 2020 (‘**the COVID regulations’**); and

4.3 all directions and regulations issued under the COVID regulations (including all directions and regulations that remain valid under regulation 2(3) of the COVID regulations).

5. It is declared that none of the declarations, regulations and directions made in terms of section 27 of the Act prior to the date of this order are invalidated only by virtue of the orders in paragraphs 2 to 4 (inclusive) above.

6. Paragraphs 2 to 5 of this order are referred to the Constitutional Court for confirmation.

7. Those respondents opposing any part of the relief sought are directed to pay the applicant's costs, jointly and severally, one paying the other to be absolved, including the costs of two counsel.'

[8] On 15 May 2020, the applicant also approached the Constitutional Court seeking direct access to that Court. That application was dismissed.

[9] I propose to deal with the issue of urgency before considering the other issues raised.

[10] The applicant contended that this application is self-evidently urgent. It stated that this matter needs to be determined with great expedition and cannot be effectively determined in the ordinary course. It contended that the Minister's regulations constitute an unprecedented limitation of fundamental rights and have cost South Africa millions of jobs and billions of rands. These vagaries continue as long as the regulations are valid.

[11] The first and fourth respondents dispute the urgency of the matter. They pointed out that the applicant brought this application, two months after the state of disaster declaration, and it did not provide any reasons why it did so after such a long time. They stated that the applicant had not raised any of its complaints or more pertinently the complaint about the constitutionality of section 27, since the Act was promulgated in 2002. They further pointed out that the applicant was consulted by the President during numerous meetings held with political parties represented in parliament. The meetings commenced on 18 March 2020 and continued on 9 April 2020, 23 April 2020 and 20 May 2020.

[12] The first and fourth respondents filed their answering affidavits on 27 July 2020 while the Speaker of the National Assembly (Speaker or second respondent) and the Chairperson of the National Council of Provinces (third

respondent) filed theirs on 31 July 2020. The respondents do not allege that they were prejudiced in the preparation of their case.

[13] In **Freedom Front Plus**[2] it was said that:[3]

> 'In these proceedings it cannot follow that even if the applicant consented to the enactment of the DMA, and subsequently supported the declaration of disaster by the second respondent on 15 March 2020 and the subsequent lockdown regulations, it could be said that it waived its right to subsequently challenge the constitutionality of the DMA or the declaration of a disaster. Its prior conduct could not be dispositive of its ongoing right to launch a constitutional challenge of the kind that this application does.'

[14] In **The Helen Suzman Foundation,**[4] the following was said about the urgency of COVID-19 cases:

> 'In considering the submissions of both parties regarding urgency, we could not lose sight of the background to this application which finds its genesis from a declaration of a disaster which is defined in the DMA as "a progressive or sudden, widespread or localised, natural or human caused occurrence" which causes or threatens to cause death, injury or disease. The stark reality of the consequences of Covid-19 needs no emphasis. Equally, in our view, that reality does not suggest a situation where relevant issues can be dealt with in the ordinary course. This would mean, unless proved otherwise, an intrinsic sense of urgency in dealing with Covid-19 matters.'[5]

[15] I agree with the sentiments expressed in **Freedom Front Plus** and **The Helen Suzman Foundation**.

[16] The first and fourth respondents did not allege that this application constitutes an abuse of court processes. This matter should be dealt with on an urgent basis. Having dispensed with the issue of urgency, the remaining issue to consider is the constitutionality of section 27 of the Act.

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[2] Freedom Front Plus v The President of the Republic of South Africa and Others [2020] 3 All SA 762 (GP) (6 July2020); (22939/2020) [2020] ZAGPPHC 266.

[3] Ibid at para 26.

[4] The Helen Suzman Foundation v The Speaker of the National Assembly and Others (32858/2020) [2020] ZAGPPHC 574 (5 October 2020).

[5] Ibid at para 29.

[17] The constitutionality of section 27 was challenged on the following bases:

17.1 firstly, 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;

17.2 secondly, it permits the creation of something like a state of emergency, but without the oversight role that section 37 of the Constitution requires for Parliament in an actual state of emergency.

17.3 thirdly, it does not enable the national assembly to scrutinize and oversee executive action as is required by sections 42(3) and 55(2) of the Constitution.

[18] The second and third bases were not stridently argued, nor were they abandoned by the applicant. The applicant, however, accepted that these bases were definitively decided in **Freedom Front Plus**.

[19] With regard to the first and second bases of the challenge in this matter, **Freedom Front Plus** held the following:

> 'The applicant made much of the fact that s37 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 second respondent. According to the applicant, in this respect, the DMA ignores the fundamental constitutional prescript that the will of the people should be respected. The applicant 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 s37. 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:

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

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

68.3. 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 third and fourth respondents' 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 applicant 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.'[6]

[20] A Full Court of this division decided **Freedom Front Plus**. In terms of the doctrine of precedent we are bound by **Freedom Front Plus**. We are also sitting as a Full Court and therefore have the authority to overrule **Freedom Front Plus** because we are a Court of equal status. However, we may only do so when we are convinced that the **Freedom Front Plus** decision was clearly wrong.

[21] In **Turnbull-Jackson**[7] Madlanga J said the following about the test for departing from a precedent of a court of equal status:

'Whether the reasoning of a court was wrong is not a matter of personal preference, mere disagreement, misgivings, doubt, let alone whim. A court with authority to depart from precedent may only do so if it is convinced that the previous decision was clearly

[6] Ibid paras 68 and 69.

