IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 139/2021

In the matter between:

THE SOUTH AFRICAN BREWERIES PROPRIETARY LIMITED	1st Applicant
NTOMBI MARIA SIBIYA	2nd Applicant
ALISTAIR HILLARY SHAPIRO	3rd Applicant
SITHEMBISO REUBEN MABASO	4th Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	2nd Respondent

CORAM: ALLIE, NDITA et CLOETE JJ

JUDGMENT DELIVERED ELECTRONICALLY ON 27 MAY 2022

ALLIE, J (CLOETE J concurring, NDITA J dissenting)

1. The applicants request the following relief in the Notice of Motion:

1.1. It is declared that Regulation 44 and Regulation 86 promulgated in Government Gazette No 1423 on 29 December 2020 by the Second Respondent are unlawful and of no force and effect.

1.2. Alternatively to paragraph 2 above, the decision of the Second Respondent to promulgate Regulation 44 and Regulation 86 in Government Gazette No 1423 on 29 December 2020 is hereby reviewed, corrected and set aside.

1.3. The Respondents are to pay the costs of this application.

2. The Applicants' grounds for bringing the Application are as follows:

2.1. Regulations 44 and 86 (**"the Impugned Regulations"**) are unlawful because they are *not necessary* to achieve any of the purposes listed in section 27(3) of the Disaster Management Act 57 of 2002 (**"DMA"**), namely:

(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.

2.2. The Minister acted *ultra vires* in making the Impugned Regulations because the DMA does not grant her the authority to do so.

2.3. The Impugned Regulations impermissibly infringe constitutional rights to dignity, privacy, bodily and psychological integrity and freedom to trade.

2.4. The Impugned Regulations constitute administrative action and are therefore subject to review under PAJA, alternatively the principle of legality.

2.5. The procedure adopted prior to making the Impugned Regulations was not fair and regular in that there was no bilateral engagement, with *inter alia*, the applicants, who were not afforded an opportunity to make representations.

2.6. The Second Respondent has allegedly not demonstrated that the Impugned Regulations in fact reduced significantly the number of trauma cases and that the Impugned Regulations are rationally connected to the purported purpose of saving hospital space and saving lives, especially since the RBB report commissioned by First Applicant allegedly shows that there is no evidence that alcohol consumption directly causes an increase in hospital cases and concomitantly, that the alcohol ban causes a decrease in hospital trauma cases because other restrictive measures such as a curfew, limited capacity of persons indoors and provincial travel restrictions all contributed to the reduction in trauma cases. Therefore, the Second Respondent relies on the correlation between alcohol consumption and trauma cases whereas she should have determined precisely the cause of the reduction in trauma cases in the presence of other restrictive measures.

2.7. Although the alcohol ban was repealed in early February 2021, the issues in dispute are not moot and the Court ought to consider them because it concerns the infringement of constitutional rights.

Mootness

3. The First Applicant advanced three bases for the relief sought: (a) its own trade, which was abandoned during argument before us with the Applicants reserving the right to raise it on appeal; (b) its interest in the totality of the "trade chain" in beer and other alcoholic beverages; and (c) the public interest as contemplated in Section 38(d) of the Constitution, in that the Impugned Regulations constituted unlawful impediments to the right to trade, including those in the "trade chain" as well as an unlawful infringement of human dignity in that they sought to limit the choice to drink alcohol. The Second, Third and Fourth Applicants all approached Court in their personal capacities.

4. The Impugned Regulations have been repealed and are of no force and effect since 2 February 2021, after they were substituted on 1 February 2021 by the easing of the restriction of the full temporary suspension on the sale, dispensing and transportation of alcohol.

5. This application was launched on about 6 January 2021 and persisted with after the repeal of the Impugned Regulations.

6. Applicants seek a declaration that the Impugned Regulations are unconstitutional and *ultra vires* the powers conferred on Second Respondent by section 27(3) of the DMA and consequently the Impugned Regulations are invalid and of no force and effect, despite them already having no force and effect since 2 February 2021.

7. There is no dispute concerning the fact that the Impugned Regulations have no legal effect any longer. The practical effect that a review of the Impugned Regulations would have, is limited to a deterrence measure in the event that the same Regulations are made in similar prevailing circumstances, and so too would a declaration that it violated certain Constitutional Rights of the Applicants.

8. Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013, provides that: *'When at the hearing of an appeal the issues are of such a nature that the decision sought will*

have no practical effect or result, the appeal may be dismissed on this ground alone.' (emphasis added)

9. Courts of appeal as well as the Constitutional Court in direct access applications have however exercised a discretion to hear matters that are moot when the appeal requires the adjudication of a distinct point of law that does not involve a determination of the merits or factual matrix.[1]

10. In the **Langeberg Municipality** [2] case, it was held that: *'… A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others*.'

11. In **S v Manamela** [3] the Constitutional Court held in a criminal trial context, that the constitutionality of the reverse *onus* provision in section 37(1) of the General Law Amendment Act 62 of 1955, holds compelling public interest because it may prejudice the general administration of justice as well as the interests of accused persons affected thereby. That issue was clearly a separate and distinct issue from the merits and the facts and it could be determined despite it being moot in that case.

12. In **Normandien Farms**[4] the Constitutional Court, with reference to the factors listed in **AA Investments**,[5] held as follows:

> *'[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: whether it is in the interests of justice to grant leave to appeal, notwithstanding*

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1 Natal Rugby Union v Gould 1999 (1) SA 432 (SCA).

2 Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) at [11].

3 S v Manamela and Another (Director-General of Justice Intervening) 200(3) SA 1 at [12].

4 Normandien Farms v South African Agency for the Promotion of Petroleum Exploration & Exploitation SOC Ltd & Another 2020 (4) SA 409 (CC).

5 AA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC).

the mootness. A consideration of this Court's approach to mootness is necessary at this juncture, followed by an application of the various factors to the current matter.

[47] Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical".

[48] This Court has held that it is axiomatic that "mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require". This Court "has discretionary power to entertain even admittedly moot issues".

[49] Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter.

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

> *(a) whether any order which it may make will have some practical effect either on the parties or on others;*
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> *(b) the nature and extent of the practical effect that any possible order might have;*
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> *(c) the importance of the issue;*
>
> *(d) the complexity of the issue;*
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> *(e) the fullness or otherwise of the arguments advanced; and*
>
> *(f) resolving the disputes between different courts."*

13. The Constitutional Court cited with approval its findings on mootness in **National Coalition for Gay & Lesbian Equality v Minister of Home Affairs**,[6] when considering the **Normandien Farms** case.

14. In **Pheko**'s[7] case, which Applicants refer to in support of the contention that litigation over the infringement of constitutional rights is never moot because the aggrieved party is entitled to a declaration of constitutional invalidity even where consequential relief is no longer possible, the Constitutional Court was called upon to decide whether to grant leave to appeal directly to it without leave to appeal to the Supreme Court of Appeal first having been pursued. The Constitutional Court had regard to section 167(3)(b) of the Constitution and confirmed the principle that it is well established that leave to appeal will be granted if a constitutional issue is raised and if it is in the interest of justice to hear the appeal.

15. The Court, without prescribing a *numerus clausus* of what constitutes the interests of justice, held:

> *"[31] Important to the interests of justice is the question of mootness. However, it too is but one of the factors that must be taken into consideration in the overall balancing process. In Independent Electoral Commission v Langeberg Municipality, this Court, per Yacoob J and Madlanga AJ, held that:*
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> > *'[T]he Court has discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which the Court may make <u>will have some practical effect either on the parties or on others</u>. Other factors that may be relevant will include <u>the nature and extent of</u>*

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6 2000 (2) SA 1 (CC) (2000 (1).

7 Pheko and Others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of SA as Amicus Curiae) 2012 (2) SA 598 (CC).

the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced."

Indeed, if the applicants' rights were not infringed and are no longer threatened, or the applicants have no interest in the adjudication of the dispute, it will not be in the interests of justice to grant leave to appeal directly to this Court.' (emphasis added)

16. The Constitutional Court went on to find in **Pheko**, that the question of whether the appellants were unlawfully evicted ostensibly in implementing an evacuation of a municipal area, was a live issue that would impact on their claim for restitutionary relief in due course.

17. It is noted that in **Pheko**, the mootness point was raised on the ground that the appellants had already been evacuated, whereas in the instant matter the Impugned Regulations have already been repealed, which means that the offending conduct had voluntarily ceased prior to the case being argued before us.

18. Respondents rely on **Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford**[8] which they argue draws the distinction between what a court of first instance may do, as opposed to a court of appeal, when there is no live controversy as follows:

'[21] I have given consideration to whether the fact that the arguments advanced on behalf of Mr Stransham-Ford engaged constitutional issues detracts from these [established] *principles. In my view they do not. Constitutional issues, as much as issues in any other litigation, only arise for decision where, on the facts of a particular case, it is necessary to decide the constitutional issue.'*

[8] Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others 2017 (3) SA 152 (SCA) at [21]-[27].

19. At the time that the High Court delivered its judgment in **Stransham-Ford,** there was no longer an existing controversy to pronounce upon. The case was no longer justiciable, therefore the Supreme Court of Appeal held that:

> *'[22] Since the advent of an enforceable Bill of Rights, many test cases have been brought with a view to establishing some broader principle. <u>But none have been brought in circumstances where the cause of action advanced had been extinguished before judgment at first instance</u>. There have been cases in which, after judgment at first instance, circumstances have altered so that the judgment has become moot. There the Constitutional Court has reserved to itself a discretion, if it is in the interests of justice to do so, to consider and determine matters even though they have become moot. It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.*
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> *[23] The common feature of the cases, where the Constitutional Court has heard matters notwithstanding the fact that the case no longer presented a live issue, was that the order had a practical impact on the future conduct of one or both of the parties to the litigation. In IEC v Langeberg Municipality, while the relevant election had been held, the judgment would affect the manner in which the IEC conducted elections in the future. In Pillay the court granted a narrow declaratory order that significantly reduced the impact on the school of the order made in the court below. In Pheko, while the interdictory relief that had been sought had become academic, a decision on the merits would affect its claim for restitutionary relief.*
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> *[24] This case presents an entirely different picture. Relief was sought specifically tailored to Mr Stransham-Ford's circumstances. The order*

expressly applied only to any doctor who provided him with assistance to terminate his life. The caveat in para 4 of the order left the common law crimes of murder and culpable homicide unaltered. No public purpose was served by the grant of the order. In any event, I do not accept that it is open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that their decision will have broader societal implications. There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task. The courts have no plenary power to raise legal issues and make and shape the common law. They must wait for litigants to bring appropriate cases before them that warrant such development. Judge Richard S Arnold expressed this well when he said:

> *'[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do …'*

[25] The situation before Fabricius J was not comparable to the position where this court or the Constitutional Court decides to hear a case notwithstanding that it has become moot. When a court of appeal addresses issues that were properly determined by a first instance court, and determines them afresh because they raise issues of public importance, it is always mindful that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues. A feature of all the cases referred to in the footnotes to para 22 above [i.e. **Langeberg, Pheko** and **Pillay**] *is that the appeal court either overruled the judgment in the court below or substantially modified it. The appeal court's jurisdiction was exercised because 'a discrete legal issue of public*

importance arose that would affect matters in the future and on which the adjudication of this court was required'. The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination."

"[26] The jurisprudence in appellate courts speaks of the case having become moot so that it no longer presents a live issue for determination. I do not think that the extinguishing of a claim by death before judgment is an instance of mootness in the sense in which that expression is used in these cases. If a cause of action ceases to exist before judgment in the court of first instance, there is no longer a claim before the court for its adjudication. Mootness is the term used to describe the situation where events overtake matters after judgment has been delivered, so that further consideration of the case by way of appeal will not produce a judgment having any practical effect. Here we are dealing with a logically anterior question, namely, whether there was any cause of action at all before the High Court at the time it made its order. Was there anything on which it was entitled to pronounce? The principles governing mootness have little or no purchase in that situation.

[27] For those reasons alone therefore the order made by Fabricius J must be set aside. But that leaves the dilemma that it is a reasoned and reported judgment by the High Court and if this Court does not at least to some extent, address the merits it may be taken as having some precedential effect. That is of particular concern in the present case, as it has already been treated as reflecting the South African legal position by a court in New Zealand. This compels us to deal with the merits insofar as necessary in order to dispel that view. In doing so I adopt the same course as did the Constitutional Court in Director of Public Prosecutions, Transvaal v Minister of Justice and Correctional Services, a case where the High Court had incorrectly entered upon the question of the

constitutional validity of certain provisions of the Criminal Procedure Act 51 of 1977 dealing with child witnesses. It did so and made a declaration of constitutional invalidity in respect of those provisions. Notwithstanding that its orders fell to be set aside for that reason alone, the Constitutional Court dealt with the issue of constitutional invalidity and held that the impugned provisions were constitutionally compliant. Inasmuch as I have concluded that, on both its exposition of the law and on the facts, the High Court should not have made the order it did, I deal with the merits to the extent necessary to explain why that was so, both legally and factually'. (emphasis added)

20. Respondents also rely on **Ramuhovhi and Another v President of the Republic of South Africa and Others, (Women's Legal Trust as amicus curiae**)[9] where the Court held that:

"[19] The general principle determining whether a court will entertain a matter is that —

(1) "courts will only act if the right remedy is sought by the right person in the right proceedings and circumstances''

21. Respondents rely further on **Laser Transport Group (Pty) Ltd and Another v Elliot Mobility (Pty) Ltd and Another**[10] where the Court held:

"[21] As shown above, this court has exercised its discretion to determine appeals which are moot where issues arising involve a discrete legal point of public importance that would affect matters in the future. In their alternative submission, the appellants argued that this court should exercise its discretion to entertain this appeal because the issues that arise 'could or should' affect similar matters in the future. They contended that the interpretation of s 2(1)(a)

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9 2016 (6) SA 210 (LT).

10 (835/2018) [2019] ZASCA 140 (1 October 2019).

of the PPPFA involved Constitutional issues that impacted on public procurement, just administrative action, and access to courts. Qoboshiyane provides no support for the appellants' submissions. If anything, that case illustrates that even where Constitutional issues are implicated, if the decision is case specific, there are no grounds for the court to exercise its discretion in favour of entertaining an appeal that is moot. Even if the assessment of objective factors under s 2(1)(b)(i) of the PPPFA was incorrectly applied, or the tender process was tainted by illegality or the Full Court's substitution of tender award was wrong, no basis was laid for a conclusion that the matter raised issues of public importance."

22. In their note on mootness, the respondents also refer to **Baleni**[11] and submit that the court in that case simply ignored **Stransham-Ford**, by seeking to distinguish it on the basis of public versus private law. In **Baleni** the first applicant approached the High Court in both her personal capacity and as a representative of her community. The remaining applicants were members of that community. They sought certain declaratory relief coupled with a *mandamus* and an interdict. The case involved mining rights. One of the grounds of opposition, raised by the fifth respondent, was that the declaratory relief, even if granted, would be academic because the applicants had since been provided with the documentation they sought, and further that there were no longer any live issues between the parties. Counsel relied on **Stransham-Ford**.

23. The High Court rejected this argument on the following basis:

'[96] That matter was about the rights of the deceased to choose his dying method. In the matter before me the applicants' standing is not only derived from their individual rights as occupiers, but also as part of a community and in the public interest. The issues raised in this matter do not only affect them, but also future generations…'

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[11] Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others 2021 (1) SA 110 (GP); [2020] ZAGPPHC 485 (11 September 2020) at [96]; [97] to [101].

24. At paragraphs [97] to [100] the High Court in **Baleni** relied on various Constitutional Court judgments dealing with the discretion afforded to an appeal court to entertain a matter that has become moot. In paragraph [101] it also cited **Ramuhovhi** in support of its conclusion. However the latter judgment was handed down on 1 August 2016, prior to **Stransham-Ford** which was delivered on 6 December 2016.

25. At para [102] the High Court in **Baleni** also referred, as authority, to **Minister of Finance v Oakbay Investments**[12] where a full court sat as a court of first instance. There the Minister of Finance sought, *inter alia*, a declaratory order in the public interest that he was not empowered by law, nor obliged, to intervene in the banking relationships between certain respondent banks and their clients. As is apparent from the judgment, this relief was specifically based on s 21(1)(c) of the Superior Courts Act 10 of 2013 ("the Act"). The relevant paragraphs of that judgment are [51] to [53]:

> *'[51] The basis for the relief that the Minister seeks is section 21(1) (c) of the Superior Courts Act 10 of 2013. It provides:*
>
> > ***Persons over whom and matters in relation to which Divisions have jurisdiction***
> > *21. (1)* A Division has jurisdiction over *all persons residing in or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and* all other matters of which it may according to law take cognizance, and has the power –
> > *(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. (Emphasis added).*
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> *[52] The exercise of the Court's jurisdiction in terms of section 21(1) (c) follows a two-legged enquiry. (See* Durban City Council v Association of

[12] 2018 (3) SA 515 (GP) at [51] to [53].

Building Societies *and confirmed in* Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd)*:*

[52.1] the Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so,

[52.2] the Court must decide whether the case is a proper one for the exercise of its discretion.

[53] The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the Court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the Court is satisfied accordingly, does it proceed to the second leg of the enquiry.'

26. At para [104] of **Baleni** the High Court found that: *"There is no doubt that the applicants in the matter before me have satisfied the requirements in terms of the first leg of the enquiry. They have an interest in an existing, future or contingent right or obligation in relation to the land that forms the subject matter of the mining right application".* (My emphasis).