[7] Turnbull-Jackson v Hibiscus Coast Municipality and Others 2014 (6) SA 592 (CC).

> wrong. The test is a stringent one. And "mere lip service to the doctrine of precedent is not enough; . . . deviation from previous decisions should not be undertaken lightly."'[8]

[22] The applicant correctly conceded that it could not argue that **Freedom Front Plus** was clearly wrong. It, however, informed us that it reserves the right to argue those bases in a higher court, if needs be.

[23] After careful consideration of the holdings in **Freedom Front Plus**, it cannot be said that **Freedom Front Plus** was wrong in its holdings with regard to the bases under consideration.

[24] Before considering the first basis of the attack on the constitutionality of section 27, I propose to first set out the legislative roadmap of the Act.

[25] The first respondent has been designated by the President to administer the Act.[9]

[26] The Act defines 'disaster' and 'disaster management' as follows:

> "**'disaster'** means a progressive or sudden, widespread or localised, natural or human-caused occurrence which
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> (a) causes or threatens to cause
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> (i) death, injury or disease;
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> (ii) damage to property, infrastructure or the environment; or
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> (iii) significant disruption of the life of a community; and
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> (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;
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> **'disaster management'** means a continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at
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> (a) preventing or reducing the risk of disasters;
>
> (b) mitigating the severity or consequences of disasters;
>
> (c) emergency preparedness;
>
> (d) a rapid and effective response to disasters; and

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[8] Ibid at para 72.

[9] Section 3 of the Act provides that 'this Act is administered by a Cabinet member designated by the President.'

(e) post-disaster recovery and rehabilitation;'[10]

[27] The Act establishes a National Disaster Management Centre (National Centre).[11] In terms of section 9 of the Act "the objective of the National Centre is to promote an integrated and coordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities".

[28] The powers and duties of the National Centre include making recommendations to any relevant organ of state or statutory functionary:

'(i) on draft legislation affecting this Act, national disaster management framework or any other disaster management issue;
(ii) on the alignment of national, provincial or municipal legislation with this act and the national disaster management framework; or
(iii) in the event of a national disaster, on whether a national state of disaster should be declared in terms of section 27;…'[12]

[29] Section 23 of the Act gives the National Centre the power to classify a disaster after assessing it. The section reads:

'(1) When a disastrous event occurs or threatens to occur, the National Centre must, for the purpose of the proper application of this Act, determine whether the event should be regarded as a disaster in terms of this Act, and if so, the National Centre must immediately
(a) assess the magnitude and severity or potential magnitude and severity of the disaster;
(b) classify the disaster as a local, provincial or national disaster in accordance with subsections (4), (5) and (6);
(bA) inform the relevant provincial disaster management centre of the decision on the classification of the disaster made in terms of paragraph (b); and
(c) record the prescribed particulars concerning the disaster in the prescribed register.'

[10] Section 1.
[11] Section 8.
[12] Section 15(1)(f).

[30] After the classification of a national disaster, the coordination and management thereof become the national executive's responsibility. Section 26 states that:

> '(1) The national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27.'

[31] The Minister may declare a national state of disaster, under certain circumscribed circumstances. After such declaration the Minister acquires the powers mentioned in section 27 of the Act. Section 27 provides:

> '(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
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> (b) other special circumstances warrant the declaration of a national state of disaster.
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> (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;
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> (b) the release of personnel of a national organ of state for the rendering of emergency services;
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> (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
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> (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;
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> (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;
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> (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.'

[32] The applicant contended that section 27 is unconstitutional because it amounts to an impermissible delegation of legislative power to the Minister. It argued that Law-making is the proper domain of the Legislature and should not be delegated excessively to the executive.

[33] In terms of section 43 of the Constitution, the legislative authority of the national sphere of government is vested in Parliament.[13] Parliament is therefore vested with the authority to make laws for the national sphere of

[13] Section 43(a) of the Constitution of the Republic of South Africa, 1996.

government. It must exercise that power subject to the Constitution. This is so because, the "Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[14] South Africa is founded, inter alia, on the values of the supremacy of the Constitution and the rule of law.[15]

[34] In **Affordable Medicines**[16] Ngcobo J said the following:

> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law." In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'[17]

[35] Parliament may delegate its legislative making functions. This was confirmed, with qualification, by Chaskalson P in **Executive Council**[18] where he said:

> 'The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms - "to make laws for the Republic in accordance with this Constitution." In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power

[14] Section 2 of the Constitution.
[15] Section 1 of the Constitution.
[16] Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC).
[17] Ibid 49.
[18] Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC).

> to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.'[19]

[36] In **Mpumalanga Petitions**[20] Langa DP set out some of the factors to consider when determining whether a delegation of legislative power is permissible. He put it thus:

> 'A legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement the primary legislation. Ordinarily the functionary will be the President or the Premier or the Member of the Executive responsible for the implementation of the law… The factors relevant to a consideration of whether the delegation of a law-making power is appropriate are many. They include the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power.'[21]

[37] It is clear from the definition of disaster that it may be a sudden or progressive natural or man-made catastrophe, that causes great damage or loss of life. It may be an anticipated or uncertain calamity. It must however be of such magnitude that it is beyond the resource capabilities of those affected by it. In such circumstances uncertainties and imponderables abound when it comes to planning and implementing a prevention or mitigating strategy.