27. Assuming that the High Court's conclusion regarding the subject matter in **Baleni** was correct (it is not necessary to take it any further than that for present purposes) in the case before us the subject matter is the Impugned Regulations that are no longer in force. It may be, as the Minister herself states, that a full alcohol ban may be reimposed in the future depending on the particular circumstances at the time. To my mind, however a distinction must be drawn between the subject matter of a full alcohol ban *per se* (on the one hand) and the true subject matter in this case (on the other) which is the Impugned Regulations that no longer exist. Put differently, the cause of action is the Impugned Regulations themselves. That cause of action fell away on 1 February 2021 but the Applicants did not amend their relief to advance a case in terms of s 21(1)(c) of the Act. They persisted in pinning their colours to the previously existing mast of the

Impugned Regulations. Accordingly, and following **Stransham-Ford** (by which we are bound) the cause of action ceased to exist before judgment in this court of first instance.

28. On the particular facts before us, no case have been advanced to support a conclusion that there is a live issue for determination that will impact on consequential future relief, whether it be restitutionary in nature or other relief and whether the relief sought would impact upon other persons, if not on the Applicants *in casu*. Indeed, the approach taken by the Applicants during argument in reply was that they would have thought the Respondents would welcome judicial guidance on the issue. **Stransham-Ford** makes clear that we are precluded from doing so as a court of first instance. The Applicants' reliance on Section 172(1)(a) of the Constitution is also misplaced since the "constitutional matter" which we are asked to declare invalid no longer exists.

29. Applicants rely on **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd** [13] for the contention that the principle of legality in a review in terms of PAJA, necessitates a consideration of a just and equitable remedy and that militates against a finding of mootness.

30. As pointed out earlier, there is no relief sought *in casu* which would constitute a just and equitable remedy. The only relevant relief sought is the declaration of Constitutional invalidity devoid of just and equitable remedial consequences.

31. Applicants also rely on the Supreme Court of Appeal's finding at [33] in **Esau** [14] for the contention that it in the interests of justice that the violation of Constitutional Rights be decided although the Impugned Regulations were withdrawn and replaced with new ones. However there the Supreme Court of Appeal sat as a court of appeal and not a court of first instance, and therefore the applicants' reliance on **Esau** for lack of mootness, is misplaced.

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[13] 2011 (4) SA 113 (CC) at [84]

[14] Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others 2021 (3) SA 593 (SCA).

32. Subsequent to the drafting of this judgment, a full court of this Division sitting as a court of first instance handed down judgment on 3 December 2021 in **Vinpro NPC v President of the Republic of South Africa and Others**.[15] Counsel were thus afforded the opportunity to file supplementary notes which they duly did on 17 and 24 December 2021.

33. In **Vinpro** it was found, seemingly following **Stransham-Ford**, that the repeal of the same Impugned Regulations at issue in this matter prior to the hearing had rendered the relief sought "moot" (the nature of the challenge on the merits appears to have been different to that before us).

34. The finding of mootness in **Vinpro** conflicts with another full court decision of first instance in this Division, namely **BATSA**, which I deal with later in this judgment under the section on "Necessity in section 27(3) of the DMA". In **BATSA** the court held that a court of first instance has a discretion to decide a moot case. There are thus two conflicting decisions of full courts of first instance in this Division.

35. **BATSA** did not refer to **Stransham-Ford**, whereas **Vinpro** refers to **Stransham-Ford** and appears to follow it although it is stated at paras [39] to [42] of the judgment that:

> *'[39] Factually, the potential "mootness" in connection with this application arose more than (6) months ago when the January Regulations were the subject of appeal. By contrast, in BATSA, the application was fully argued when the dispute was "live". Judgment was reserved and the issue of mootness only made an appearance (2) weeks later, this before the judgment was handed down.*
> *[40] Conversely, in the current application, whatever the factual position and circumstances were in January 2021 and, whatever influences these held for*

[15] (1741/2021) [2021] ZAWCHC 261 (3 December 2021).

the lawfulness or otherwise of the January Regulations would have no bearing on any future regulations that may or may not be contemplated by the government respondents.

[41] Unterhalter AJA, writing for the court in Capitec Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others, eloquently set out the correct test to be applied when a shield of mootness is raised in the following terms, namely:

> *'…if the appeal remains live in respect of the principal litigation, there is no basis to rule that the appeal is moot…'*

[42] In our view this court does not have any discretion to hear a matter which has become moot and in our view, this matter has become moot.'

36. Be that as it may, for the reasons set out herein, I find that there was no live controversy when the matter was argued before us and in this sense the matter had been rendered "moot". To this extent I agree with the conclusion reached in **Vinpro** on mootness.

37. To this should be added that in their supplementary note the applicants placed reliance on **J T Publishing (Pty) Ltd v Minister of Safety and Security**.[16] There the Constitutional Court held that *it* has the power to decide whether or not to hear moot cases and I do not see how this advances the applicants' submissions on mootness. In any event that decision pre-dates the Superior Courts Act. I have not been able to find, nor were we referred to, any decisions of courts of first instance, other than **Baleni** and **BATSA**, to the effect that in a challenge as currently formulated by the applicants a court of first instance has the power to decide a matter where there is no longer a live controversy between the parties.

38. Concerning the possible imposition of a further alcohol ban in the future, relevant conditions that prevail then, are likely to differ markedly from those that prevailed on 28 December 2020, in that South Africa now has access to vaccinations not only for its

[16] 1997 (3) SA 514 (CC).

health care workers, but also for the entire population. However, since the scientific knowledge on SARS CoV-2 is ever evolving as are variants of the virus, the rationality for the justification that motivates the imposition of alcohol bans or suspensions in the future is not capable of being pre-determined in this matter, and therefore the extent of an impact that a decision on the Impugned Regulation's validity would have on other persons in the future is not capable of determination at this stage.

39. In **FITA**,[17] the full bench held that by their very nature, natural disasters may often result in unforeseen consequences.

40. Mindful of the likely change in exigencies, I am nonetheless of the view, that should I be incorrect in finding that there is no live issue for determination in this case, it would serve the litigants *in casu* well that I nonetheless consider the remaining issues in dispute.

41. As was stated by the Constitutional Court in **Spilhaus Property v MTN** at paragraph [44][18] *'…The Supreme Court of Appeal itself has said that it is desirable, where possible, for a lower court to decide all issues raised in a matter before it. This applies equally to the Supreme Court of Appeal. This is more so where, as here, the final appeal court reverses its decision on the chosen limited point. This may impact on the fairness of an appeal hearing. Litigants are entitled to a decision on all issues raised, especially where they have an option of appealing further. The court to which an appeal lies also benefits from the reasoning on all issues.'*

Relevant Provisions in the Disaster Management Act 57 of 2002 ('DMA') and the Impugned Regulations

[17] Fair-Trade Independent Tobacco Association v President, RSA and Another 2020(6) SA 513 (GP) at [82].

[18] 2019 (4) SA 406 (CC).

42. The following provisions of the Act, which constitutes the legislation in terms whereof the Second Respondent made the Impugned Regulations, are relevant to the issues in this case.

43. The preamble to the DMA provides a clear purpose as follows:

> "*To provide for-*
> *an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation; the establishment and functioning of national, provincial and municipal disaster management centres; disaster management volunteers; and matters incidental thereto."*

44. Clearly in the preamble the legislature contemplates that the DMA ought to enable the creation of a synchroniable policy aimed at stemming, and diminishing, the risk of disasters as well as the establishment of national, provincial and municipal centres that would co-ordinate all measures employed to address a disaster and its consequences.

45. In the definition section of the DMA, "risk assessment" is defined as follows:

> "*a methodology to determine the nature and extent of risk by analysing potential hazards and evaluating existing conditions of vulnerability that together could potentially harm exposed people, property, services, livelihoods and the environment on which they depend."*

46. That definition makes the ambit of the DMA wide enough to encompass consideration of protection to people, property, services, the environment and livelihoods.

47. The DMA provides for the creation of a National Disaster Management Centre with a Head appointment. In these papers the Head of the Centre is Dr Tau who, in terms of section 23(1) b) of the DMA, on 15 March 2020, classified the Covid-19 pandemic as a national disaster in Government Notice 312 published in Government Gazette No. 43096.

48. In section 26, the DMA provides for National Executive involvement as follows:

> *'(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.*
> *(2) The national executive must deal with a national disaster-*
> *(a) in terms of existing legislation and contingency arrangements, if a national state of disaster has not been declared in terms of section 27 (1); or*
> *(b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27 (2), if a national state of disaster has been declared.'*

49. In Section 27(2), the DMA provides a description of the objects of regulations made in terms of the Act as follows:

> "*(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:*
>
> *(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.' (emphasis added)

50. Section 27(3) 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"

51. The Applicants do not challenge the constitutionality of the DMA itself, but only the Impugned Regulations, which have been repealed.

52. Regulation 44 read as follows:

"Sale, dispensing, distribution and transportation of liquor

(1) The sale and dispensing of liquor for-

(a) off-site consumption; and

(b) on-site consumption is prohibited.

(2) The consumption of liquor in public places is prohibited.

(3) The tasting and selling of liquor to the public by registered wineries, wine farms, and other similar establishments registered as micro manufacturers, is prohibited.

(4) The transportation of liquor is prohibited, except where the transportation of liquor is-

(a) in relation to alcohol required for industries producing hand sanitizers, disinfectants, soap or alcohol for industrial use and household cleaning products;

(b) for export purposes;

(c) from manufacturing plants to storage facilities; or

(d) being transported from any licensed premises for safe keeping.

(5) No special or events liquor licenses may be considered for approval during the duration of the national state of disaster.

(6) The Cabinet member responsible for transport must, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, health, police and trade, industry and competition, issue directions for the transportation and storage of liquor.

(7) The sale, dispensing, distribution, transportation, and consumption of liquor in contravention of sub-regulations (1), (2), (3), (4) and (5) is an offence."

53. Regulation 86 contained similar provisions to Regulation 44, save that it was directed at certain areas designated as hotspots.

54. Regulation 44 came into effect on 29 December 2020 and it was repealed on 1 February 2021. At the time of its promulgation, it was not known when it would be repealed.

55. It is common cause that the Liquor Act (Act 59 of 2003) regulates the sale of alcohol but does not provide for the countrywide suspension on the sale of alcohol.

Factual prevailing context prior to the promulgation of the Impugned Regulations

56. The advent of Covid-19 globally and by March 2020, in South Africa, is well documented by the Supreme Court of Appeal[19] and does not require repetition here.

57. The Impugned Regulations were imposed at the time when the country commenced its second wave of Covid-19 virus infections, which according to the epidemiologist, Professor S S Abdool Karim, was driven by a new variant, namely, the 501Y.V2 variant.

58. The new variant allegedly spreads faster and that means that people would become infected quicker and in turn spread it to others quicker.

59. According to Prof Abdool Karim, he anticipated that the second wave would commence in the first week of January 2021, after people moved around and socialised over the festive season but in fact the second wave started a few weeks before that.

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[19] Minister of Co-Operative Governance and Traditional Affairs v De Beer & Another [2021] 3 All SA 723 (SCA); Esau *supra.*

60. The second wave started earlier than expected because of super spreader events held by high school pupils and University students, after the completion of their examinations.

61. Prof Abdool Karim briefed the Minister of Health about the new variant as soon as he was made aware of it in late November 2020, without at that stage knowing the full impact that the new variant would have.

62. On 18 December 2020, Prof Abdool Karim and others provided the Minister of Health with an update on the nature and extent of the new variant with specific reference to the fact that it was 50% more transmissible than the previous strain of the virus and that it was being detected in hospitals in the Eastern and Western Cape as well as in Kwazulu-Natal. Prof Abdool Karim and his colleagues also briefed the President and the public later on that same day.

63. Prof Abdool Karim advised the Minister of Health that he was concerned that hospitals would not be able to cope with the intensive care needs of Covid-19 patients and the needs of those in need of care in alcohol related injuries or illness, and Covid-19 related deaths would increase unless patients with alcohol related conditions decrease. Prof Abdool Karim states the following: "*On the 27th December 2020, South Africa's second wave was about to surpass the peak of the first wave with a 7-day moving average of 12,129 reported new cases. Notably, the cases were continuing to increase far more rapidly than had been experienced in the first wave*."

64. Prof Abdool Karim notes that: " *A consequence of far too rapid a rise in admissions into hospitals is an increase in mortality, not necessarily because of the virus, but because knowing hospitals are filled, people delay in seeking treatment and when they do reach a hospital, either no beds are available or it could be too late*."

65. In support of the above allegation, Prof Abdool Karim relies on statistics from hospital admissions and deaths in the Western Cape, Eastern Cape and KwaZulu-Natal.

66. Prof Abdool Karim concludes with the following expert opinion: "*Having researched the manner in which the virus is spread and the speed with which it spreads, it is clear to me that a central aspect to stopping the spread of Covid-19 requires individuals to act for the common good. That means wearing a mask and social distancing even if you have no symptoms – because you may be asymptomatic and liable to spread the virus to others around you. It also means a level of sacrifice by individuals in order that the health infrastructure is protected and preserved for those who need it. The country requires collective community action and individuals taking action for not only their own benefit but for the benefit of the community, failing which more lives will be lost*."

67. In describing the conditions that prevailed within the various provinces shortly before the Impugned Regulations were made, the Second Respondent said the following:

> *"[168] Based on the experience in the first wave, the provinces were relatively confident that they had the requisite capacity in the event of a second wave. With regards to the number of beds, staff and capacity, the provinces had more at their disposal in facing the second wave than in relation to the first wave. Even though capacity had in a number of respects doubled, given what the indications were based on the first wave, the second wave had turned out to be more severe than had been predicted. This is attributed (in large measure) to the nature of the new variant and the resultant intensity of the second wave. Since the second wave started, a number of field hospitals that had been closed had to be recommissioned.*
>
> *[169] As at 22 December 2020 Mpumalanga was the only province with a new test positivity rate below **10%** whilst the WC had the highest new test positivity at **39,0%** followed by EC at **34,1%**, KZN at **30,3%**, Limpopo at **27,6%**, North West at **18,7%**, Northern Cape at **18,0%**, Gauteng at **15,9%**, and Free State at **10,1%**. The overall positivity for newly tested individuals was **25,6%**. Although Gauteng appeared to be lagging behind, Tshwane was showing a **41.5%***

*increase compared to the previous week and the West Rand reflected a **48.5%** increase since the previous week.*

[170] By 21 and 22 December 2020, the regular briefings from the various provinces conveyed swiftly escalating numbers of COVID-19 infections and an attendant strain on the health system which, if not effectively managed, could result in an overall collapse of the health system and devastating loss of lives. Some provinces expressly sought stricter measures in relation to alcohol."

68. With specific reference to the Western Cape and its Premier's letter requesting a 14-day alcohol ban the Second Respondent states the following:

*"[177] On 24 December 2020, the Premier of the WC wrote a letter to the Minister of Health, calling for further restrictions which were deemed necessary in the context of the second surge of infections being experienced in the province to, as it was described – protect "the public health system in the province from total collapse". A copy of the letter is attached as **"**NCDZ16". The following aspects of the letter warrant highlighting:*

177.1. It referred to the meeting on 22 December 2020 when the WC raised the escalating crisis in the WC due to the resurgence of the pandemic and called for additional restrictions to be imposed to limit the spread of the disease and protect the public health system.

177.2. It noted that the purpose of the letter was to provide a more detailed account of the current situation in the WC and to request that <u>additional regulatory measures</u> be introduced for the province for a 14-day period, which were considered necessary to combat the second wave of the pandemic.

177.3. As at 23 December 2020 at 13h00, the WC had 35 450 active cases of COVID-19; nearly 1 in 5 of the 181 905 COVID-19 cases ever reported in the province was diagnosed in the previous 2 weeks.

*New cases were more than double the first wave's peak and approaching 3 000 per day. The test positivity rate was beyond the first wave, at **46%**. The province was thus in a steep second wave trajectory.*

177.4. The health platform was under considerable strain with the daily number of new admissions surpassing the first wave - at that time more than 300 per day with no signs of plateauing. There were more than 3 000 confirmed COVID-19 cases and persons under investigation admitted across the public and private sector.

177.5. The province's recorded number of deaths was equivalent to the first wave's peak and showed no signs of plateauing. Between 00h00 and 17h00 on 23 December 2020, 169 new deaths were reported and 140 on the previous day.

177.6. There had been a total of 3 319 HCW infections recorded, with 636 infections and 7 HCW deaths in the past 7 weeks.

177.7. The health care system was at a tipping point and suffered the real risk of running out of capacity to meet the overwhelming demand.

177.8. A general fear regarding the festive season and super spreader events was also expressed. More specifically, in relation to the interaction between the festive season and alcohol related hospital admissions, the letter expressed the following views:

> *"During this same time the Western Cape has seen increases in alcohol-related trauma presentations and admissions to hospitals, in keeping with the normal end of year trauma increase. Despite a modest impact on weekend trauma numbers due to the current restriction on alcohol sales, we are still seeing significant increased alcohol-related trauma presentations and admissions*

over the festive period (Figure 3). This amounts to a significant colliding epidemic of both alcohol-related trauma and a severe COVID-19 second wave."

177.9. It was urgently requested that the restrictions suggested be applied immediately to the WC for a 14-day period to limit both SARS-CoV-2 transmission, as well as reduce the trauma burden and consequent strain on its health services. While the province was making every effort to increase health care capacity, it implored that these restrictions were essential to reduce demand and prevent the imminent collapse of the health system.

177.10. As a result of the dire situation, the WC Premier proposed a 14-day <u>total</u> suspension on the sale and distribution of alcohol for that period (page 5). In relation to the motivation for the <u>total</u> temporary suspension, the letter records the following reasons:

> *'Every year, there is an increase in trauma over the festive season with a large impact on health service capacity. Alcohol contributes substantially to the trauma burden. Half of homicide and motor vehicle deaths test positive for alcohol with >40% having alcohol concentration above the legal driving limit. This translates into a massive burden of trauma patients at our health facilities.*
>
> *Western Cape data from sentinel trauma facilities shows a large increase in the number of Emergency Centre visits, hospital admissions and ICU admissions with each relaxation of the alcohol restrictions since Alert Level 5, and a reduction when restrictions have been re-instated.*
>
> *The restricted trading hours implemented on 15 December 2020 had marginal impact on the trauma burden compared to the*

previous week. Although there was a 20% reduction in trauma burden over the weekend of 19 – 20 December 2020 compared to the previous weekend, the number of trauma admissions remained extremely high. Further restriction is therefore warranted.