[38] The applicant correctly accepted that it was impossible for Parliament to predict in advance what the precise nature of a national disaster would be and for it to provide a clear policy framework to deal with such a disaster.

[39] A disaster can be sudden, widespread and cause immense damage if it is not arrested timeously or its potential to cause damage minimized speedily. Parliamentary law-making processes are not geared towards making laws speedily. Disasters will always affect provinces. The process for Parliament to pass an ordinary Bill affecting provinces is also a long drawn out process.[22]

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[19] Ibid para 51. Justice Alliance of SA V President of the RSA 2011 (5) SA 388 (CC) at paras [53] and [54].
[20] In re Constitutionality of the Mpumalanga Petitions Bill, 2000 2002 (1) SA 447 (CC).
[21] Ibid para [19].
[22] Section 76 of the Constitution.

The constitutional public access and involvement processes of Parliament may also impede an effective and rapid response to a disaster.[23]

[40] Since it is impossible for Parliament to legislate, in advance, ways and means to deal with sudden foreseen or unforeseen calamities, it is best for it to delegate some of its functions. There is no other realistic way of ensuring effective governance during disasters. The executive would be better placed to deal rapidly, comprehensively and effectively with disasters in a way that Parliament cannot do. Parliament might conceivably not even be in session when a sudden disaster strikes.

[41] The applicant asserted that the Act gives the Minister the right to depart from existing legislation. This is incorrect. Nowhere in the Act does it give the Minister the power to amend or repeal any existing legislation. In terms of section 26(2)(b) the national executive, which is primarily responsible for the coordination and management of national disasters, must deal with a national disaster in terms of existing legislation and contingency arrangements augmented by regulations or directions made or issued in terms of section 27(2), if a national state of disaster has been declared. This makes it plain that the Minister does not have the power to amend or repeal existing legislation. In fact, the national executive, which includes the Minister, may only augment existing legislation and contingency arrangements. Parliament's plenary legislative powers are not implicated in this matter. The Act does not allow the Minister to usurp Parliamentary legislative powers.

[42] The different ways in which a disaster may manifest necessitates giving the executive wide enough powers so that it can deal effectively with the disaster in terms of the Act. The changing circumstances will also necessitate quick regulation. In the context of COVID-19, the different alert levels and adjusted alert levels also call for rapid regulation making in order to ease the burden on those affected by them. The complexity of government business relating to COVID-19 demands that the executive be at the business end of the fight

[23] Section 59 and 72 of the Constitution.

against the pandemic. The delegated power is, in my view, of a regulatory nature. The act contains sufficient policy detail for the executive to implement the policy in accordance with the Act.

[43] Parliament has delegated its power to a member of the executive. It did not delegate its power to a faceless person. The Minister, who is designated by the President, acts under the control of the national executive. The delegee is subject to parliamentary control and oversight. Section 42(3) of the Constitution enjoins Parliament to scrutinize and oversee executive action.[24] The Minister is not exempted from this process.

[44] Furthermore, the Minister is accountable to Parliament. Section 55(2) of the Constitution states that:

> '(2) 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.'

[45] The subject matter of the delegated power is, as I have indicated above, very unpredictable and unforeseeable. The Minister is called upon, by way of wide delegated powers, to ensure that the risk posed by the disaster and its consequences are efficiently and effectively addressed. I agree with the respondents that the delegation is made for truly exceptional circumstances. The unpredictability and practical regulatory measures that will have to be put in place to deal with a disaster must be flexible, expeditious and wide.

[46] The applicant argued that section 27 gives the Minister unbridled powers. This, according to the applicant, renders the section unconstitutional. The applicant complained that the section gives the Minister the power to legislate

[24] The Constitution of the Republic of South Africa, Act 108 of 1996.

on almost anything. And at the stroke of a pen, so the argument goes, make laws that affect fundamental rights and criminalize certain acts. The applicant stated that the fact that so much power is concentrated in one-person subject to almost no oversight renders the section unconstitutional. These arguments do not square up with the provisions of the Act.

[47] The purpose of the Act is, *inter alia*, to provide for an integrated and coordinated disaster management policy that focuses on prevention or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery. As I have indicated above the executive would need wide powers in order to realize the stated purposes of the Act. In order to ensure the proper exercise of the wide powers given to the executive, the Act systematically creates numerous constraints on the executive, specifically on the Minister who is designated to administer the Act.

[48] The Act contains sufficient restrains on the Minister's power. The restrains manifest in the fact that the Minister must exercise the power in pursuit of certain stated positive goals. The Act also subjects the Minister's power to negative constraints. I now turn to illustrate the negative constraints and positive goals.

[49] The Minister may not declare a state of disaster on a whim. Certain objective requirements must be present before the Minister declares a national state of disaster.

[50] First, there must be a disaster as defined in the Act.

[51] Second, the National Centre must first classify the disaster as a national disaster before the Minister may declare a national state of disaster. This is so because the classification of a disaster designates primary responsibility to the sphere of government that would be responsible for the coordination and management of the disaster.

[52] Third, after the classification of a national disaster the national executive must deal with it in terms of existing legislation and contingency arrangements. If the Minister has declared a national state of disaster the national executive must deal with it in terms of national legislation and contingency arrangements as augmented by regulations or directions issued by the Minister or his or her delegee. The Minister, being part of the national executive, will perform the functions subject to and in accordance with the decisions of the national executive. In **Esau**[25], Plasket JA summarized the position as follows:

> 'In terms of s85(1) of the Constitution, executive authority is vested in the President. Section 85(2) determines how that authority is exercised. It provides:
>
> "The President exercises the executive authority, together with the other members of the Cabinet, by- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; (b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the Constitution or in national legislation."
>
> In terms of this section, the Constitutional Court held in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, the exercise of executive authority 'is a collaborative venture in terms of which the President acts together with the other members of the Cabinet'. The consequences of this allocation of power in s85(2) were spelt out in *Minister of Justice and Constitutional Development v Chonco and Others*. Ministers act collectively with the President and they are all 'collectively and individually accountable to Parliament under s92(2) of the Constitution'. That means that the entire collective is responsible for every decision, whether or not particular individual members were party to a particular decision.'[26]

[53] Fourth, 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 warrant the declaration of a national state of disaster.

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[25] Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9 (28 January 2021).

[26] Ibid paras [54] and [55].

[54] Although the words “special circumstances” are not defined in the Act, it should, in my view, be circumstances 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, prepare for and respond to the disaster, and, in the aftermath, to reconstruct the damage caused by the disaster. Before the declaration of a national state of disaster the Minister must be satisfied that the requirements mentioned above are present. Therefore, if existing legislation or contingency arrangements adequately provide for the risk or no special circumstances exist, a declaration of a national state of disaster would not be lawful.

[55] Fifth, the Minister must consult a cabinet colleague before making regulations or issuing directions that have an impact on that colleague’s portfolio.

[56] Sixth, the Minister’s power to make regulations or issue directions or authorize the issuing of directions may only be exercised in pursuance of the positive purposes stated in section 27(3) of the Act. The Minister may only exercise those powers if they are 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.

[57] In **Helen Suzman Foundation** it was correctly stated that:

> ‘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.
>
> Therefore on the Section 7(2) argument our view is that the threat caused by the pandemic to the well - being and life of the people of South Africa would have required

> a state response that is grounded in Section 7(2) and that what was required were measures that were reasonable and effective.'[27]

[58] The applicant argued that section 27 empowers the Minister to sub-delegate her power to an impersonal body or faceless persons. It was argued that this is so, because the Minister's power to authorize the issuing of directions is unrestricted.[28]

[59] There is no constitutional provision against sub-delegation. The Act expressly gives the Minister the power to sub-delegate. The Minister may, in terms of the Act, therefore sub-delegate her legislation making function. The applicant does not have a problem with this. Its argument is that the sub-delegation authorised by the Act is impermissible because the Minister may delegate her functions to a faceless person. In **AAA Investments**,[29] Langa CJ said that Ministers will of necessity have to delegate their powers, which do not require the exercise of a political discretion, to officials in their respective Departments.[30]Ministers may therefore delegate certain limited functions to officials in their respective Departments.

[60] The applicant's objection regarding the Minister's power to sub-delegate the issuance of directives to unspecified persons has merit. Earlier in this judgment, I pointed out that the identity of the person to whom power is delegated is important. In my view the same holds true of the person to whom power is sub-delegated.

[61] Since section 27(2) purports to give the Minister the power to sub-delegate her power to any person or body it may be an impermissible delegation of power. An expansive interpretation of the sub-section might be problematic whereas a restrictive one would be in conformity with the Constitution.

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[27] Ibid paras [70] and [71]. Esau ibid at para [16].
[28] Section 27(2).
[29] AAA Investments (Propriety) Limited v The Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC).
[30] At para 89.

[62] We are enjoined to interpret this sub-section in conformity with the Constitution. In **Hyundai**[31] it was said:

> '…Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.
>
> Limits must, however, be placed on the application of this principle.24 On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.25 A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.'[32]

[63] The factors which are relevant in order to determine whether sub-delegation is allowed may in my view also be harnessed, with the necessary changes, in order to determine whether expressly permitted sub-delegation passes constitutional muster. These factors include, nature and impact of the power; extent of the sub-delegation and continued review by the original delegator; practical necessity and the identity and importance of the delegator and the delegee.

[64] The sub delegation in terms of section 27(2) is very wide and may include policy decisions, which are decisions that should preferably be made by a member of the national executive. The power to issue directives may include the power to limit fundamental rights. The power to limit fundamental rights should not and cannot be exercised by an unaccountable, faceless person or body.

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[31] The Investigating Directorate: Serious Economic Offenses and Others v Hyundai Motor Distributors (Pty) Ltd and others 2001 (1) SA 545 (CC).

[32] Ibid paras [23] and [24].

[65] The sub-delegation in terms of section 27(2) may involve the exercise of a discretion. The discretion is not a mechanical one, but includes a significant amount of policy making and careful decision making.[33]This kind of delegation should not be given to an official but may be given to a cabinet member.

[66] With regard to practical necessity, *Baxter* says the following:

> 'Although the breadth, complexity and impact of the power might constitute important reasons for requiring its holder to exercise it personally, these factors might also constitute the very reasons for construing a power of delegation: the number of decisions that have to be made could make it practically impossible for the power to be exercised personally. The courts have shown some flexibility; they have recognized that the benefits of efficiency and localized, ad hoc discretionary decision-making sometimes outweigh the disadvantages of delegation and have found delegation in such circumstances to be valid.'[34]

[67] The scope of the issues that the Minister is authorized to issue regulations and directives about, is very wide and inter-sectoral. It is practically desirable that the Minister sub-delegate her power to her colleagues who have knowledge about their respective portfolios.