Use of alcohol results in people relaxing their efforts to prevent SARS-CoV-2 transmission with reduced social distancing, lack of mask use and reduced sanitising. Further restriction of trading hours will result in crowding at alcohol retail outlets during the allowed trading hours, which would promote spread of SARS-CoV-2. A complete restriction on alcohol sales is therefore recommended. The economic impact will be limited as the existing restricted trading hours would in any event limit sales on several days over the next 14 days (weekends and public holidays).'

*[178] Already by 27 December 2020 the following places had a bed utilisation rate (BUR) of more than **80%**: Garden Route (**123%**); Cape Winelands (**107%**) and Overberg (**102%**). The critical care beds (ICU and high care) in the City Metro already had a BUR of more than **90%** (from **94%**)."*

69. In terms of the DMA, the Second Respondent as well as other relevant members of the Cabinet, have a duty to publish Regulations and/or Directions that embark upon the exercise of balancing competing needs, interests and harms to ultimately protect property, people and their livelihoods.

70. In the answering affidavit, Second Respondent describes the factual prevailing situation, immediately prior to the Regulations being promulgated as follows:

"*There were more than one million confirmed COVID-19 cases with approximately 27000 COVID-19 related deaths by 28 December 2020. The number of new infections were rising at an unprecedented rate, with more than*

50 000 cases having been reported between Christmas Eve and 28 December 2020. The majority were in the EC, WC KZN and Gauteng with an alarming increase in Limpopo. Although the EC was tapering off, infections in Gauteng were growing exponentially. Infections were expected to increase further as more residents of Gauteng returned home following the festive season…. With a consistent upward trajectory in new cases, active cases and hospitalisation, one of the biggest challenges was to have staffing, equipment and oxygen supplies for extra beds. Around a third of COVID-19 patients in hospital were on oxygen and concerns were being raised about oxygen shortages. Also of great concern at this juncture was the rising number of public healthcare workers testing positive in almost all provinces. In this regard, I refer to the four primary indicators which informed the Impugned Regulations."

71. The Minister describes those primary factors as:

71.1. An increase between 10 December 2020 and 1 January 2021, in new cases, new hospitalisations and new deaths;

71.2. The number of active cases far exceeded what had been experienced during the peak of the first wave;

71.3. The daily positivity rate had not shown any material reduction during the period 10 December 2020 to 3 January 2021;

71.4. The increase in hospitalisations meant that less beds were becoming available;

71.5. Positive cases among healthcare workers had skyrocketed and many of them reported being physically and mentally exhausted, falling prey to COVID-19, dying or watching colleagues die.

72. The test for rationality, the test for whether the Impugned Regulations are *necessary* as contemplated by section 27(3) of the DMA and the test for whether the

Impugned Regulations are reasonable and justifiable are all inextricably bound up with the determination of essentially the same question, namely, whether the means justify the ends, objectively.

Principle of Legality and the Doctrine of Separation of Powers

73. The Principle of Legality has developed into a "*residual repository of fundamental norms about how public power ought to be used. It thus acts as a kind of safety net, catching exercises of public power that do not qualify as administrative action*. "[20]

74. The doctrine of separation of powers not only ensures that each arm of government takes responsibility for its own Constitutionally ordained sphere of operation, but it also serves to protect the legitimacy of the judiciary by not permitting the judiciary an impermissible foray into the spheres of the executive or the legislature and in so doing, keeping the tension that is necessary among the three arms of government, in equilibrium.

75. In **Esau,** the Supreme Court of Appeal discussed the imperative of a Court's assessment of the exercise of public power with due regard to the Principle of Legality, i.e. that the restrictions employed under the DMA must comply with the law and no less, with the supreme law, namely the Constitution while recognising that the exercise of judicial power, too, is subject to the Principle of Legality which is expressed *inter alia*, by the Doctrine of Separation of Powers. It held as follows:

> *"[5] In other words, even in times of national crisis, as this undoubtedly is, the executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution. The rule of law, a founding value of our Constitution, applies in times of crisis as much as it does in more stable times.*

[20] "The Principle of Legality In South African Administrative Law" by Cora Hoexter [2004] MqLawJl 8; (2004) 4 Maquarie Law Journal 165.

And the courts, in the words of Van den Heever JA in R v Pretoria Timber Co (Pty) Ltd and Another should not, even when the legislature has conferred 'vast powers' to make subordinate legislation on the executive, 'be astute to divest themselves of their judicial powers and duties, namely to serve as buttresses between the Executive and the subjects'.

[6] That is not to say that the courts have untrammeled powers to interfere with the measures chosen by the executive to meet the challenge faced by the nation. Judicial power, like all public power, is subject to the rule of law. Perhaps the most obvious constraint on the power of the courts is the doctrine of the separation of powers, a principle upon which our Constitution is based and which allocates powers and responsibilities to the three arms of government – the legislature, the executive and the judiciary. What the separation of powers means in a case such as this, is that a court may not set aside decisions taken and regulations made by the executive simply because it disagrees with the means chosen by the executive, or because it believes that the problems that the decisions or regulations seek to address can be better achieved by other means: the wisdom of the executive's exercises of power are not justiciable, only their legality. Somewhat cynically, Schreiner JA, in Sinovich v Hercules Municipal Council, said that '[t]he law does not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby'.

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

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

76. In **Clairison**'s **CC**,[21] the Supreme Court of Appeal expressed the view that due deference must be accorded to the decision-maker's weighting once it has established that it has had regard to all the relevant factors:

"[19] The power of review is sourced today in the Constitution, and not the common law, but sound principles are not detracted from because they were

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[21] MEC for Environmental Affairs and Development Planning v Clairison CC 2013 (6) SA 235 (SCA) at [19].

expressed in an earlier era. As was said in Pharmaceutical Manufacturers of South Africa: In re Ex parte President of the Republic of South Africa [1]

> *'That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development'.*

[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker. As it was stated by Baxter:

> *'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.*' (emphasis added)

Role and Function of Expert Witnesses

77. In **Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd & another**[22] the following was reiterated concerning the purpose and role of expert witnesses:

> *"[98] Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as 'hired guns'. In The Ikarian Reefer* [23] *Cresswell J set out certain duties that an expert witness*

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[22] (451/12) [2015] ZASCA 2 (4 March 2015) at [98].

[23] National Justice Compania Naviera SA v Prudential Assurance Co Ltd ('The Ikarian Reefer') [1993] 2 Lloyd's Rep 68 [QB (Com Ct)] at 81 – 82. Approved in Pasquale Della Gatta, MV; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa 2012 (1) SA 58 (SCA) para 27, fn 12 and Schneider NO and Another v AA and Another 2010 (5) SA 203 (WCC) at 211E-I.

should observe when giving evidence. Pertinent to the evidence of Mr Collett in this case are the following:

> *The duties and responsibilities of expert witnesses in civil cases include the following:*
>
> > *1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation …*
> >
> > *2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise … An expert witness in the High Court should never assume the role of advocate.*
> >
> > *3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion. . . . .*
> >
> > *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.' These principles echo the point made by Diemont JA in Stock [24] that:*
> >
> > > *'An expert … must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning*

[24] Stock v Stock 1981 (3) SA 1280 (A) at 1296 E-G. See also Jacobs and Another v Transnet Ltd t/a Metrorail and Another 2015 (1) SA 139 (SCA) at [15].

and is accordingly to that extent in as good a position as the trial Court was.'

78. In **Twine & Another v Naidoo & Another**,[25] the Court set out 17 criteria that expert witnesses ought to meet if their testimony are to be admitted. The court went on to discuss 4 factors that should be considered when courts evaluate expert testimony. The entire discussion, while not meant to be exhaustive, is indeed helpful.

79. At sub-paragraph 18. (s) the court held as follows:

> "*The court should actively evaluate the evidence. The cogency of the evidence should be weighed "in the contextual matrix of the case with which (the Court) is seized." If there are competing experts it can reject the evidence of both experts and should do so where appropriate. The principle applies even where the court is presented with the evidence of only one expert witness on a disputed fact. There is no need for the court to be presented with the competing opinions of more than one expert witness in order to reject the evidence of that witness."*

80. Respondents rely on **Media24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd** [26] to support their argument that the Plascon-Evans rule applies to the evaluation of expert evidence based on opinions.

81. However in Media 24, the court went beyond merely accepting the evidence of the respondent's experts as facts alleged by the respondent that could be accepted in the absence of oral evidence. The court in that case looked at the extent to which the expert evidence of the respondent firmly and comprehensively set out a basis for refuting the expert evidence of the applicant, which was expressed in general terms, and found that the applicant failed to disprove the expert evidence of the respondent.

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[25] [2018]All SA 297 (GJ) at [18].

[26] 2017 (2) SA 1 (SCA).

82. It is therefore necessary for this Court to compare the expert evidence of Mr Murgatroyd, who is employed by Applicants, with the expert evidence of Dr Makgetla as well as all the medical and scientific reports and affidavits presented on behalf of Respondents that Mr Murgatroyd takes issue with, in deciding whether the disputes of facts that arise from those affidavits are firstly, relevant and material to the test to be applied and secondly, if so relevant, whether disputes between the experts on both sides are capable of resolution on the papers.

83. In paragraph 37 of the answering affidavit, Second Respondent states the following concerning the expert report upon which she relied in making the Impugned Regulations:

> "*The December Sentinel Report featured as a central element in the rationale for the Impugned Regulations, which as I shall show, established that there is a clear and definitive correlation between alcohol availability (which was halted by the temporary suspension) and the number of trauma/emergency cases. It followed from this that the temporary suspension would have the effect of reducing in significant numbers – not negligible, as the Applicants state) – the demands on hospitals, trauma and emergency units. This correlation is also demonstrated from what I say under the heading of "Impact of the Temporary Suspension". The allegations in this section of my affidavit will be confirmed by Dr Ismail, an author of the December Sentinel Report*."

84. An example of the Applicants' expert according more weight to "*other factors*" by describing those as more important without embarking upon a statistical analysis of how much weight can be attributed to those other factors, can be found in the passage from the RBB report quoted below.

85. First Applicant defers to this report in replying to the aforementioned paragraph 37 of the answering affidavit.

86. Its author states the following:

> "*The AA conflates the concepts of correlation and cause/effect…However, in the case at hand, there are evidently other important factors that might be expected to have an impact on trauma cases, either in complete isolation or in combination with the consumption of alcohol*." (emphasis added)

87. Throughout both RBB reports, Mr Murgatroyd advances the view that an alcohol ban cannot be construed as a significant or primary explanation for a reduction in trauma cases because other restrictive measures are contributing factors. The corollary of that argument is that it is likely that those other measures play a more significant role in the reduction of trauma cases. One searches in vain in the RBB report for any statistical or factual evidence that supports the assertion that the "*other factors*" are indeed more *"important*" than the temporary suspension of alcohol consumption.

88. The RBB report opines that the evidence on the efficacy of the liquor bans contained in the answering affidavit is *not credible* because: "*it relies on observed correlations between the implementation (or lifting) of the bans and the number of trauma cases. In doing so, this evidence ignores the effect of other important lockdown measures, as well as other factors, that, in and of themselves, can be expected to affect the number of trauma cases. Without disentangling the effects of these other restrictions/factors, no reliable inferences can be drawn from the observed correlations… In addition, the limited attempts made to try to isolate the effect of the liquor bans from other lockdown measures only account for a limited number of relevant factors,* [and] *in turn, ignore other key factors that can be expected to affect the level of trauma cases. Thus, this evidence is also unlikely to be probative as to the effect of the liquor bans themselves."* (emphasis added).

89. The role of an expert witness must be confined to facts supported by technical and/or scientific information.

90. It is not for an expert to provide an opinion on the credibility of evidence alleged by a litigant in his/her affidavit but to address the extent to which he/she differs with the facts and views expressed by the opposing party's expert witnesses.

91. It is also not the function of an expert witness to delve into the probative value of lay witnesses' evidence.

92. Opinion evidence on facts that a court could and should decide for itself, should not be admitted because it is more likely to be superfluous and cause confusion.[27]

93. Determinations on the credibility and probative value are findings made by the Court and counsel may advance argument based on why a Court should or should not, as the case may be, make those determinations

94. The answering affidavit and the expert reports annexed thereto clearly acknowledge that other restrictions that operated with the alcohol suspension would have contributed to a decrease in trauma cases in hospitals.

95. The court welcomes expert evidence that will elucidate the issues in dispute but that evidence has to set out a sound basis for opinions offered.

96. Speculative assertions by an expert witness are most unhelpful.

97. Unsupported opinions by expert witnesses ought not to be accepted.

Relationship between Alcohol Consumption and Healthcare Capacity

98. There is a dispute of fact between the parties concerning the nature and extent of the relationship between alcohol consumption and healthcare capacity.

99. The RBB report on which Applicants rely and which was filed only with the replying papers, states that:

> "*The main reason why correlation does not imply causation is that correlation does not take into account other factors that may affect the variable(s) of interest…"*

[27] Holtzhauzen v Roodt 1997 (4) SA 766 (W) at 772C-D.

100. Despite the new matter raised in reply as outlined above, both sides have fully ventilated the issues in dispute on the papers and agreed to the filing of further affidavits.

101. In paragraph 24 of the founding affidavit, Applicants make the constant refrain in the sub-paragraphs to paragraph 24 that: " *…the ban on alcohol contributed, at most, very little, to the drop in trauma cases*" and conclude in paragraph 24.8 that:

> "*The sale of alcohol is not, in and of itself, the cause of movement and gathering of people any more than any other activity (such as funerals) is*."

102. It appears to be common cause that the availability of alcohol for consumption is one contributing factor to the increase in trauma cases presenting at hospitals. Where the parties diverge, is on what proportion of influence that contributing factor should hold in relation to other factors that formed a further curb, i.e. other restrictive measures imposed to manage the Covid-19 pandemic.

103. The facts raised by the Second Respondent concerning the relationship between alcohol consumption and trauma cases are supported with extensive expert reports and clinical observations reported to researchers or data collectors who incorporated it into their findings, for example, in the following reports:

89.1 The Sentinel reports;

89.2 Provincial Health Department Reports;

89.3 The MAC advice;

89.4 The Barron study;

89.5 The SACMC Epidemic Explorer report;

89.6 Dr Ismail's report;

89.7 Professor Parry's report to the MAC;

89.8 Professor Myers' evidence on binge drinking;

89.9 Professor Abdool Karim's evidence; and

89.10 Professor Matzopoulos' report.

104. The clinical observations of medical personnel cannot be diminished to the extent that Applicants suggest, for example, that breathalyser tests ought to be used before concluding that patients have consumed alcohol and to ignore clinician reports on the ground of hearsay evidence. Those observations were collated and expressed in the report of Professor Abdool Karim, the MAC and Sentinel reports.

105. It is not reasonable to suggest that clinicians cannot correctly observe whether a patient has consumed excessive alcohol nor ought they to rely on a patient's own explanation concerning the use of alcohol. That is an undue and wholly unjustified criticism of the valuable contribution of the first line *modus operandi* adopted by medical practitioners globally, namely, to first make clinical observations and to take account of a patient's narrative.

106. Applicants and respondents agree that alcohol serves as a social lubricant.

107. It follows therefore, that the availability of alcohol in restaurants serves also as a social lubricant.

108. Applicants assert that the alcohol ban had an economically devastating impact on restaurants because patrons expect alcohol to be available on request.

109. Applicants argue that it would have been less harmful to the economy to have tightened the other measures/restrictions. One of those measures are the conditions under which restaurants may operate with regard to the number of persons they may

have in their establishments as well as the implementation of social distancing, hours of operation, wearing of masks and physical hygiene measures.

110. Applicants give scant consideration to the fact that the availability of alcohol in restaurants would surely also have made the enforcement of social distancing and wearing of masks extremely difficult in circumstances where people had imbibed a '*social lubricant*" thereby leading to a reduction in inhibitions at a time when the "*other measures*" are designed to inhibit people in order to contain the spread of the virus.

111. Applicants aver that the number of hospital beds and consequently equipment, medical supplies and healthcare workers saved, as a consequence of the reduction in trauma cases, is minimal and is a benefit that it is far outweighed by the cost.

112. In response to Applicants' allegations that the economic cost of the alcohol suspension outweighs the benefit, Second Respondent states in the answering affidavit at paragraph 339.8:

> "*As regards the impact on the fiscus and the taxes that are allegedly lost, I again refer to the reports prepared by Dr Makgetla. I reiterate that what must be weighed against losses sustained are ultimately the cost to this country if the health care system is overwhelmed and thereby debilitated and we are unable to contain the spread of the virus or are forced to place everyone under hard lockdown, again, to retard the proliferation of the virus. These consequences will be so devastating for South Africa that everything possible must be done to avoid such an outcome*."

113. Respondents therefore juxtapose with the economic costs to the liquor and associated industries suggested by Applicants, the economic cost to the entire country, including all industries. That is a consideration that Applicants' case appears to lose sight of.

114. Respondents allege at least a saving of 9 trauma cases less per day following the imposition of the alcohol ban and state that, the figure is significant as every life saved, is valuable.