[68] Disaster Management is defined as an integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at dealing rapidly with the calamity and its effects. It therefore needs a polycentric management approach. The respective Ministers are the best suited to formulate policies and strategies for their respective Departments in order to mitigate the risk and effects of a disaster.

[69] Ministers, as part of the National Executive, are accountable to Parliament. Their decisions are subject to parliamentary scrutiny. They may make policy decisions pertaining to their respective Departments. They are, in terms of the Act, subject to the collegial control of the Minister and the National Executive

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[33] Baxter Administrative Law Juta & CO 1991 at 438 and 440.
[34] Ibid at 441.

as a whole. In most cases, legislation allows Ministers to make regulations for issues mentioned in the particular legislation.

[70] In my judgment section 27(2) must be interpreted to mean that the Minister may authorise a fellow Minister to issue directions. This interpretation is not strained and is in conformity with the Constitution.

[71] The Minister has in any event authorized only her cabinet colleagues to issue directions regarding COVID-19, within their respective portfolios, either on their own or after consulting a fellow Minister.[35]

[72] The applicant further contended that section 27(2)(n) is too wide because it essentially allows the Minister to authorize a cabinet colleague to issue directions that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimize the effects of the disaster. Likewise, so the applicant argued, regulation 4(10)(c) is too wide because it provides that:

> 'Any Cabinet member may issue and vary directions, as required, within his or her mandate, address, prevent and combat the spread of Covid-19 and its impact on matters relevant to their portfolio from time to time, as may be required, including-
> (a) disseminating information required for dealing with the national state of disaster;
> (b) implementing emergency procurement procedures;
> (c) taking any other steps that may be necessary to prevent an escalation of the national state of disaster or to, contain and minimize the effects of the national state of disaster; or
> (d) taking steps to facilitate international assistance.'

[73] It must be emphasized that this pandemic has practically affected all facets of our lives. Its effects are multi-sectoral and cut across ministerial portfolios. It is therefore a very pragmatic approach to give a specific Minister with intimate knowledge about his or her portfolio the right to issue directions about matters within his or her mandate. That particular Minister will also have the benefit of experts within his or her Department to advise him or her on the necessary

[35] Government Gazette No. 43258 of 29 April 2020.

measures to contain the effects of the pandemic on that particular Department.

[74] The applicant is 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. Those powers, however, relate only to COVID-19 matters, which are matters that demand a swift, integrated, necessary and effective response.

[75] The applicant argued that section 27 is invalid because the Act does not give guidance to the Minister. It pointed out that in **Dawood**[36] the Constitutional Court held that legislation that grants a decision-maker a discretion that can be exercised in a way that infringes constitutional rights can be unconstitutional if it is not accompanied by guidelines that would prevent that discretion from being exercised in an unconstitutional manner. In **Dawood** O'Regan J said:

> 'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here.
>
> We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be

[36] Dawood, Shalabi and Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC).

> required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.'[37]

[76] **Dawood** is distinguishable from this case. In **Dawood,** officials were given discretionary powers without any express constraints. The Act, however, as I pointed out earlier, puts various constraints on the exercise of the Minister's powers. The Act contains sufficient guidance to the Minister to enable her to exercise the powers granted by it constitutionally. Those affected by the decisions will clearly be in a position to know exactly on what basis to challenge her decisions which adversely affect them. The objective requirements to which the decisions are subjected curtail her power.

[77] The applicant stated that the Minister has unbridled powers because she decides whether to declare a national state of disaster and when to extend it. I have already dealt with the factors that the Minister must consider before declaring a state of national disaster. The Minister cannot on a whim extend the state of national disaster. I agree with the Minister's contention that the power of extension of the national state of disaster is by clear implication subject to the same requirements as the original declaration of the national state of disaster terms of section 27(1).

[78] The legislative making power of the executive is subject to the Constitution and the Bill of Rights entrenched in it. When legislation limits rights, such limitation will pass constitutional muster only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, after taking into consideration all relevant factors.[38] This was explained as follows in **Helen Suzman Foundation**:

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[37] At paras 53 and 54.

[38] Section 36 of the Constitution reads:

> '(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

> '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 balance (sic) 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.'[39]

[79] The Minister's legislative powers are subject to the Constitution and existing laws. The issue of whether regulation making by a Minister is administrative action within the meaning of the Promotion of Administrative Justice Act (PAJA)[40] has not yet been definitively decided by the Constitutional Court. The Supreme Court of Appeal has held that it is.[41]We are bound by that holding.

[80] All Ministers' regulations are therefore subject to judicial review based on legality and PAJA.

[81] The applicant asserted that there is insufficient parliamentary oversight and involvement in the raft of delegated legislation that is being made almost daily by the executive. It contended that Parliament should have a *veto* power over the Minister's power to declare a national state of disaster and the making of regulations pursuant to such declaration. It stated that a Parliamentary *veto* power "would ensure that the elected representatives of South Africa have an opportunity to engage with, question and ultimately decide whether to disapprove of the measures taken by the Minister. In other words, it would place the debate about these measures where they belong - before the elected representatives of South Africa and in the public eye".