115. The Applicants' allegation that the cost outweighs the benefit also fails to take account of the Respondents' section 27 (3) obligation under the Constitution which provides: "*(3) No one may be refused emergency medical treatment.*"

116. The difficulty with the RBB report is that it employs an exclusively economic cost-benefit analysis but in so doing, it does not take account of the cost to employers and consequently to the economy, and to employees who are away from work due to quarantine, illness caused by Covid-19 and death. Occupational Health and Safety legislation, for example, is designed to protect employees against illness and injury for the purpose of having a healthy workforce, which in turn, contributes to productivity and that contributes to GDP and the economy. The impact that absenteeism due to Covid-19 had on the liquor industry, the economy and GDP is not addressed by Mr Murgatroyd and that omission is not explained in Applicants' papers or argument.

117. Applicants cannot seek refuge in not bearing the *onus* to justify the Impugned Regulations. The principle that he who alleges must prove, remains intact where Applicants aver contributing factors that allegedly lead to the relationship between alcohol and trauma becoming no more than correlation and not causation, but Applicants do so without any statistical specificity and express it in vague and unsubstantiated terms.

118. Additionally, Government had a duty to uphold the right to health care and life, during the height of the pandemic, in circumstances where the virus had mutated into a variant that is 50% more transmissible and where it caused people that are asymptomatic to also spread the virus. Government would have abdicated its responsibility and duties in terms of section 27 of the Constitution, were it to have adopted a pure economic cost-benefit analysis in managing the pandemic.

119. There is no duty on Government to provide a scientifically and statistically accurate set of facts to prove that the consumption of alcohol has a significant impact on the number of trauma cases requiring medical attention. It must demonstrate that there is a rational connection between those factors and it is common cause that there is a connection.

120. The rationality of the Impugned Regulations have to be *connected* to the object of saving lives by freeing up hospital space caused by trauma cases. That connection is not required to be a statistically accurate *causal connection*. What is required is that on an objective consideration of the facts, during the second alcohol ban, which is an experience that Respondents rely on, and evidently, during the alcohol ban that is the subject matter of these proceedings, there was a significant reduction in hospitalisations associated with alcohol induced trauma, injury or illness.

121. All that Respondents have to demonstrate is that the decision to make the Impugned Regulations was rationally connected to the effect it sought to achieve, and that it is consequently reasonable and justifiable in an open and democratic society based on human dignity, equality, freedom as attenuated, in the context of a global pandemic, on the principle of individual autonomy having to yield to collective responsibility. It does demonstrate that the decision to apportion more weight to the right to adequate healthcare in order to uphold the right to life than to the autonomy based rights and freedom to trade, is based on the spirit, purport and ethos of *Ubuntu*.

122. In this regard, I note that the RBB report uses the concept “cause/effect” as though they are alternatives, whereas the Merriam-Webster dictionary meaning of ‘*cause*’ is *“something that brings about an effect or a result”* and the meaning of ‘*effec*t’ is *“something that inevitably follows an antecedent (such as a cause or agent)”*.

123. A further inconsistency in the RBB report is that it criticises the Respondents’ medical expert reports for not providing scientifically accurate statistics concerning the proportion of decline in trauma cases attributable to measures other than alcohol

restrictions, but then it does not make a statistical analysis of what proportion of the financial loss that First Applicant suffered is attributable to other measures and what proportion is attributable to the alcohol suspension.

124. Applicants provide no legal basis upon which this Court should apply causation as opposed to correlation as the criterion for reasonable, justifiable and rational decision-making, other than alleging that it is irrational and unjustifiable not to do so.

125. Therefore, giving consideration to the need for a process of disentangling the effect that other restrictive measures had on trauma case reductions in hospitals from the impact that the alcohol ban had on trauma cases, is not required because there is no legal obligation on Respondents to provide accurate statistics that support causation as opposed to correlation.

126. The stance adopted by Applicants concerning the Respondents' reliance on the correlation between alcohol and trauma leads to an unrealistic expectation being placed on Respondents at the time when the second wave was current and infections escalated rapidly. It is an approach that also unreasonably diminishes the value of scientific research and the coalface experience of clinicians. For example, in the replying affidavit, the Applicants state that:

> "*the Government conducted no investigation, study or analysis of the harmful effects associated with the alcohol ban….in the absence of such a study it was simply not ;possible for the Second Respondent to make the decision to reimpose the alcohol ban on 29 December 2020 in a manner that was rational and that satisfied the constitutional requirements for the incursion into rights guaranteed by the Constitution occasioned by such ban…The decision was not truly polycentric because of the government's failure to collect and analyse relevant data and evidence….*"

127. Dr Parry who is the director of the Alcohol, Tobacco and Other Drug Research Unit at the South African Medical Research Council, states that:

"*13.2.The exercise that SAB seeks is a near impossibility particularly in times of a crisis of unprecedented proportions. I say this because, in order to apply the model advanced by RBB, I would have to test the approach in relation to each measure by singularly imposing such measure- without any other measure being in place- at a time when trauma units are under stress for the purposes of ascertaining whether one measure is more effective than the other*."

128. Applicants challenge that assertion by Dr Parry as follows:

'*And the difficulties articulated by Dr Parry in paragraph 13.2.are ludicrously overstated. Instead of the repetitive mantra deployed by all the respondents' expert witnesses in this case, that all clinical DOCTORS (WHICH Dr Parry is not), know which of their trauma patients are under the influence of alcohol, they ought to have devised some method including perhaps breathalysers, to obtain evidence. In the absence of even an attempt to obtain some objective and scientific evidence of this nature, which cannot be difficult, their protestations are clearly self-serving and ring very low*."

129. Dr Ismail, who is a co-author of the Sentinel Report, a report to which Second Respondent had regard in deciding to make the Impugned Regulations, states that the Applicants' response to Dr Parry's raising of practical difficulties that would be encountered in embarking upon a disentangling of other restrictive measures proposed by RBB does not address the following:

"*The RBB report ignores the departure point, which is that alcohol plays a profound and significant role in causing trauma presentations. This is a well-known phenomenon as evidenced by Anderson et al (2009), Hahn et al (2010), Duailbi et al (2007), BARBOR ET AL (2010) and remains undisputed even in times of Covid. Furthermore it is the front-line clinician experience, local trauma and forensic pathology surveillance, national evidence, and international peer-*

reviewed evidence from a host of first world countries and the World Health Organisation (WHO). Importantly, according to the WHO's report on Alcohol and Injury in Emergency Departments it was found that 45% of South African patients presenting to Emergency Departments for injuries reported that their injuries were related to alcohol involvement.
(https:/www.who.int/substance_abuse/publications/alcohol_injury_summary.pdf)
"

130. Dr Makgetla addresses the causal-correlation analysis proffered in the RBB report as well as Applicants' allegation that government had sufficient time to conduct a statistically accurate study of the causal relationship between alcohol consumption and trauma case, as follows:

"*The RBB Report starts by asserting a standard for acceptable evidence to justify measures to contain the pandemic. Specifically it argues that any measures must meet a proposed ideal proof of causality. To this end, it cites basic text on the risks of simply confusing causality and correlation (RBB 2021:9) (and incidentally misquoting Woolridge to bolster its claim). Its unnuanced declaration, however, ignores the critical importance of correlation. In both natural and social sciences as an initial indication of a potential causal relationship. In addition, the RBB entirely ignores the extensive literature on decision-making during public health emergencies, when information, time and resources for testing evidence are, by definition limited… The practical shortcomings of a simplistic demand for incontrovertible proof of causality before implementing any policy are heightened during a public health emergency. Both the WHO and European CDC, amongst others, have developed guidelines on the use of evidence in these circumstances. ...In sum, the WHO finds that public health authorities have little choice but to make the best of the available evidence, especially in the early phases of a disease outbreak resulting from a novel pathogen. That evidence may include the experiences of medical health personnel and other affected people; available*

but imperfect or incomplete data; international experience; and recommendations by individual experts or relevant institutions… While policies should ideally be accompanied by a systematic review of the supporting evidence 'such formal assessments may not be possible' in every case (WHO 2017:25). Moreover, in some instances, the pressures of an emergency means that logical extrapolation from known conditions may have to substitute for direct evidence (WHO 2017:26). In other words, causality may have to be inferred from a combination of experience, logic, theory and the available information, both qualitative and quantity, because an emergency often does not leave either time or resources to set up experiments or generate statistics suitable for rigorous analysis." (emphasis added).

131. Applicants assert, in further affidavits, that the literature on the relationship between alcohol and trauma cases is irrelevant because it does not take account of other restrictions imposed; that the experiences of clinicians with regard to their clinical observations of trauma patients that consumed alcohol is unscientific and impermissible hearsay, although their experiences form part of the Sentinel Report's research data and that Dr Makgetla is not qualified to express an opinion on what factors Government ought to consider when implementing policy during a public health emergency.

132. There is no yardstick founded upon established principles of law that requires Second Respondent to provide reasonable and justifiable explanations that encompasses causality purely and no correlative factors.

Temporality of Regulations challenge

133. The temporality of the suspension of alcohol sales is challenged by Applicants on the grounds that the Regulations do not provide a termination date for the suspension.

134. The difficulty with that allegation is that the Regulations themselves state that:

134.1. They are made in terms of section 27(2) of the DMA;

134.2. They apply for the duration of Adjusted Alert Level 3;

134.3. Section 27(5) of the DMA provides for a National State of Disaster to endure for 3 months although it can be extended thereafter;

134.4. The Regulations were preceded by a Power-Point presentation made by government to the liquor industry on 2 December 2020 in which graphs were displayed showing a correlation between a reduction in trauma cases and the alcohol ban, albeit, on the Applicants' version, a misleading and unscientific stance due to no account being taken of restrictions on movement and gatherings. The Power-Point presentation expressly refers to previous alcohol restrictions and the relaxation of those restrictions;

134.5. The Applicants refer to the temporary suspension of alcohol sales as the third alcohol ban and detail two previous sets of restrictions on the sale of alcohol, both of which were subsequently relaxed. Both were of temporary duration and made in terms of the DMA.

135. In the light of the patently obvious temporal nature of the DMA, its Regulations and the two previous sets of alcohol restrictions, which were of temporary duration, the Applicants' assertion that they had no grounds for believing that the ban of alcohol would be of limited duration cannot be accepted.

Constitutional Rights argument

136. Applicants allege that the Impugned Regulations violate consumers' rights to choose to purchase and consume alcohol for pleasure or to relieve anxiety and in so doing, violate their rights to ;

136.1. Dignity;

136.2. Privacy; and

136.3. Bodily and psychological integrity;

137. Additionally, Applicants allege that people employed in the liquor industry and those employed in enterprises dependent on the liquor industry (such as the Second and Third Applicants) have had their rights to practice a trade infringed as envisaged in section 22 of the Constitution. Although counsel for the Second Respondent sought to

argue otherwise, in **Esau**[28] it was accepted that the regulations at issue there infringed section 22 rights and that this has a close and direct connection to the right to human dignity.

138. Although Fourth Applicant asserts that the alcohol ban violated his right to dignity, it is alleged to do so because he (and other individuals) are not free to choose whether to consume alcohol or not and to use it, *inter alia*, as a means of relaxation. It was submitted on behalf of the Second Respondent that the infringement of the right to dignity was only temporary in nature, and the suggestion appears to have been that therefore this was not a real infringement. That is no answer to the violation of a right as the jurisprudence makes clear. It is only relevant to the second leg of the enquiry, namely justification.

139. However, when people infected with Covid-19 are denied the opportunity of being hospitalised and receiving adequate health care, their rights to dignity are also infringed in that they have to endure the ravaging effects of the virus in less than optimal conditions, especially in the case of the majority of poor people in this country, who already lack sanitarily safe living conditions and often live in overcrowded spaces.

140. Applicants allege that healthcare facilities were already inadequate before the pandemic and that is a failure of Government that cannot be addressed with the imposition of an alcohol ban. Applicants allege further that corruption in the health care sector's procurement processes is a further failure of Government to deliver adequate healthcare facilities.

141. I accept that healthcare facilities in this country are by and large inadequate to the extent that they are not accessible to people in every corner of South Africa and there are problems of sufficiency of medical personnel, equipment and supplies.

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[28] Esau *supra* at [118] and [121].

142. The extent of the inadequacy and the extent to which corruption contributed thereto is however not fully canvassed in the papers and this Court cannot make findings on those issues.

143. What is abundantly clear, is that Respondents cannot refuse to put in place immediate measures required to free up hospital facilities and save lives because allegations of corruption in the healthcare sector are being investigated and pursued. To do so, would amount to endangering lives and governing in fear of polemics.

144. Respondents have an obligation to address healthcare needs, subject to section 27(2) of the Constitution where it provides: *"(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."*

145. Covid-19 has indeed brought into sharp focus the failure of services and policies, globally.

146. Government is duty bound to make healthcare facilities available during a National State of Disaster, like Covid-19 and it cannot simply refuse to do so, solely, for historical reasons of insufficiency of resources.

147. It is common cause that approximately 31% of South Africans consume alcohol. Respondents present expert evidence to show that a large proportion of those persons consume alcohol in binges. The evidence that gender based violence (GBV) and physical violence is closely associated with alcohol abuse cannot reasonably be gainsaid.

148. Therefore, it is not the consumption of alcohol *per se* that leads to overburdening of hospitals but the abuse of alcohol, irrespective of whether it is abused by the victim of violence or the perpetrator.

149. Applicants allege that robberies of businesses that sell alcohol, lead to potential violent exchanges and an increase in trauma cases and conclude with the following

remark: "*It is strange that a Government that professes to desire to reduce trauma presentations has created circumstances for precisely that increase and apparently without any consideration of this very foreseeable consequence of the ban on alcohol.*"

150. By parity of reasoning, Applicants' argument aforesaid means that all potential violations of Regulations made under section 27(2) of the DMA are "*foreseeable consequences*" and therefore no restrictive measures ought to be imposed because they can all lead to "*potential violent exchanges*."

151. Were Respondents to govern out of fear for the unintended consequence of those violations, Government would be abdicating its constitutional and statutorily imposed responsibilities.

152. Applicants make the allegation that: "*The presumption that abuse of alcohol results in increased trauma admissions to hospitals takes no sight of the fact that the overwhelming majority of adults who take alcohol do so, in moderation and not to a point where they lose control or a social inhibition against the use of violence.*" Applicants do not support that assertion of responsible behaviour attributed to "*the overwhelming majority of adults"* with any statistics or research results.

153. Applicants aver that the ban *indiscriminately* affects every single person at every level, including moderate drinkers. This is indeed so, but I cannot conceptualise of constitutionally sustainable alcohol restrictions that would distinguish between moderate drinkers and those that drink excessively, nor is it for the Court to prescribe the crafting of such measures.

154. Second Respondent demonstrates that she and the entire Cabinet were mindful of the need to save livelihoods, by the following allegation in the answering affidavit :

> "*The President warned that these activities, if not managed responsibly, posed the greatest immediate threat to our management of the pandemic, which up to then had been proceeding according to a plan that allowed for a staggered*

lifting of lockdown restrictions which was vital for an economy that sorely needed a boost over the festive period."

155. It can therefore, not be reasonably contended that the Second Respondent over-emphasised the need to save lives and neglected her duty to save livelihoods in making the Impugned Regulations.

156. The polycentric nature of the Second Respondent's decision to make the Impugned Regulations must also be considered. It is the entire Cabinet sitting as the NCCC, together with the various tiers of Government that are consulted before Regulations are made in terms of the DMA.

157. In **Bato Star**,[29] the Constitutional Court discussed the principle of judicial deference as follows:

'[46] In the SCA, Schutz JA held that this was a case which calls for judicial deference. In explaining deference, he cited with approval Professor Hoexter's account as follows:

> *"[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious*

[29] Bato Star Fishing Ltd v Minister of Environmental Affairs & Tourism and Others 2004 (4) SA 490 (CC) at [46] to [49].

determination not to usurp the functions of administrative agencies; not to cross over from review to appeal." (footnote omitted)

Schutz JA continues to say that "[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function". I agree. The use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.

[47] This was also recognised in a recent House of Lords judgment, R (on the application of Pro Life Alliance) v British Broadcasting Corporation. 33 In his speech, Lord Hoffmann commented: "My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. . . . [W]hen a court decides that a decision is within the proper

competence of the legislature or executive, it is not showing deference. It is deciding the law."

[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

[49] Section 2 of the Act requires the decision-maker to have regard to a range of factors which are to some extent in tension. It is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The

court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances." (emphasis added)

Freedom to Trade Rights

158. In considering the extent to which the Impugned Regulations are alleged to have impacted upon the Right to Trade freely, subject to regulation by law, as alleged by Applicants, the following are relevant.

159. Section 22 of the Constitution guarantees the right in the following terms:

> "*Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.*"

160. There exists a plethora of legislation and regulations that regulate the practice of trade, careers and professions. The right is also subject, as are most Constitutional rights, to the limitation in section 36. The right is accordingly not an absolute one.

161. The DMA, as outlined earlier, already made provision for the protection and managing of lives and livelihoods at the stage of its promulgation.

162. The Second Respondent expresses an acute awareness of her duty to balance considerations of protecting lives with those of conserving livelihoods in her answering affidavit.

163. In a situation of a National Health Disaster, like Covid-19, there invariably will be a need for Government to embark on a balancing exercise that involves trade-offs and the sacrificing of livelihoods to save lives.

164. First Applicant makes overbroad and sweeping allegations of the loss of employment occasioned by the 5-week alcohol suspension under consideration without providing statistics concerning actual job losses directly attributable to the Impugned

Regulations. At best, in the founding affidavit, Applicants say: "*An impact assessment estimates job losses in consequences of the two previous alcohol bans, perhaps reaching up to 165 000 jobs lost*." (emphasis added).

165. To the extent that First Applicant relies on estimates of job losses in the alcohol industry, it is notable that trade unions representing erstwhile employees who either lost their jobs or those who actually lost their employment and those who are at risk of losing their jobs, have not joined these proceedings nor was reference made to any legal proceedings brought by them.

166. Second Applicant states that she laid off 6 of her 8 employees as a result not only of complete alcohol suspensions but also because of alcohol trading hour restrictions. She regrettably did not mention in her founding affidavit whether she utilised the Corona Virus Temporary Employer-Employee Relief Scheme (TERS) system available to her to mitigate the economic loss to her erstwhile employees.

167. Respondents allege that the suspension was necessary in order to ultimately save lives, was temporary in nature, production, bottling and transportation of alcohol for export consumption was not suspended, therefore trade in that sphere could continue and the impact on employees in the liquor trade as well as in other sectors, could be somewhat mitigated by TERS grants.

Rights to Dignity and Privacy

168. Section 10 of the Constitution provides as follows:

> *"Everyone has inherent dignity and the right to have their dignity respected and protected*."

169. Section 14 of the Constitution provides:

> *'Everyone has the right to privacy, which includes the right not to have -*

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.'

170. I do not find any prohibition in the Impugned Regulations on persons who find themselves in the position of the Fourth Applicant who consumes alcohol in his home, provided he already had it in his home. It is so that he may have been precluded from acquiring it for the duration of the ban because of Government's decision not to give advance notice, but in reality that is the extent to which the Regulations impact upon his choice to exercise autonomy privately.

171. Applicants contend that the Impugned Regulations violate the right to dignity by taking away consumers' rights to choose to purchase and consume liquor, by leaving employees without the means to ply a trade of their choice in circumstances where employment provides dignity, and to deny consumers, like Fourth Applicant the right to relax and unwind by consuming alcohol in the privacy of his home.

172. Respondents allege that the limitation is temporary and a small sacrifice for consumers to make in the broader scheme of saving lives.

173. Applicants rely on the case of **Barkhuizen**[30] for the proposition that dignity encompasses human autonomy and the right to make one's own decisions even if harmful to oneself.

174. What the Constitutional Court went on to say in paragraph 57 of **Barkhuizen**'s case underscores the context in which the statement was made that human autonomy impacts upon human dignity, namely: "*The extent to which the contract was freely and*

[30] Barkhuizen v Napier 2007 (5) SA 323 (CC) at [57].

voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."

175. Applicants also rely on the case of **Somali Association**[31] for the argument that the right to trade and work is a self-standing right that implicates the right to dignity as well.

176. In the context of refugees and asylum seekers, the Supreme Court of Appeal held that they have a right to self-employment rather than face starvation and have their dignity impaired.

177. The Bill of Rights in fact entrenches and guarantees the concept of human autonomy and freedom of choice in various spheres of life, however, the existence of Covid-19 with its mutations and variants have compelled Governments globally to limit human autonomy in the interests of saving lives and limiting the harm caused by the pandemic.

178. I accept that being productively employed provides people with a sense of purpose, economic independence and dignity and conversely, not being employed, impairs dignity.

179. Dignity is however a more composite concept than just having the freedom to implement one's own decisions, even if they might be considered foolhardy. As the Constitutional Court has pointed out in **Makwanyane**,[32] dignity extends also to how one dies. That judgment thus places the relationship between the right to life and the right to dignity in proper perspective.

180. In the context of a global pandemic, if those who drink alcohol to excess and cause harm to themselves and/or others as a result were permitted to continue to

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[31] Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism 2015 (1) SA 151 (SCA) at [43].

[32] S v Makwanyane & Another 1995 (3) SA 391 (CC).

exercise autonomous decisions, even where those decisions lead to situations where other people cannot have access to adequate healthcare facilities and have to suffer the ravages of Covid-19 and die unseemly, often in squalor, without medical treatment, then that autonomy violates the rights to dignity of those denied access to hospitals. It is that assertion of individual rights and freedoms at the expense of the collective populace i.e. the horizontal application of rights, that Respondents describe as lacking in *Ubuntu.*

Right to bodily and psychological integrity

181. Section 12 (2) of the Constitution provides:

> "*Everyone has the right to bodily and psychological integrity, which includes the right -*
>
> *(a) to make decisions concerning reproduction;*
>
> *(b) to security in and control over their body; and*
>
> *(c) not to be subjected to medical or scientific experiments without their informed consent.*"

182. Once again, the Applicants contend that the Fourth Applicant's rights and those of others were infringed because their autonomy to make decisions concerning what, when and how they consume alcohol were being restricted unduly.

183. Applicants rely on the case of **Hofmeyer** [33] for the proposition that absolute rights of personality include a person's right to bodily integrity with a mental element. There can be no reasonable grounds on which to differ with that proposition, save to state that the case concerned the 1988 detention without trial of an individual in a pre-Constitutional era and the court was called upon to determine the legislative justification for imposing solitary confinement in a prison.

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[33] Minister of Justice v Hofmeyer [1993] 2 ALL SA 232 (A).

184. The weighing up of the applicants' right to bodily integrity against the rights of people who had become infected with Covid-19 and are unable to be treated in hospitals because of the high number of trauma cases means that once again the horizontal application of rights has to be managed during a National State of Disaster by the State.

185. In **Makwanyane,** the Constitutional Court said the following concerning the relationship between the right to life and other human rights guaranteed in the Constitution, albeit with reference to the interim Constitution:

> *"Death is the most extreme form to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution. It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs…"*

186. At paragraph 39, the Constitutional Court in **Makwanyane**, cognisant of the limitation provision contained in section 33 of the interim Constitution, which is the predecessor to section 36 of the 1996 Constitution, states that:

> "*Our Constitution expresses the right to life in an unqualified form, and prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right…"*

187. At paragraph 145 in **Makwanyane**, the Constitutional Court stated the following:

> *"The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals."*

188. Although the International Covenant on Civil and Political Rights allows for suspension of rights in times of public emergency that threatens the life of a nation, Article 6 affirms the primacy of the right to life as follows:

> *"Every human being has the inherent right to life. This right shall be protected by law…"*

189. It is axiomatic that without the right to life, all the other Constitutional rights hold very little substance, for once the right to life is upheld and protected, closely associated rights that impact on the quality of life such as the rights to dignity, privacy, bodily and psychological integrity, choosing a career, profession or trade, can be engaged. In that sense, the right to life is an enabling, *sine qua non* and primary right, without which the '*quality of life rights'* have limited efficacy.

190. Section 7(2) of the Constitution provides: "*(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."*

191. In the context of a global pandemic where scientific knowledge about its impact is ever evolving, the section 7(2) positive obligation of Government must be exercised with due regard to weighing competing interests against one another, while ensuring that the primary constitutional right to life is not unduly compromised or negated, for without upholding that right, the remaining rights have limited value.

192. With reference to the Minister's understanding of her duty to balance against lives, livelihoods, and to consider less restrictive means, the following in the answering affidavit is relevant:

> *"Cabinet was alive to the fact that the temporary suspension would once again affect livelihoods in certain sectors of the economy. Despite the temporary suspension being imposed, we recognise that the liquor industry is a major employer and an important contributor to the South African economy. Also, that it would impact on the restaurant trade once again, despite our earlier efforts to relax the restrictions in relation to sit-down meals at restaurants. Inevitably*

some sectors would be affected more gravely than others. This, however, had to be balanced against the priority at the time, which was to save lives and ensure capacity of the health system, In addition, consideration was given to imposing restrictions on certain provinces and not others but as the pandemic is fluid and capable of changing rapidly, it was unlikely that all the provinces would not be affected. … as the overall situation deteriorated and given the increase in infections, it was not feasible to designate hotspots as had been done a few weeks previously and leave parts of the country unaffected. The entire country had become a hotspot."

193. The Second Respondent recognises in the answering affidavit, that in mediating competing rights and interests, that proportionality exercise has to balance against vital rights to life and adequate healthcare, rights that involve freedom of choice (including the right to trade). Second Respondent expressly refers to the sacrificing of those individual freedoms as being in the interests of the common good, which she says represents the spirit of *Ubuntu*.

194. Despite Applicants' counsel stating during oral argument that he appreciated the important function that Government had to fulfil and that he does not underestimate the role of Government in managing the effects of the pandemic, Applicants do not appear to accept the need to sacrifice individual rights in the interests of the common good. Instead, Applicants assert that all the violations of rights of individuals complained of, are equally important. The consequential impact of that stance is demonstrated by Applicants' replying papers in which Applicants reject Second Respondent's assertion that it was necessary to sacrifice economic success in order to save hospital facilities so that lives could be saved. Applicants in their papers, challenge Respondents as having made Regulations that are not necessary nor rationally connected to the purpose sought to be achieved, nor were they allegedly, reasonable and justifiable, First Applicant concludes in the replying affidavit that: " …*There are about 200 private hospitals in South Africa. When 5000 is divided by 580 (i.e. 380 public hospitals plus 200 private hospitals), the saving is less than 9 patients per hospital per week…This is the only benefit of the alcohol prohibition on which the Minister relies*." Therefore,

Applicants contend that the saving of hospital beds after the Impugned Regulations were made are insignificant and the Impugned Regulations were not necessary.

195. In **Esau**,[34] the Supreme Court of Appeal opined as follows concerning the objects of the DMA and the consequential limitation occasioned by regulatory restrictions on, *inter alia*, the right to choose a trade as follows:

> *"[131] The purposes of reg 16 and reg 28 was to keep the pandemic under control and to save lives, while at the same time allowing more social and economic activity than hitherto. The DMA anticipated that in the case of some disasters at least, drastic action would have to be taken. For this reason, it specifically empowered the making of far-reaching and invasive regulations, including 'the regulation of movement of persons' and 'other steps' if these measures were necessary for purposes, inter alia, of 'dealing with the destructive and other effects of the disaster'.*
>
> *[132] At its most basic, the purpose of the limitation of the fundamental right to freedom of movement and of trade, occupation and profession was the protection of the health and lives of the entire populace in the face of a pandemic that has cost thousands of lives and has infected hundreds of thousands of people. In a sense, there has been something akin to a trade-off: the rights to freedom of movement, to dignity and to pursue a livelihood were limited to prevent the spread of Covid-19 and that, in turn, protected the right to life of many thousands of people, who would have died had the disease had the opportunity to run unchecked through the country."*

196. The Impugned Regulations were made in the middle of the second wave of the Covid-19 pandemic in South Africa. At that stage, the following restrictions were already in place as part of those applicable to Alert Level 3, namely:

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[34] Esau *supra* at [131] to [132].

196.1. From 18 September 2020 to 3 December 2020, the sale of liquor for off-site consumption, excluding duty free shops, wineries and wine farms was permitted only from 10am to 6pm Mondays to Thursdays, excluding public holidays, while on-site consumption at licensed premises was permitted on all days subject to curfew restrictions;

196.2. On 3 December 2020 on-site consumption was not permitted in hotspots;

196.3. The curfew had changed from being between 22h00 and 4am to 21h00 to 6am;

196.4. Social gatherings were limited to 50 people indoors;

196.5. Beaches were closed, save for those that were not located in hotspots.

197. What the aforementioned list of restrictions that were in place immediately before 28 December 2020 demonstrates, is that the Second Respondent did implement less restrictive means first in order to attempt to achieve the desired outcome, yet the number of hospital admissions continued to rise.

198. Section 39(1)(a) of the Constitution provides an instructive paradigm within which rights must be interpreted. It states:

> *"When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."*

199. In interpreting the Bill of Rights, this Court is compelled to act in conformity with section 39(2) of the Constitution, which reads as follows: "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*".

200. That interpretation must therefore take account of the rights to bodily and psychological integrity of the collective populace that could be infringed if applicants were allowed to exercise their individual rights at the expense of the collective.

201. As Second Respondent alleges, she had to make uncomfortable trade-offs in deciding to make the Impugned Regulations, namely, weigh against the freedom of Applicants to trade and consume alcohol, the physical harm to those infected with SARS-CoV-2 and the detriment to the economy if a hard lockdown would result from the proliferation of alcohol induced trauma cases.

Necessity in section 27(3) of the DMA

202. Applicants call upon this Court to adopt a strict and narrow interpretation of the word "*necessary*" in section 27(3) of the DMA.

203. Once again, Applicants challenge the Respondents' reason for imposing the Impugned Regulations, namely to release alcohol related trauma case pressure on the healthcare system immediately on the ground that it was not necessary to achieve a reduction in pressure on trauma related hospitalizations.

204. Underpinning that argument, is Applicants' expert, Mr Murgatroyd's assertion that Respondents relied on a correlation between alcohol consumption and trauma cases and not on causation, which could allegedly only be established by disentangling from the alcohol restrictions, other measures imposed at the time, such as extended curfew hours, prohibition on inter provincial travel, limitation on number of persons allowed at social gatherings and closure of certain businesses.

205. Applicants' challenge is based on allegations that the expert witnesses of Respondents failed to present reliable and credible evidence that alcohol measures alone, excluding other restrictive measures, bring down the number of trauma cases that present at hospitals and therefore the findings of those expert witnesses are allegedly flawed because they conflate correlation with causation.

206. Applicants go on to allege that it is irrational for Respondents not to have first established what effect the alcohol ban had on trauma cases, over and above other restrictive measures that were in place at the time.

207. According to Applicants, the failure to have done so, led Respondents to overstate the impact of the alcohol ban on trauma cases. That argument impacts on the Respondents' proportionality exercise, the rationality test and the enquiry of necessity in terms of section 27(3) of the DMA.

208. Regulation-making powers in the DMA afford the executive wide ranging authority to enable the protection of lives, property, livelihoods and management of the destruction and devastation that could result from a disaster.

209. Therefore, the limitation of "*only to the extent necessary*" for achieving the objects set out in the DMA is a salutary one which balances against the need for wide ranging executive powers required to manage a disaster, the protection of the rights, principles, norms, standards, values and ethos of a constitutional democracy founded upon the principle of legality and based on substantive justice and equality.

210. I am fortified in the conclusion that the words: "*to the extent necessary*" represent an express limitation built into the DMA for the exercise of regulation making powers by the relevant Minister, in light of what is set out below.

211. In **Esau**[35], the Supreme Court of Appeal considered the restrictions placed on regulation making provided for in the DMA as being the following:

> *"[14] In the event of a national disaster befalling the country,* ***s 27(1)*** *vests powers in a designated minister, by notice in the Government Gazette, to declare a national state of disaster. He or she may only do so, however, if one of two preconditions is present: if 'existing legislation and contingency*

[35] Esau *supra* at [14] to [16].

arrangements do not adequately provide for the national executive to deal effectively with the disaster; or if 'other special circumstances warrant the declaration of a national state of disaster'.

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

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

> *'(a) assisting and protecting the public;*
>
> *(b) providing relief to the public;*
>
> *(c) protecting property;*
>
> *(d) preventing or combating disruption; or*

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

212. In **Endumeni's**[36] case it was made clear that the approach to interpretation should not only be holistic with due regard being had to context but also to the purpose for which the provision was made. The Supreme Court of Appeal expressed the new approach to interpretation thus:

"*[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the*

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[36] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18].

words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (footnotes omitted)

213. In accordance with **Endumeni**, a Court has to approach the interpretation of section 27(3) with simultaneous regard to the express words used, the context of the DMA read as a whole, its purpose and whether the interpretation contended for would lead to a sensible outcome as opposed to an insensible one.

214. Respondents *in casu* are alive to the fact that the Impugned Regulations had a substantially negative impact on livelihoods for those employed in the liquor industry or who depend on the full functionality of the liquor industry, although they hold the view that Applicants overstate those negative consequences. Respondents aver, with reference to extensive medical and scientific evidence, reports received from healthcare workers who were on the frontline of fighting the adverse consequences of the pandemic, and a specific appeal from the Western Cape Premier himself, that they had to weigh against saving livelihoods, the section 27 constitutional imperative of providing adequate healthcare with immediate effect at that time and in so doing, save lives.

215. Mindful that the onus to prove a justification for making the Impugned Regulations rests on Respondents, once they have alleged a constitutionally sanctioned purpose in making the Impugned Regulations, Applicants *in casu* ought to gainsay that alleged purpose with reference to facts supporting the contention that the Respondents exceeded the bounds of necessity. In so doing, Applicants cannot challenge the Respondents' justification and rationale purely on the basis of an economic cost benefit analysis, for to do so is to overlook Respondents' constitutional duty to act in the interests of upholding the constitutional right to life in the context of the legislative obligation under the DMA to save lives.

216. Section 27(3) of the DMA provides that the Second Respondent may only exercise the powers set out in section 27 (2) to the extent that it is necessary for achieving the purposes set out in section 27(3), namely to assist, protect and provide relief to the public; protect property and prevent or combat disruption or to deal with other devastating effects of a disaster. As the Supreme Court of Appeal put it in **Esau** at [58]:

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

217. The pandemic placed a strain on the healthcare services of not only a developing country like South Africa, but also on those services of first world, better resourced and developed countries.

218. Restrictions that *prima facie* appear to limit constitutional freedoms to work, to dignity, privacy and to move as they please in those countries were also imposed, as they were in South Africa.

219. Most developed countries did not impose a full-scale alcohol ban as Second Respondent did, but those countries do not necessarily have alcohol abuse or binge drinking and related trauma cases on a scale that South Africa has.

220. As Professor Matzopoulos noted: "*Alcohol is a well-established risk factor for injuries and the causal relationship is well established. As pointed out by Prof Parry in his affidavit, alcohol satisfies most of the Bradford Hill criteria for causation… It is important to note that alcohol has indeed been included as a risk factor for injuries in all the comparative risk assessments for global burden of disease studies as well as the South African comparative risk assessments… South Africa has a particular problem*

with binge drinking, which is most prevalent on weekends at which injury rates are at their highest."

221. Professor Matzopoulos relies on several studies cited, to support his assertion of the well-established nature of risk factors for alcohol related injuries described above.