(e) less restrictive means to achieve the purpose.

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

[39] Ibid para 69.

[40] Act 3 of 2000.

[41] Esau Ibid paras 83 and 84.

[82] The oversight issue was already addressed in **Freedom Front Plus**. I add these few comments to emphasize what the second and third respondents stated in concluding that the current Parliamentary oversight and accountability measures are indeed sufficient.

[83] They pointed out that because national disasters are unpredictable and in most cases fleeting, it is impractical for Parliament to delegate powers to the Minister with millimetre precision. They further stated that the Constitution, the Parliamentary oversight and accountability model and the rules of Parliament enable it, without the *veto* power, to exercise its mandate completely.

[84] In order to ensure that its oversight and accountability mandate is not hampered, during the pandemic, it adopted specific rules to facilitate virtual sittings in the National Assembly as well as the National Council of Provinces. Both houses continued with their business even during the COVID-19 lockdown. The various committees of the National Assembly as well as the select committees of the NCOP continued with their oversight duties. They set out in detail how and when members of the national executive were called to account to Parliament during the national state of disaster. On the contrary, the applicant could not point to specific failures of Parliament to conduct its oversight and accountability functions.

[85] We may not prescribe to Parliament how it must execute its oversight function. This was made plain in **Nkandla**.[42] The Constitutional Court found as follows:

> '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 them, 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

[42] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC).

> 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". 95 Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution.96 It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.'[43]

[86] It is correct that the Act gives the Minister wide powers. I must, however, point out that even wide rivers have banks. The negative constraints, positive objectives, judicial review and Parliamentary oversight constitute sturdy banks that ensure the Minister's power is sufficiently limited. Section 27 of the Act withstands constitutional muster. This application ought to be dismissed.

[87] In light of my conclusion, I do not deem it necessary to deal with the appropriateness of the remedy suggested by the applicant.

[88] All the parties were in agreement that the **Biowatch**[44] principle should apply with regard to costs.

[89] I accordingly make the following order:

[89.1] Condonation is granted for the applicant's non-compliance with the prescribed forms, time periods and service requirements and leave is granted for this application to be heard as one of urgency in terms of Uniform Rule 6(12).

[89.2] The application is dismissed with no order as to costs.

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[43] Ibid at para 93.

[44] Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC) at paras 22 and 23.

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C.J. MUSI, JP

I concur.

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L. WINDELL, J

MATOJANE J

[90] I have had the benefit of studying the main judgment. I am respectfully unable to concur fully in the reasoning and the outcome it reaches. The application concerns a critical question relating to the limits of the delegation of plenary legislative power by Parliament. This issue lies at the heart of our constitutional democracy.

[91] Briefly stated, my reasons for disagreeing with the main judgment are these:

(a) Section 27(2) of the Disaster Management Act ("the DMA") constitutes an excessive delegation of legislative power by Parliament to the Minister.

(b) The scope of the discretion granted to the Minister is broad and open-ended[45], with insufficient guidance provided as to how to exercise that power.

[45] Helen Suzman Foundation v Speaker of the National Assembly and Others (32858/2020) [2020] ZAGPPHC 574 (5 October 2020) in paragraph 11 this court explained that:

'It is clear that the power to make regulations and issue directions is wide ranging and extensive in dealing with the effects of a Disaster but at the same time, also has the potential to have far reaching impact on the lives of ordinary South Africans. Since the declaration of the national state of Disaster, there has been much regulation making over the past few months covering a wide range of issues.'

(c) The process of executive law-making lacks transparency, public participation and debate of the parliamentary process and reduces accountability in the exercise of delegated legislative power.

(d) For any of the reasons set out above, I am of the view that section 27(2) is unconstitutional.

[92] The essential point of difference I have with the main judgment is that section 27(2) of the DMA grants the Executive excessive regulation-making powers to legislate, interpret and execute legislation that has wide-ranging limitations on the fundamental rights of all citizens without requiring that such legislation be first tabled in Parliament and approved by Parliament to ensure accountability and openness of Government.

[93] I accept that Section 27(2) is intended to enable the CoGTA Minister to swiftly enact regulations that are responsive to a sudden national disaster. I also accept that Parliament cannot legislate in advance to meet the demands of combating unforeseen calamities. Unless the regulations were regarded as too urgent to await prior consultation with the National Assembly, there is no reason why the Minister of CoGTA could not table in Parliament a copy of any declaration of a national disaster; any regulations made or directions issued under section 27(2) and any extensions of the COVID-19 state of Disaster to enable the National Assembly to make recommendations or even invalidate them as they intended to cover even the post-Disaster period.[46]

[94] Since the declaration of the national state of Disaster on 25 March 2020 and despite numerous meetings between members of Parliament and the Executive and direct consultation by the President with political party leaders represented in Parliament, no covid related legislation to enhance and strengthen Parliament's oversight of the delegated legislation has been

[46] Helen Suzman Foundation supra para 91:
'… the DMA was intended to cover Disasters of a progressive nature (which must read extended in duration), that it required continuous responses and measures (far removed from a once off intervention) and that it also extended to cover the post Disaster period. All of this militate against an interpretation that the DMA was intended as a short term measure and that the powers it bestows on the Minister were intended to be of limited duration only.'

forthcoming. It bears mentioning that such meetings are not parliamentary oversight but mere presentations by the Executive.