222. The UCT-STELLENBOSCH UNIVERSITY-SAMRC discussion paper or "Barron study", as it is referred to, was authored in November 2020 but only published widely in January 2021, albeit, *ex post facto*, concerning the second alcohol ban. It confirms the extent of the alcohol abuse problem in South Africa and the impact that it has on mortality rates.

223. While the mortality rates may appear to the Applicants to be insignificant to the reason offered by the Second Respondent for the making of the Impugned Regulations, they are in fact not insignificant. The mortality statistics demonstrate that fatal injury or illness often follow alcohol abuse.

224. While the Second Respondent did not make the Impugned Regulations with the specific purpose of reducing mortality rates caused by alcohol consumption, the Barron study, as it is referred to in the papers, provides an ongoing assessment tool that the WHO recommends governments adopt in evaluating the restrictions imposed to curb the spread of the virus, and which the Second Respondent states would have given her cause to amend the Impugned Regulations had it presented an outcome of no significant relationship between alcohol consumption and trauma cases.

225. The purpose of the WHO's recommendation of subsequent assessment, is to determine whether measures employed to contain the spread of COVID-19 remain relevant and necessary to ensure improvement over time through engagement with stakeholders as well as ongoing research.

226. The Barron study therefore demonstrates that alcohol consumption leads to an increase in mortality rates, which means that people become fatally ill or injured as a result of excessive alcohol consumption, including by others. It is reasonable to infer

that some of the fatalities recorded in the study were preceded by trauma related hospitalisation.

227. If the validity of the Impugned Regulations are to be considered by this Court despite their mootness on the grounds that it impacts on the infringement of rights and will have implications for alleged future transgressions, then what is being contemplated, is this Court adopting a forward-looking, *"crystal ball"* approach to possible future violations of rights. In so doing, it must therefore be open to this Court to have regard to all the available expert evidence placed before it in this matter, including reports that were published subsequent to the Impugned Regulations.

228. In both **FITA**[37] and **BATSA**[38] the courts considered the meaning of *'necessary'* for purposes of s 27(3) of the DMA. They reached different conclusions. **FITA** found that *'necessary'* means *'reasonably necessary'* whereas **BATSA** found that it means *'strictly necessary'*.

229. The judgment in **FITA** was handed down on 26 June 2020 and **BATSA** on 11 December 2020. Both were thus delivered before the Supreme Court of Appeal decision in **Esau** on 28 January 2021. It appears that the latter decision did not deal in specific terms with whether or not *'necessary'* means *'reasonably necessary'* or *'strictly necessary'* since it does not appear to have been an issue before it. The intended appeal against the **FITA** judgment was subsequently withdrawn, while the appeal in BATSA is currently pending before the Supreme Court of Appeal.

230. To my mind, it is not required of us, for present purposes, to determine which of the tests in **FITA** and **BATSA** are correct. In **Esau** at [140] the Supreme Court of Appeal authoritatively stated that *'Drastic measures were required and an excess of caution was called for, especially given the limited knowledge about Covid-19, even among experts in the field of epidemiology…'.* Having regard to the facts and expert evidence in

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[37] See footnote 14 *supra* at [84] to [87].

[38] 2021 (7) BCLR 735 (WCC) at [195] to [199].

this case, I am persuaded that the imposition of the temporary alcohol ban was essential given the exigencies that applied to the imperative of saving lives and therefore, it was made "only to the extent necessary".

The *ultra vires* challenge

231. Applicants allege that because section 26 (2)(b) of the DMA clothes the Second Respondent only with the power to: *"…deal with a national disaster (b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27 (2), if a national state of disaster has been declared)"* (emphasis added), she therefore acted beyond the authority vested in her by the DMA in making the Impugned Regulations because they amended the Liquor Act and did not augment it.

232. Second Respondent answers that the Impugned Regulations: "*…supplement and/or extend and/or amplify and/or intensify the provisions and objects of the legislation."*

233. Second Respondent contends that section 26 (2) of the DMA contemplates a situation where existing legislation will not suffice in providing a legislative basis for managing a national state of disaster, hence it authorises the making of Regulations to achieve the objects of the DMA.

234. In **Smit**[39] the Constitutional Court held that:

> *'[35] The Legislature may not assign plenary legislative power to another body, including the power to amend the statute. Subordinate legislation is one not enacted by Parliament. In Executive Council, this Court said:*
>
> > *"There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to*

[39] Smit v Minister of Justice and Correctional Services & Others 2021 (1) SACR 472 (CC) at [31].

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 power to another body." (emphasis added)

235. It is therefore not impermissible for the legislature, as it has done in section 26 of the DMA, to delegate to the Second Respondent the power to augment existing legislation where same does not provide for meeting the objects of the DMA.

236. In **Esau**[40] the Supreme Court of Appeal expressed reservations about the soundness of the Appellants' argument in that case that the Minister may not amend existing legislation in terms of the DMA as follows:

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

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

[60] I have my doubts as to the correctness of these arguments on the facts of this case understood in their proper context but I do not intend to traverse those issues. These challenges fail for a more fundamental reason. In motion proceedings, applicants are required to make out their case in their founding

40 Esau *supra* at [58] to [60].

affidavit and may not make out their case in reply. These challenges were not raised in the founding affidavit, but only in the replying affidavit, with the result that the respondents had no opportunity to answer them." (emphasis added)

237. I accept that the Second Respondent may not amend existing legislation in terms of the DMA. She must however augment existing legislation to the extent that it is necessary, in this instance, to address the management of the national state of disaster in a manner that will ultimately protect lives, save livelihoods, protect property, prevent or combat disruption or address the destructive and other effects of the disaster.

238. Applicants contend that Section 27(2)(n) of the DMA does not authorize the Impugned Regulations. This provides: "*(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…*". They also submit that the Second Respondent's reliance on Section 27(2)(i) is misplaced.

239. Second Respondent alleges that the alcohol suspension was always intended to be of limited duration and the DMA contemplates the need to take measures including suspending the sale of alcohol in a manner that will limit the harm occasioned by a national disaster, a purpose that is contemplated in section 27(2) (i).

240. Second Respondent does not rely on the power conferred on her by section 27(2)(n) but rather on section 27(2)(i) which provides: "*(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area."* The DMA expressly permits the making of Regulations to suspend or limit the sale and distribution of alcohol.

241. In the absence of a construction being placed on section 27(2)(i), other than its express and unambiguous words, the power to suspend the sale of alcohol accords with the contextual and purposive approach to its interpretation.

242. The Liquor Act and regulations made in terms thereof undoubtedly provide for the regulation and indeed the suspension or cancellation of the right to sell liquor in

certain instances. The Act provides for registration of distributors of liquor subject to the imposition of reasonable and justifiable conditions for registration and for the issuing of liquor licences, which registration and licences may be cancelled or revoked in certain circumstances. The Act therefore provides for situations where individual registrants or licence holders may have their authorization to sell liquor suspended or permanently cancelled.

243. Admittedly, the Liquor Act does not provide for the temporary suspension of the sale of liquor on an industry-wide basis, hence, to that extent, the Second Respondent deemed it prudent to make Regulations under the DMA to widen the regulatory ambit of the Liquor Act and its Regulations.

244. Once Second Respondent discharges the *onus* of demonstrating that the decision to make the Impugned Regulations is reasonable and justifiable, and within the ambit of the powers conferred on her by section 27(2) of the DMA, there can be no suggestion that she acted *ultra vires* in making those Regulations.

Applicability of section 36 of the Constitution

245. Applicants contend that the Impugned Regulations are not laws of general application and therefore they cannot be justified in terms of section 36 of the Constitution.

246. Section 36 of the Constitution provides:

> "*36. Limitation of rights*
>
> *1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
>
> *(a) the nature of the right;*

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

(c) the nature and extent of the limitation;

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

(e) less restrictive means to achieve the purpose.

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

247. A law of general application is a law that applies equally to all persons and does not single out specific categories of people arbitrarily. The Impugned Regulations applied across the board to all persons in South Africa at the time.

248. Applicants correctly assert that it is the Respondents who bear the onus of establishing that the limitations on their rights are reasonable and justifiable.[41]

249. In **Esau**,[42] the Supreme Court of Appeal considered the rationality of Regulations made under the DMA and held that that the rights' infringement occasioned by the Regulations are subject to the test of reasonableness and rational connectedness to the purpose as well as to proportionality. The Supreme Court of Appeal therefore found that Regulations made under the DMA are subject to the limitations under section 36 of the Constitution when it held as follows:

"[139] I shall conclude by considering the last two factors listed in s 36(1) together. Essentially, they boil down to the reasonableness of the infringement of fundamental rights by asking the questions whether there is a rational connection between the infringements and their purpose; and whether the

[41] Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as amicus curiae) 2001 (4) SA 491 (CC) at [18]; Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC) at [36].

[42] Esau *supra* at [139] to [141].

means chosen were proportionate. When all is said and done, this is the heart of the limitation enquiry. As O'Regan J and Cameron AJ said in S v Manamela and Another (Director-General of Justice Intervening) the proper approach to the limitation enquiry is 'to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose'.

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

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

(emphasis added)

250. In **Manamela**[43], the Constitutional Court held:

"[32]… It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key

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[43] S v Manamela and Another (Director General of Justice Intervening) 2000 (3) SA 1 (CC) at [32].

factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."

251. The Court clearly has to consider the proportionality exercise upon which the Second Respondent had to embark by a holistic assessment of all the listed factors in section 36(1) and the context in which the power was exercised under the DMA with reference to its purpose.

252. Most notably, how are Respondents reasonably expected to identify and prevent people who engage in reckless behavior due to excessive alcohol intake, from causing an escalation in trauma cases, and how would those measures be capable of implementation and monitoring successfully within the short space of time required to bring down the trauma case numbers in hospital during December 2020 and January 2021? These are questions that impact on the issue of less restrictive means but they are also relevant for the determination of what constitutes necessity as contemplated under the DMA.

253. In considering the nature and importance of the rights violation, it has to be noted that the exercise of individual persons' rights that were allegedly infringed such as privacy, dignity and physical and psychological bodily integrity are all, as discussed earlier, rights which in the context of the highly transmissible variant that drove the spread of the pandemic at the time, also held by people who sought access to adequate healthcare in an attempt to avert death once infected with Covid-19. If Government had failed to implement measures that would immediately make hospital beds; facilities and

healthcare workers available to those infected persons that would have led to the infringement of those same categories of rights of the collective populace who were infected with Covid-19.

254. The purpose, importance and effect of the Impugned Regulations, namely to *immediately* reduce the number of trauma cases that present at hospitals in order to create free space and resources in hospital and in the intensive care units, specifically, for people infected with COVID-19 and to encourage those who require hospitalization, to present themselves at hospitals at an early enough stage of their illness cannot be overstated. Therein lies the reasonableness and justification for the Impugned Regulations.

255. In **Qwelane**[44] at paragraphs 141 to 143, the Constitutional Court addressed the separate inquiry of less restrictive means as follows:

> *"[141]… However, as this Court held in Economic Freedom Fighters:*
>
> > *"While less restrictive means is where most limitations analyses may 'stand or fall', one must not conflate this leg with the broader balancing proportionality enquiry as envisaged by section 36(1)."*
>
> *[142] Further in Mamabolo this Court explained:*
>
> > *"Where section 36(1)(e) speaks of <u>less restrictive means it does not postulate an unattainable norm of perfection.</u> The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant."*

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[44] Qwelane v SAHRC & Another [2021] ZACC 22 (20 July 2021).

[143] Rather, as this Court explained in Economic Freedom Fighters:

> *"All relevant factors must be taken into account to measure what is reasonable and justifiable, and the factors listed in section 36(1)(a)-(e) are not exhaustive. What is required is for a court to 'engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'*." (emphasis added)

256. In a perfect world, the Second Respondent would perhaps have been able to restrict alcohol abuse if she had sufficient time and resources within which to do so, but given the lack of means and opportunity that Second Respondent describes, with which to determine how alcohol is used or abused once it is purchased, there was no reality based, viable alternative to an alcohol ban.

257. Taking account of all the submissions of Mr Murgatroyd as well as those of Dr Makgetla and Respondents' medical experts, the one factor that is constant, is that there are no absolutely accurate statistics available now nor were there any on 28 December 2020, with which to conclude with precision how many trauma cases were reduced by lack of alcohol consumption, but it is common cause that there was a reduction in trauma cases that presented at hospitals after the Impugned Regulations were made. It is of no particular moment to the rationality enquiry whether the relationship between trauma and alcohol consumption is correctly described as causation or whether it is correlation. Every single expert provides estimates to support his/her conclusion on the nature of that relationship and its significance for achieving the purpose of freeing up hospital facilities and thereby saving lives.

258. In the final analysis, there is no absolute and in this instance, scientifically completely accurate standard, against which the reasonableness of the alcohol suspension can be measured without taking account of the exigencies associated with the global pandemic, the changes in the variants of the virus, the fallibility in human behavior as the months dragged on, super spreader events by school and university students that appear to have precipitated a new wave of infections, the season for

heightened social interaction namely, Christmas and New Year, and the fact that Second Respondent cannot reasonably be expected to have embarked on a statistics gathering exercise of extricating from the reduction in trauma cases at the time of previous alcohol restrictions, the percentage attributable to other restrictions imposed under the DMA, to arrive at an exact statistic that could serve as an only direct cause for the reduction in trauma cases attributable to alcohol suspension.

The Rationality Test

259. In **De Beer**,[45] the Supreme Court of Appeal discussed the application of the rationality test by courts as follows:

> *"[101] The exercise of public power, including the decision to promulgate regulations under s 27(2) of the Act must have a rational basis. In Democratic Alliance v President of South Africa, the Constitutional Court framed rationality review thus:*
>
> > *'The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are concerned is constitutional.'*
>
> *Rationality review applies both to the process by which a decision is made and to the decision itself. But an enquiry into rationality, as this Court observed*

[45] Minister of Cooperative Governance and Traditional Affairs v De Beer and Another [2021] ZASCA 95; [2021] at [101]; [105]-[106].

in Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others, 'can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable…

[105] The second error can be illustrated with reference to the high court's fifth case of supposed irrationality. Regulation 35, while permitting funerals with up to 50 attendees, prohibited night vigils. The high court asked itself, rhetorically, why night vigils were wholly banned if the purpose was to prevent the spread of the virus through close proximity. Why not rather impose 'time, distance and closed casket prohibitions'? Why not allow a vigil without the body of the deceased? Here the high court regarded the prohibition of night vigils as irrational because, in the court's opinion, there were more appropriate (i.e. less restrictive) ways of achieving the lawmaker's purpose. That is not an application of the rationality test. It engages in the very enquiry that the rationality test precludes, that is, whether the court can craft a better regulation than the Minister did. The high court should have asked itself whether prohibiting night vigils is rationally related to the purpose of restricting the spread of the virus, not whether a more limited restriction might also have achieved that purpose.

[106] These legal errors permeated the high court's findings in respect of the validity of the regulations. In that, the approach was also fatally flawed. The high court did not properly apply the rationality test to each of the impugned regulations. Instead, it embarked upon a comparative exercise and for the rest, it relied upon conjecture and speculation. It lost from sight that the question is not whether some other measure might better achieve the purpose or might be more appropriate, only whether the measure actually employed is rationally related to the purpose." (emphasis added)

260. It is therefore not for this Court to substitute its decision on what it considers to be less restrictive means for that of Second Respondent's, but to consider firstly, whether the means employed by the Respondents justify their stated ends and if they do, then to consider objectively whether less restrictive means are available to achieve

the precise ends, which in this case, was: to *immediately* reduce the number of trauma hospitalisations and/or hospital treatment required in sufficiently significant numbers so that patients presenting with Covid-19 related illness could be adequately accommodated and treated at hospitals at an early enough stage in their illness to enable them to recover and avert death.

Application of PAJA and procedural fairness

261. I am of the view that section 85(2) (a) of the Constitution, includes the power of Cabinet members to implement national legislation, by making regulations. Section 85(2)(a) provides that:

> "*2. 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;"*

262. In **Tshwane**'s **case**,[46] the Supreme Court of Appeal held that the making of regulations constitute administrative action.

263. Similarly in **Sizabonke Civils CC t/a Pilcon Projects**,[47] the Court held regulation making to be administrative action and therefore reviewable under PAJA.

264. Section 1 of PAJA lists under paragraph (aa), the executive powers of the National Executive that are excluded from the definition of administrative action. However, Section 85(2)(a) of the Constitution does not form part of that list of excluded provisions.

265. Relevant sections of PAJA merit repeating here.

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[46] City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) at [10].

[47] Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality & Others 2011 (4) SA 406 (KZP) at [17].

266. Section 3 (2) provides as follows:

" (*2) (a) A fair administrative procedure depends on the circumstances of each case.*

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

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5."

267. Section 3(4) prescribes the circumstances under which sub-section 2 may be departed from:

"(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

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

(i) the objects of the empowering provision;

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

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

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

268. Section 4(1)(a) to (e) provide a list of procedural steps that an administrator must follow to uphold the right to procedurally fair action:

> "4 (1) *Administrative action affecting public*
>
> *In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –*
>
> *(a) to hold a public inquiry in terms of subsection (2);*
> *(b) to follow a notice and comment procedure in terms of subsection (3);*
> *(c) to follow the procedures in both subsections (2) and (3);*
> *(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
> *(e) to follow another appropriate procedure which gives effect to section 3."*

269. Section 4(4)(a) and (b) provide for a departure from the process set out in section 4(1) (a) to (e):

> *"(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and (3).*
> *(b)In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –*
> *(i) the objects of the empowering provision;*
> *(ii) the nature and purpose of, and the need to take, the administrative action;*
> *(iii) the likely effect of the administrative action;*

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

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

270. In the case of **Bato Star**,[48] the Constitutional Court held that a relevant consideration in the determination of procedural fairness and reasonableness, is context and that the adjudication of the issue ought to be approached with due deference and sensitivity to the special role of the executive in regulation-making. The Court held at paragraphs 91 and 92, thus:

"[91] The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bills of Rights. In Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others, this Court explained the meaning and the interpretive role of section 39(2) in our constitutional democracy as follows: 'This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.'

[92] I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words 'have regard to'. That approach

[48] Bato Star Fishing Ltd *supra* at [91] to [92].

tends to isolate section 2(j) and determine its meaning in the ordinary meaning of the words 'have regard to'. It 'ignores the colour given to the language by the context'."

271. In **New Clicks** [49] the Constitutional Court held:

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

272. In **New Clicks** at para 145, the Constitutional Court found that reasonableness and procedural fairness are context specific. It held as follows:

"Reasonableness and procedural fairness are context specific. What is reasonable and procedurally fair in one context, is not necessarily reasonable or procedurally fair in a different context. In R v Secretary of State for the Home Department, ex parte Daly Steyn LJ referred to an observation by Laws LJ emphasising that "the intensity of review in a public law case will depend on the subject matter in hand". Steyn LJ went on to say "[t]hat is so even in cases involving convention rights. In law context is everything". In First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance Ackermann J referred with approval to this passage." (footnotes omitted)

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[49] Minister of Health and Another v New Clicks SA (Pty) Ltd and Others 2006 (2) SA 311 (CC) at [126].

273. In **Esau**,[50] the Supreme Court of Appeal considered that regulation-making under the DMA by the Minister of CoGTA constitutes administrative action and falls within the ambit of PAJA but also went on to say that if the Court is wrong and regulation-making is in fact the exercise of executive power, then on the facts of that case, given the exigencies of the disaster, the regulations made were procedurally rational. The Supreme Court of Appeal explained thus:

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

274. In adjudicating whether the requirements for procedural fairness have been met, a Court must not merely go through the motions of ticking the checklist in section 4(1)(a) to (e), but should in fact take into consideration all the specific facts that are relevant to the making of the decision as required in section 3(2(a).

275. Applicants complain that the presentation made by Government did not allow for feedback to them, however, Second Respondent alleges that First Applicant did previously make representations concerning restrictions and/or a ban on alcohol sales and those representations were considered. In that event, Second Respondent was required to do no more than to provide Applicants with "*a reasonable opportunity to make representations*" as expressly provided in section 3(2) (b) (ii).

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[50] Esau *supra* at [101].

276. First Applicant states that it had a representative present when Government made the power-point presentation. Although Applicants allege that there was no opportunity to provide input at that presentation, on Applicants' version, First Applicant had engaged with Government previously concerning alcohol restrictions and Second Respondent alleges that First Applicant previously held the view that it espouses in the papers, namely that an alcohol ban should not be imposed. The fact that Second Respondent did not accede to First Applicant's longstanding request, nor did she follow Prof Parry's suggestion of alcohol restrictions, does not mean that she acted procedurally unfairly or irrationally. It simply means, she took the decision to impose the ban while being cognisant of the views held by Applicants and Prof Parry.

277. The DMA does not prescribe a procedure for regulation making under section 27. Remaining cognisant of the purpose of the DMA, namely to provide a legislative framework for managing disasters, the fact that the DMA provides for the following: consultation and representations at national and municipal level which is to be co-ordinated by the National Centre; a National Disaster Management Advisory Forum; and an Intergovernmental Committee, it is hardly surprising that a procedure is not prescribed for regulation making. The executive, of course has a constitutional duty to act fairly.

278. In **Esau**, the Supreme Court of Appeal said the following concerning adequate prior consultation and procedural fairness:

> *"[96] I turn now to whether the time allowed for the making of representations was sufficient in the circumstances. Once again, context is crucial to the resolution of this issue: while, in one case, it may be unfair to allow a person two weeks to make representations, in another, it may be fair. It will always depend on the circumstances. In MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd, for instance, a developer had been given 48 hours within which to make representations as to why a prohibitory directive should not be issued in terms of the Environment Conservation Act 73 of 1989. This, it was argued, was procedurally unfair. The*

Constitutional Court held, however, that 'in light of the serious harm already caused and the threat of continuing harm, the 48-hour notice period, which HTF did not struggle to meet in submitting its representations, was adequate by the procedural fairness standards required by PAJA'.

[97] The DMA does not prescribe a procedure for the making of regulations in terms of ***s 27.*** *That is left to the COGTA Minister who, whatever procedure she chooses, is under a duty to act fairly The absence of a procedure in the DMA is not surprising given the nature of disasters. In some cases, such as a flood or an earth quake, for instance, extremely urgent action may be required to manage the disaster, while in other cases, a long drought, for instance, more time for reflection, planning and consultation may be available to decision-makers. The definition of a disaster recognizes a sliding scale in the nature of disasters, ranging from the sudden to the progressive. Within this context, the COGTA Minister was required to assess the urgency of the matter, and to calibrate the procedure adopted by her, including the time to be allowed for the making of representations, to the degree of urgency.*

[98] In that weighing-up process, the need to relieve the populace of some of the more draconian economic and social restrictions was an important factor. As the lockdown regulations impacted on the rights of people, their planned amelioration brought with it a measure of urgency that justified the limiting of the time available to members of the public to make representations. As soon as regulations no longer served a legitimate purpose, they had to be repealed or amended as quickly as reasonably possible. It is also important to bear in mind that the level 4 regulations in their initial form were not necessarily to be the final word on level 4 restrictions: it had always been made clear by the COGTA Minister that rule-making in terms of the DMA was flexible, particularly because in its response to the pandemic, the government was feeling its way in hitherto uncharted territory, there being no blueprint for how to respond to so unique and unexpected a disaster: if a measure was not, in retrospect, appropriate to the purposes of the DMA, it could at short notice be repealed or amended."

279. In this matter, Applicants allege that the Power-Point presentation which was attended by a representative of First Applicant was a unilateral presentation with no opportunity for bilateral engagement.

280. Respondents answer that allegation by stating that:

280.1. A public consultation process was undertaken between 25 and 27 April 2020 concerning the draft framework proposed for each Alert Level, and all interested persons were required to provide their feedback by 27 April 2020. The Government received 816 sector submissions and 70 014 emails from the public;

280.2. Submissions made at the time then relevant to the suspension or limitation on the sale of alcohol were again considered before making the Impugned Regulations;

280.3. Under the auspices of NEDLAC, a task team referred to as the Rapid Response Task Team (RRTT) was set up to facilitate dialogue between Government and social partners;

280.4. After the July 2020 alcohol suspension the Government made a call for comments and interested parties were afforded 7 days in which to make submissions. Those submissions were again considered prior to making the Impugned Regulations.

280.5. VINPRO made presentations to the Minister in December 2020 for the keeping of alcohol sales open, despite there only being hotspot sales restrictions in place at the time. Those representations were provided to the National Coronavirus Command Council (NCCC) and they were taken into consideration prior to the making of the Impugned Regulations.

280.6. Cabinet members convened a meeting with the liquor industry role-players on 28 December 2020 at which the power-point presentation that

Applicants refer to, was made. At that meeting the attendees were made aware of the escalating number of new COVID infection; the increase in positive cases among healthcare workers; the increased demand and strain on hospitals; the MAC proposal for a suspension of liquor licences, various slides compiled in the Sentinel Report that shows a correlation between the lack of alcohol restrictions; and the increase in trauma case hospitalizations. The liquor industry attendees drew Government's attention to the impact that a ban would have on the industry and that submission was considered before making the Impugned Regulations.

280.7. Ministers with different portfolios also consulted with sectors within their sphere of management, for example Tourism consulted with the restaurant sector.

281. The Second Respondent alleges that it was absolutely necessary to immediately alleviate the burden on healthcare workers and healthcare facilities and in so doing to drive down the number of infections.

282. The Second Respondent alleges that the immediacy of the suspension without prior notice was essential to prevent a "*run*" on liquor outlets, which in turn would cause crowds to congregate and increase the spread of the virus.

283. In these circumstances, what Applicants seemingly postulate as procedural fairness is a bilateral engagement in which Applicants' view that "*the savings in hospital beds are negligible*", ought to have prevailed.

284. Applicants argue that it is imperative that Second Respondent engage in bilateral discussions with the liquor industry role-players, but it is plain that she ought also to have regard to the observations and data collected by clinicians and other health care workers. To find otherwise is unsustainable because Applicants' assertion of constitutional rights would then not adequately take into account how upholding those

rights impacts upon the constitutional rights of health care workers and patients infected with COVID-19.

Conclusion

285. For the reasons already articulated in this judgment, I am of the view that Respondents have discharged the *onus* of proving on a balance of probabilities that the making of the Impugned Regulations:

285.1 fell within the ambit of the powers granted to Second Respondent under section 27(3) read with section 26 of the DMA in that they were necessary for assisting and protecting the public; providing relief to the public; preventing disruption to health services; and addressing other destructive effects of the pandemic, notably, a complete collapse in the health system;

285.2 did no more than temporarily expand upon the existing authority under the Liquor Act, to suspend sales of alcohol, albeit in different circumstances to those prescribed by the Liquor Act, and are expressly permitted under section 26(2)(i) read with section 27(1) of the DMA where existing legislation does not adequately provide for dealing effectively with the disaster;

285.3 could only be of temporary duration given the express provision in section 27(5) of the DMA. The fact that the current National State of Disaster has been extended several times beyond its initial 3 month duration, does not detract from the temporal framework within which the Impugned Regulations were only permitted to have effect. The duration of those Regulations were always subject to the jurisdictional fact of a declaration of a national state of disaster;

285.4 had a direct effect on the relationship that exists between alcohol consumption and trauma cases that present at hospitals. In the light of the fatal consequences attached to Covid-19 infections, saving of hospital beds and

access to medical treatment was justified as contemplated under the DMA and the Constitution;

285.5 was rationally connected to the DMA's statutorily mandated purpose of saving lives and livelihoods and to the constitutional mandate of upholding the right to life and the right to adequate health care;

285.6 was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the rights to dignity, equality, life and health care of the collective populace;

285.7 represented the least restrictive means of achieving the purpose of *immediately* freeing up hospital facilities and services to people infected with Covid-19;

285.8 made the restriction placed on the rights of Applicants proportional to the harm sought to be averted.

286. I agree with Applicants that the making of the Impugned Regulations is an exercise of public power that is subject to PAJA but find that Second Respondent acted procedurally fairly and rationally given the nature of the exigencies and the indisputable fact that Government did not expect the second wave of the virus to be worse than the first wave, nor did it have the luxury of time to consult more broadly when the applicable variant was highly transmissible, Covid-19 related deaths had escalated substantially and the health system was in danger of collapsing.

Costs

287. Applicants bring a challenge based on a violation of constitutional rights, most of which respondents now acknowledge as having been infringed, albeit for reasonable and justifiable reasons taking account of the exigencies occasioned by the pandemic.

288. In accordance with the **Biowatch** principle,[51] I am of the view that the case calls for the application of section 38(d) of the Constitution, and given the public interest aspects of the case, no party should be mulcted in costs and each party should bear their own costs.

IT IS ORDERED THAT:

1. **The application is dismissed; and**
2. **Each party is ordered to bear its own costs.**

JUSTICE R. ALLIE

CLOETE, J:

I agree

JUSTICE J. CLOETE

NDITA J

[289] I have read the comprehensive judgment by my colleague Allie, and I am respectfully unable to concur fully in the reasoning and the outcome reached. The main judgment has carefully set out the relevant facts in this matter, and I fully adopt the exposition. I expand on the facts insofar as is necessary. These are my reasons for the disagreement.

[290] In this application, the applicants seek the following relief:

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[51] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC) at [56].

"1. That the normal rules for time limits and service of any process be dispensed with, and this matter be heard as one of urgency under Rule 6(12) of the Uniform Rules of Court.

2. That it be declared that Regulation 44 and Regulation 86 promulgated in Government Gazette 44044, No. R. 1423, on 29 December 2020 are unlawful and have no force and effect.

3. *Alternatively,* to paragraph 2, above, that the decision of the second respondent to promulgate Regulation 44 and Regulation 86 in Government Gazette 4404 No. R. 1423 on 29 December 2020 be hereby reviewed, corrected and set aside,

4. That the respondents are to pay the costs of this application."

[291] The background underpinning the promulgation of the impugned regulations may be summarised thus: on 15 March 2020, a national state of disaster was classified by Dr Mmaphaka Tau, in his capacity as Head: National Disaster Management Centre in terms of section 23 (1) (b) of the Disaster Management Act 57, 2002 ("the DMA"). On 25 March 2020, the lockdown regulations were introduced giving directives for the closure to the public of all premises or places mentioned in annexure D, except to those persons rendering security, it relates to the use and the sale of alcohol. The relevant part reads thus:

"(x) on-consumption premises, including taverns, shebeens, shisanyama where liquor is sold;

(xi) off-consumption premises, including bottle stores, where liquor is sold;

(xi) off-consumption areas in supermarkets where liquor is sold."

[292] On 16 April 2020, new regulations promulgated in Government Gazette 43232, effective from 26 April to 30 April 2020. The new regulations prohibited the

transportation of liquor, except where it was required for industries producing hand sanitisers, disinfectants, soap alcohol for industrial use and household cleaning products. On 28 May 2020, new regulations permitting the restricted sale of alcohol were promulgated. On 12 July 2020, the second respondent reintroduced a complete ban of alcohol in terms of a new Regulation 44. The ban was later ameliorated in August so as to permit the sale of alcoholic beverages under various degrees of restrictions.

[293] On 29 December 2020, the second respondent, acting in terms section 27(2) of the DMA promulgated the Regulations that are sought to be impugned in this application. These are:

(a) A new Regulation 44:

> **"Sale and dispensing of liquor**
>
> (1) The sale, dispensing and distribution of liquor-
>
> (a) for off-site consumption; and
>
> (b) for on-site consumption is prohibited.
>
> (2) The consumption of liquor in public places is prohibited.
>
> (3) The tasting and selling of liquor to the public by registered wineries, wine farms, and other similar establishments registered as micro manufacturers is prohibited.
>
> (4) The transportation of liquor is prohibited except where the transportation of liquor is -

(a) in relation to alcohol required for industries producing hand sanitisers, disinfectants, soap or alcohol for industrial use and household cleaning products,

(b) for export purposes.

(c) from manufacturing plants and storage facilities; or

(d) being transported from any licenced premises for safe keeping.

(5) No special or events liquor licences may be considered for approval during the duration of the national state of disaster.

(6) The Cabinet member responsible for transport must, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, health, police and trade, industry and competition, issue directions fr the transportation and storage of liquor.

(7) The sale, dispensing, distribution, transportation and consumption of liquor is contravention of sub-regulations (1), (2), (3) and (4) is an offence."

(b) A new regulation 86 is applicable to hotspots only but is otherwise precisely the same as Regulation 44.

[294] The grounds advanced by the applicants for seeking the aforementioned order, are, in a nutshell, the following:

294.1 The outright ban on the sale, distribution and dispensing of alcohol (while leaving consumption unscathed) is unconstitutional because it denies the fundamental constitutional rights to trade freely and human dignity. According to the applicants, the consequence of this erosion is the destruction of livelihoods.

294.2 The law does not permit the Executive to ban entire industries by executive fiat, when there are other reasonable and proportionate measures that will achieve legitimate aims while respecting constitutional rights. Reasonable and measured restrictions on sale and social restrictions for all businesses are proven remedies where extreme solutions are called for. Prohibition, however, is unconstitutional, ineffective, a boon to criminal elements and economically devastating.

294.3 The Executive's use of its powers under the DMA to declare a total ban on alcohol – the only product banned in South Africa – infringes on the rights of tavern owners, shop keepers, brewers and all those along the value chain in so disproportionate a manner as to be unconstitutional.

THE PARTIES ANDTHEIR STANDING

[295] The first applicant is the South African Breweries (Pty) Ltd (SAB), a company, duly registered as such, carrying on business as a manufacturer of alcoholic beverages (not including spirits) and distributor thereof. Its principal place of business is 65 Park Lane, Sandown, 2196, Gauteng Province. The first applicant is a juristic person as contemplated in section 8(4) of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"). SAB is a brewer, distributor and seller of beer (and other beverages, not including wine and spirits). It alleges that it has an interest in end consumers having access to the purchase of these beverages because, without them, it has no industry, and therefore also an interest in the ability of wholesalers to purchase beer from it (including the transport of its product by people such as owner-drivers), and on-sell that beer to retailers; and, finally, it has an interest in the continued business of the retailers, whether licensed supermarkets, specialised liquor shops or the hospitality trade in end-consumers having access to the purchase of these beverages because so much beer is sold to end consumers by them. Put in another way, SAB has an interest in the totality of the trade in beer. Thus, it has standing to bring this application.

[296] Apart from the standing referred to above, SAB states that it brings this application in the public interest as contemplated in section 38(d) of the Constitution in that the regulations which are sought to be impugned constitute unlawful impediments to the right to trade (and this would include the trade of persons who supply it with product, owner-drivers who deliver beer to sale outlets and the outlets themselves); as well as an unlawful infringement of human dignity in that they seek to limit the choices routinely made by those very many people who enjoy partaking, overwhelmingly in moderate quantities, of alcoholic beverages.

[297] SAB states that it has been South Africa's premier brewer and leading distributor of beer for 125 years and operates seven breweries and fourty-three depots in South Africa with an annual brewing capacity of 3.1 billion litres. Its portfolio of beer brands meets the needs of a wide range of consumers and includes five of the country's six most popular beer brands. Its beer has an alcohol content of between 4% and 6%.