[95] Parliament has not made any broad policy decisions in relation to COVID-19 at all; this is because of the breadth of section 27 and the manner in which it excludes parliamentary involvement. This is a comprehensive divesting of legislative power by Parliament to the Executive.

[96] The Constitution's transformative aim is to ensure that the fundamental democratic values of accountability, responsiveness and openness are realised. Chaskalson J in New Clicks South Africa[47] stated that the Constitution calls for an open and transparent Government and requires public participation in making laws by Parliament and deliberative legislative assemblies. The same was echoed by Sachs J in Executive Council I when he stated that:

> 'The reason why full legislative authority, within the constitutional framework mentioned above, is entrusted to Parliament and Parliament alone would seem to be that the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision-making process, the involvement of civil society in relation to committee hearings, and the pluralistic interaction between different viewpoints which parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution. It is Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes'[48].

[97] Rehnquist J in the United State Supreme Court[49] explained the importance of the rule against excessive delegation of legislative power as follows:

> 'First and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine

[47] Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA para 113.
[48] Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC) (***'Executive Council I'***) para 205.
[49] Industrial Union Department, AFL-CIO v American Petroleum Institute 448 US 607 at 685–686 (1980).

> guarantees that, to the extent that Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion. Third, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.'

[98] Parliament does not possess the legislative power as original power. The authority of Parliament to make laws is contained in section 43 of the Constitution, which vests the national legislative authority in Parliament, an elected and deliberative body. The Legislature cannot further delegate delegated powers as expressed in the legal maxim *delegare non potent delegare*. Chaskalson P in Executive Council, Western Cape[50] affirmed that:

> '… In a modern state, detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution that prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country, and I do not doubt that under our Constitution, Parliament can pass legislation delegating such legislative functions to other bodies.'

[99] The Constitutional Court defined the limits to which legislative power may be delegated by explaining the crucial distinction between delegating authority to make subordinate legislation within the framework of an empowering statute, which is allowed and assigning plenary legislative powers to another body that is not[51]. The power under scrutiny, in that case, was section 16A of the Local Government Transition Act 209 of 1993, which purportedly conferred power on the President to amend the Act by proclamation. The section was declared invalid for inconsistency with the Constitution in that its provisions amounted to a delegation of plenary legislative authority to another body.

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[50] Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC).
[51] Ibid at para 51. See also Bezuidenhout v Road Accident Fund 2003 (6) SA 61 (SCA) para 10.

[100] In Justice Alliance,[52] the Constitution required an Act of Parliament to extend the terms of office of any Constitutional judge, including the Chief Justice. Parliament chose to give its power to the President through section 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001. The President exercised that power by deciding to extend the term of the then Chief Justice. The Constitutional Court held that it was 'self-evident that section 8(a) itself did not extend the Chief Justice's tenure but instead surrendered power to the President to do so if he wished: The Court held that:

> '… primary reason for delegation is to ensure that the Legislature is not overwhelmed by the need to determine minor regulatory details. Thus, delegation relieves Parliament from dealing with detailed provisions that are often required for the purpose of implementing and regulating laws. As Chaskalson P observed in *Executive Council I*, delegation "is necessary for effective law-making". However, the Court properly draws a distinction between delegation to make subordinate legislation within the framework of an empowering statute and "assigning plenary legislative powers to another body'.
>
> Section 8(a) does not delegate the determination of mere minor detail to the Executive but shifts all of the power granted by section 176(1) from Parliament to the Executive. The provision usurps the legislative power granted only to Parliament and therefore constitutes an unlawful delegation.

[101] As in the present case, the broad regulation-making powers of the Minister goes beyond stipulating the details necessary for the implementation of the legislation passed by Parliament. The section transfer plenary legislative power exclusively to the Minister of CoGTA without the democratic input of Parliament. In terms of section 27(1) of the DMA, the CoGTA Minister is empowered to declare a national Disaster and to make regulations "after consulting the responsible cabinet member". She is solely responsible for the powers and functions assigned to her by the President as section 92(2) of the Constitution states that *"Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions"*. There is no requirement that the Cabinet must

[52] Justice Alliance of South Africa v President of the Republic of South and Others 2011 (5) SA 388 (CC) at paras 61-62.

discuss and agree to the declaration of the Disaster and to the regulations promulgated in terms of the proclamation. The Cabinet as a collective cannot overrule her decisions.

[102] The Minister of CoGTA is empowered to declare a national state of Disaster, if, in her view, existing legislation and contingency arrangements do not adequately provide for the national Executive to deal effectively with the Disaster; or other special circumstances warrant the declaration of a national state of Disaster". The "other special circumstances" are not defined. Parliament has no say on whether existing legislation and contingency arrangements do not adequately provide for the national Executive to deal effectively with the Disaster.

[103] The Minister of CoGTA decides what a national Disaster is, when it may be declared, and its extension requirements. The Minister keeps her powers for as long as the state of Disaster continues.

[104] Most importantly, the CoGTA Minister not only decides when to assign herself the regulatory powers under section 27(2), she is empowered to extend the national state of Disaster for a month at a time without parliamentary approval or any member of the Executive. There is no limitation to the number of extensions the Minister could effect in terms of section 27(5)(c)[53]. With no indication as to when the vaccine will be fully rolled out, and the time the post-pandemic economic recovery will take, the Minister of CoGTA will continue to run the country without any parliamentary input.

[105] Section 27 empower the Minister to delegate the power to make directions to others. There is no restriction to whom she can grant this power. The Minister has permitted every other Minister to pass COVID regulations relating to their department without parliamentary oversight or even the oversight of the CoGTA Minister herself. This is not a lawful delegation.

[53] Helen Suzman Foundation v Speaker of the National Assembly [2020] ZAGPP 574 at 103 – 104.

[106] Section 27(4) provides that regulations made under section 27(2) 'may include regulations that prescribe penalties for contravention of the regulations. This has a significant impact on an individual's rights and liberties and would generally fall within the Parliament's domain as it has far-reaching consequences. This is yet another example of the Legislature delegating its legislative power to the Executive.

[107] The main judgment in paragraph 76 states that the Act contains sufficient guidance to the Minister to exercise the powers granted to her. Granted, the powers of the Minister in section 27(2) are subject to section 27(3), which provides as follows:

> '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'

[108] Neither the Act nor the regulations guide as to circumstances relevant to the Minister's exercise of her broad discretionary powers in a constitutional manner, given that section 27 legislation has the potential to violate rights. Deliberations that usually accompanies the drafting of delegated legislation is absent, and there is no guidance as to when the limitation of rights will be justifiable. The listed restrictions permit far-reaching interventions to assist or protect the public; prevent or combat disruption; dealing with the destructive and other effects of the Disaster. Without the policy framework within which the Minister must operate, it becomes difficult for the courts to determine how the Minister takes a particular decision or how she arrived at the decision to extend the state of the Disaster.

[109] Dawood[54] highlighted the importance of providing guidance in the original legislation that will prevent the discretion from being exercised in an unconstitutional manner where too much discretionary power is conferred on the Executive. The Court stated that:

> 'We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. The guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.'

[110] The main judgment in paragraph 41 states that the purpose of the regulations and directions made under section 27 is merely to augment existing legislation and contingency arrangements and that the Minister has no power to repeal, override or contradict any existing law. Section 27 permit the making of regulations inconsistent with the primary legislation. The main judgment is well aware of the decision In Esau,[55] where it was held that Section 27(2) is broad enough to "intrude upon existing legislation in a Disaster situation in which the DMA builds in checks, balances and limitations" and the judgment in BAT - SA [56] , where it was held that it was not *ultra vires* for the Minister to pass regulations inconsistent with existing acts, in so far as the inconsistency did not amount to a prohibition.

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[54] Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[55] Esau v Minister of Co-operative Govenance and Traditional Affairs 2020 (11) BCLR 1371 (WCC) para 175

[56] The British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others (6118/2020) [2020] ZAWCHC 180 (11 December 2020).

[111] The above two decisions show that excessive delegation of legislative power diminishes the courts' capacity to limit the abuse of power as there are no ascertainable standards to test the exercise of delegated legislative discretion.

[112] The Minister's power goes beyond augmenting existing legislation. Section 27(2)(g) of the DMA permits the Minister to make subordinate legislation that suspends or limit the transportation and sale of alcoholic beverages; this is even though those matters are allowed and regulated by and in terms of national and provincial primary legislation (i.e. the national Liquor Act 59 of 2003 and provincial liquor laws made by the provincial legislatures).

[113] For the reasons stated above, I find that section 27 of the DMA delegates wide powers to the Minister of CoGTA and is accordingly unconstitutional.

[114] The applicant seeks an order that would read into section 27 of the DMA the requirement that the CoGTA Minister table every declaration of the national state of Disaster every extension thereof, and regulations and directions enacted under section 27 in Parliament, and that Parliament be given the right to disallow regulations and directions enacted or extensions of any national state of Disaster.

[115] The Constitutional Court[57] has held that "reading-in" should be resorted to sparingly because the "actual act of writing or editing legislation may constitute a possible encroachment by the Judiciary on the terrain of the Legislature and, therefore, a violation of the separation of powers".

[116] It should be for Parliament and not the Court to determine how to perform its functions of oversight over the Executive. In National Coalition for Gay and Lesbian Equality and Others,[58] The Constitutional Court stated that its

[57] Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others (CCT05/15) [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 (CC) (18 August 2015).

[58] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999) at para 76.

remedy of reading-in was not final and would eventually be controlled by the Legislature it held that:

> 'It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part, or reading into or extending the text, its choice is not final. Legislatures are able, within Constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine- tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.'

[117] I would have declared the section unconstitutional and suspend the declaration of invalidity for two years to enable Parliament to amend the DMA to make it constitutional. This will not undermine the Minister's ability to continue to respond swiftly and effectively to a sudden national disaster and will not invalidate any portion of the CoGTA Minister's response to COVID-19, the national Disaster, as well as the regulations and directions made under it.

K.E. MATOJANE, J

Appearances:

For the Applicants:	Adv S. Budlender SC with Adv M. Musandiwa & Adv P. Oliver Instructed by Klagsbrun Edelstein Bosman Du Plessis Inc. Pretoria
For the 1st & 4th Respondents:	Adv. W. Trengove SC with Adv A. Hassim & Adv T. Moshodi Instructed by State Attorney Pretoria

For the 2nd & 3rd Respondents:	Adv. N.H. Maenetje SC with Adv N. Muvangua Instructed by State Attorney Pretoria