[298] It claims to have contributed to the public finance as follows:

298.1 Excise duty – 11.5 billion.

298.2 PAYE – R1 billion.

298.3 VAT – R4 billion.

298.4 Income Tax – R2 billion

[299] According to SAB, any limitation on SAB's business imperils the aforegoing source of revenue for the South African State and the irrevocable loss to the fiscus because of the wholesale alcohol ban is approximately R4.5 billion.

[300] The second applicant, Ms Ntombi Maria Sibiya, a natural person whose business address is 607 Reverend RTJ Namane Drive, Mothoeng Section, Tembisa, 1632. Ms Sibiya is the owner and proprietor of a tavern that serves alcoholic beverages (as well as) food and soft drinks) to in-house customers. She states that:

300.1 the alcoholic bans before 17 August 2020 reduced her turnover to nothing although her overheads continued, and she has used her savings to pay them.

300.2 Her business supports eight employees (and their families) and her own seven dependants which include six grand-children (four of whom are at school) and a son;

300.3 The third complete ban on the sale of alcohol has forced her to retrench six of her eight employees and deploy her personal savings to keep her business afloat. She says that if the current ban continues, she will soon be "forced to permanently close Ntombi's tavern."

[301] The third applicant is Mr Alistair Hillary Shapiro, a natural person whose business address is 2 Hennie Alberts Street, Brackenhurst, Alberton. He is what is termed 'an owner-driver'. This means that he pulls the trailer containing SAB's product for delivery to various sales outlets. He states that:

301.1 He has made a very substantial capital investment in the business (including ownership of two large trucks) which he stands to lose if the alcohol ban is continued.

301.2 The side of his business that delivers SAB products employs between 16 and 32 people, depending on the season, most of whom are husbands and fathers like himself.

301.3 In the first of the two alcohol bans he deployed R1.5 million of his savings in order to cover ongoing overheads and salaries that did not stop simply because his income stopped.

301.4 He has exhausted his savings and has no remaining lines of credit.

301.5 He estimates that his business has only “two weeks to live” and he has advised his staff to seek employment elsewhere.

[302] The fourth applicant is Mr Sithembiso Reuben Mabaso, a natural person who resides at Southgate Ridge Security Estate, 1 Duinooord Crescent, Meredale, Johannesburg. He states that:

302.1 He is a moderate drinker who has never sought admission to a trauma ward owing to an alcoholic-related injury or been involved in any sort of public violence.

302.2 He has a stressful job as an attorney, and has a daily ritual of unwinding after work with an alcoholic “drink or two in the evenings” as part of his work-life balance.

302.3 The alcohol ban has deprived him of his harmless pleasure, in breach of his constitutional rights.

[303] The first respondent is the President of the Republic of South Africa. He is cited in his official capacity as he is the Head of the National Executive in terms of section 83 of the Constitution and because section 26(1) of the Disaster Management Act provides that the National Executive is primarily responsible for the coordination and management of National Disasters.

[304] The second respondent is the Minister of Cooperative Governance and Traditional Affairs, appointed to the Executive by the President and is the designated Minister in terms of section 3 of the Disaster Management Act. The second respondent is cited in her official capacity as the Minister responsible for administering the DMA and with powers to promulgate regulations in the Government Gazette in terms of section 27(2) thereof. The regulations prohibiting the sale, dispensing and distribution of alcohol, and limiting the transport thereof – were so promulgated by the second respondent in terms of her powers.

[305] The reasons advanced by the second respondent for the total ban of alcohol as can be discerned from the answering affidavit is the need to save every life and every hospital bed. In order conserve hospital capacity, the sale, dispensing and distribution of alcohol had to suspended.

MOOTNESS

[306] It is common cause that when the applicants initiated these proceedings on or about 6 January 2021 the impugned provisions were still in force. They were however, repealed and substituted on 1 February 2021, thereby rendering the issues moot. Counsel for the respondents fervently argued that based on the judgment of the Supreme Court of Appeal in *Minister of Justice and Others v Estate Stransham-Ford*[52], this court is precluded altogether from determining issues that are moot or where there is no live controversy. According to the argument, such powers are exclusively vested in the appeal court, and that for a general division of the High Court to decide such issues amounts to usurping the functions of an appeal court. Furthermore, that section 16 (2)(a)(i) of the Superior Courts Act 10 of 2013, provides that:

> "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

Accordingly, so went the contention, based on the above, should this court find that the issues are moot, it cannot exercise a discretion to hear the matter, the application should be dismissed on that basis alone. To this end, the Court in *Stransham-Ford* held*:*

> "[25] The situation before Fabricious J, was not comparable to the position where this court or the Constitutional Court decides to hear a case notwithstanding that it has become moot. When a court of appeal addresses issues that were properly determined by a first instance court and determines them afresh because they raise issues of public importance, it is always mindful

[52] 2017 (3) 152 SCA

that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues. A feature of all the cases referred to in the footnotes to paragraph 22 above is that the appeal court either overruled the judgment in the court below or substantially modified it. The appeal court's jurisdiction was exercised because "a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required". The High Court is not vested with similar powers. Its function is to determine causes that present live issues for determination." (internal footnotes omitted, own emphasis supplied, my underlining)

[307] In the main judgment, Allie J, makes the following finding:

"Assuming that the High Court's conclusion regarding the subject matter in *Baleni* was correct (it is not necessary to take it any further than that for present purposes) in the case before us the subject matter is the impugned regulations that are no longer in force. It may be, as the Minister herself states, that a full alcohol ban may be reimposed in the future depending on the particular circumstances at the time. To my mind however, a distinction must be drawn between the subject matter of a full alcohol ban per se (on the one hand) and the true subject matter in this case (on the other) which is the impugned regulations no longer exists. Put differently, the cause of action is the impugned regulations themselves. That cause of action fell away on 1 February 2021 but the applicants did not amend their relief to advance a case in terms of s 21(1)(c) of the Act. They persisted in pinning their colours to the previously existing mast of the impugned regulations. Accordingly, and following *Stransham-Ford* (by which we are bound) the cause of action ceased to exist before judgment in this court of first instance.

28. On the particular facts before us, no case have (sic) been advanced to support a conclusion that there is a live issue for determination that will impact on the consequential future relief, whether it be restitutionary in nature or other

relief and whether the relief sought would impact upon other persons, if not on the Applicants. “

[308] It seems to me that by stating that the applicants pinned their colours to the mast of the impugned regulations and that they did not amend their relief to advance a case in terms of s 21(1)(a) of the Act, the main judgment relies on the dictum in *Ramuhovhi and Another v President of the Republic of South Africa and Others*, (Women’s Legal Trust as amicus curiae) 2016(6) SA 210 (T), wherein the following was said:

> “[19] The general principles determining whether a court will entertain a matter is that “courts will only act if the right remedy is sought by the right person in the right proceedings and circumstances.” (internal footnote omitted)

However, paragraph 19 of the judgement continues thus:

> “the Constitutional Court recognised that even in cases that are technically moot as between the parties the interests of justice may tip the balance in favour of entertaining a particular dispute.”
>
> These constitute the principles of standing, ripeness and mootness and it is prudent for this Court to deal with these issues and to determine if it the court should entertain this matter as a constitutional issue.” (internal footnote omitted)

[309] Notwithstanding the above finding, the learned judge came to the conclusion that:

> “36, Mindful of the exigencies, I am nonetheless of the view that should I be incorrect in finding that there is no live issue for determination in this case, it would serve the litigants in *casu* well that I nonetheless consider the remaining issues in dispute.
>
> 37. As was stated by the Constitutional Court in *Spilhaus Property* v MTN para [44] “. . .. The Supreme Court of Appeal itself has said that it is desirable,

where it is possible for a lower court to decide all issues raised in a matter before it This applies equally to the Supreme Court of Appeal. This is more so where, as here, the final appeal court reverses its decision on the chosen point in limited point. This may impact on the fairness of an appeal hearing. Litigants are entitled to a decision on all issues raised, especially where they have an option of appealing further. The court on which an appeal lies, benefits from the reasoning on all issues."

[310] I am doubtful that the approach adopted in the main judgment to the effect that the basis for determining the issues in the present application may be derived from the *Spilhaus* judgment. This I say because if one were to accept that that should be the case, it means that in every case where mootness is raised as an issue, the court must as a matter of procedure consider every other issue. In addition, mootness is invariably always raised as a preliminary issue and the requirement of considering whether the determination of the whole matter is in the interests of justice falls away. Put in another way, the approach also renders the *Stransham-Ford* judgment, on which the reasoning for holding that this court has no jurisdiction to entertain moot issue redundant. Furthermore, it also negates the respondents' contention to the effect that this court, being bound by the *Stransham-Ford* judgment, ought to dismiss this application on the basis that there are no live issues to be determined by it.

[311] Although the *Stransham-Ford* judgment seems to suggest that a court of first instance is not entitled to entertain a moot issue, I am of the view that in the light of the facts in the matter at hand, it must be distinguished.[53] First, in the *Stransham-Ford* matter the cause of action was of an entirely personal nature and when Mr Stransham-Ford died, the order of the court a quo did not have any practical effect and it (the court) had no authority to issue it. Second, the mootness of the proceedings was not the only ground upon which the order of the court *a quo* was found wanting, the Court also held that there was no full examination of the local and international law as against the

[53] See also Baleni v Regional Manager, Eastern Cape Mineral Resources and Others 2021 (1) SA 110 (GP); [2020] ZAGPPHC 485 (11 September 2020)

Constitution and that interested parties were not afforded an opportunity to be heard. The present matter involves constitutional issues impacting on the rights of the applicants and for as long as the DMA remains operative, and as evidenced by the three alcohol bans, it is in my view in the interests of justice that the issues raised by the applicants be determined fully. Furthermore, given that the prohibition may be withdrawn at any stage, even after a constitutional challenge has been launched, as is the case in the present proceedings, it may well be that the prohibitions may never be tested constitutionally, something that is untenable in a constitutional democracy. In my judgment, the *Stransham-Ford* judgment is clearly distinguishable as the rights sought to be enforced were purely personal, contrary to the impact of the DMA regulations to the applicants and general public.

[312] In my view, the correct approach is to determine whether, notwithstanding the mootness, it is in the interests of justice to determine the issues in this application as set out in *Normandien Farms(Pty) Ltd v South African Agency for the Promotion of Petroleum Exploration and Exploitation SOC Ltd & Another* 2020 (4) SA 409 (CC) thus:

> "[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the matter. The central question for consideration is whether it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this court's approach to mootness is necessary at this juncture, followed by an application of the various factors to the current matter.
>
> [47] Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical".
>
> [48] This court has held that it is axiomatic that "mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal,

even if moot, where the interests of justice so require". This Court "has discretionary power to entertain even admittedly moot issues".

[49] Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weights in favour of entertaining a moot matter.

[50] Moreover, this court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

(a) whether any order which it may make will have some practical effect either on the parties or on others.

(b) the nature and extent of the practical effect that any possible order might have;

(c) the importance of the issue;

(d) the fullness or otherwise of the arguments advanced; and

(e) resolving disputes between different courts." (internal footnotes omitted)

[313] What constitute the interests of justice is defined by the circumstances of each case. That said, what is required is the balancing of the relevant factors before a value judgment is made on where the interests of justice lie. (See *Spilhaus*, para 16). In the matter at hand, what further demonstrates that the interests of justice require the determination of the matter notwithstanding the fact that the impugned regulation have been repealed is that there is a lingering likelihood that the ban may be re-introduced.

[314] It will be recalled that the applicants also seek the review of the impugned regulations in terms of PAJA. As set out in the main judgment, relying on *Bengwenyama*

Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd [54]they contend that the principle of legality in a review necessitates a consideration of a just and equitable remedy and that militates against a finding of mootness. At paragraph 84, the Court explains the principle thus:

> "[84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity is justified in the particular circumstances of the case before it. Normally, this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even if the 'the desirability of certainty' needs to be justified against the fundamental importance of the principle of legality."

[315] The majority judgment points out that there is no relief in *casu* which would constitute a just and equitable remedy as the only relief the applicants seek is a declaration of invalidity devoid of just and remedial consequences. In *Bengwenyama* the Court dealt with the issue of a just and equitable remedy as follows:

> "[85] The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct is in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA in providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to

[54] 2011 (4) SA 113 (CC) at 84

lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented, direct or collateral, the interests involved, and the extent or materiality of the breach of the constitutional right to just and administrative action in each particular case." (internal footnotes omitted)

[316] It indeed is so that the applicants in seeking the review and setting aside of the impugned regulations have not sought a just and equitable remedy. In my view, it matters not that they have not sought any such remedy. This I say because the aforegoing passage from the *Bangwenyama* judgment states that the remedial approach taken by a court will depend on the circumstances of each case and it seems to me that in certain cases a mere declaration of unlawfulness would suffice. I am fortified in my view by the fact that in *Bengwenyama*, the Constitutional Court set aside the decision granting prospecting rights to the first respondent in respect of Farm Nooiverwacht 324 KT and Eerstegeluk 327 KT in the Limpopo Province and did not make provision for a remedy. The *Bengwenyama* applicants in the High Court had sought to set aside the state's decision to grant a prospecting licence on their land.

[317] The applicants contend that where an infringement of constitutional rights is alleged, the matter can never be moot because the aggrieved party is entitled to an order declaring constitutional invalidity even where there is no consequential relief. In so contending they state that in terms of s 21(1) (c) of the Superior Courts Act 10 of 2013, this Court has discretion to grant a declaratory order in the public interest. Section 21(1) (c) of the Supreme Court Act provides thus:

"**21 Persons over whom and matters in relation to which Divisions have jurisdiction - -** (1) A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within its

area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

The reasoning adopted in the main judgment is, as I have earlier alluded to that the applicants are not entitled to rely on the section because they *"have persisted in pinning their colours to the previously existing mast of the impugned regulations. Accordingly, and following the Stransham-Ford by which we are bound) the cause of action ceased to exist before judgment in this court of first instance*."

[318] I have already indicated that the *Stransham-Ford* judgment is distinguishable from the facts in *casu*.

[319] The applicants contend that, notwithstanding the withdrawal and subsequent replacement of the impugned regulations, it is in the interests of justice that the violation of constitutional rights be determined because the issue remained alive because of the likelihood of a return to Alert Level 4 and the re-imposition of the impugned Regulations. For this contention they rely on the judgment of the Supreme Court of Appeal in *Esau and Others v Minister of Cooperative Governance and Traditional Affairs and Others*[55], wherein the court stated the following:

"[33] The alert level of the country has since been reduced further to level 1, before being increased again to level 3. Many of the restrictions in the level 4 or level 5 regulations no longer apply. Despite that, the appellants argue that the issues they raised are not moot, particularly as the country could be placed once more on level 4 and 5. While the respondents argued in their papers that

[55] Essau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others 2021 (3) SA 593 (SCA)

the matter was moot, they did not persist with that contention and argued the merits of the appeal fully. I am satisfied that the interests of justice require a decision from this court on the issues raised by this appeal, even though the level 4 regulations have been replaced with level 3 regulations. It is only in respect of one matter – the validity of directions issued by the Minister of Trade Industry and Competition – that they rely on mootness. I shall deal with that issue in due course. I turn now to deal with the issues that we are required to decide."

[320] The main judgment reasons that the rationality of the justification that motivates the imposition of alcohol bans or suspensions in the future is not capable of being predetermined in this matter, and therefore the extent of the impact that a decision on the impugned regulation's validity would have on other persons in the future is not capable of determination at this stage. Whilst it is so that the different circumstances may well apply if or when the regulations are re-imposed, in my view, however, even if the prohibition has been withdrawn, if it is capable of repetition, or there is a substantial chance that it may be re-imposed, the matter cannot be moot. Put differently, it is difficult to imagine a Regulation impacting so profoundly on the constitutional rights of the citizens of this country, and capable of repetition, evading scrutiny.

[321] I now turn to consider the expert evidence.

THE EXPERT EVIDENCE

[322] It is common cause between the parties that the second respondent bears the onus of showing that the limitation is justifiable. In so doing she must present facts supporting the justification. In *casu,* this has been done by the presentation of expert evidence.

The RBB Report

[323] The applicants on 19 February 2021 filed an economic assessment report compiled by Mr Richard Murgatroyd, a specialised economist and partner at RBB

Economics. Pursuant to the filing of further answering affidavits, Mr Murgatroyd filed a second report on 29 June 2021. Mr Murgatroyd states that he was requested to compile a report on the economic impact of the ban on the sale of alcohol more particularly:

> 323.1 the effect of liquor bans on trauma reduction';
>
> 323.2 the capacity of the healthcare system to treat COVID-19 patients;
>
> 323.3 the economic cost of the liquor ban, including the impact on participants in the value chain of the alcohol industry and the impact on the government fiscus; and
>
> 323.4 the survey evidence relating to the impact of the ban on the restaurant industry.

[324] At the heart of these proceedings is the efficacy of the liquor ban in reducing the number of trauma cases, and in turn reducing the strain on the country's healthcare system. It will be recalled that the respondents in the answering affidavit state that:

> "The research shows that when an alcohol ban is imposed, the demands on trauma emergency units are reduced and, conversely, when alcohol bans are uplifted, the demands on trauma and emergency units are increased."

[325] The RBB Report refutes this averment. The central point made in the RBB report is that since several factors may explain the stated or observed changes in trauma case numbers, conclusions cannot be reliably drawn regarding the impact of any individual factor unless one is able to disentangle the effect of this factor from other factors that may plausibly have attracted trauma case numbers. Furthermore, the observed correlation between the imposition or removal of the liquor bans yields little or no insight into the efficacy of the liquor bans themselves if one disentangles their impact from other measures introduced at the same time. According to the report, it would be incorrect to infer from the existence of a broader linkage between alcohol consumption and trauma admissions that the liquor bans had an impact on trauma cases in South

Africa, given the other measures that were in place at the same time. Put in another way, correlation does not imply causation.

[326] The concept of correlation and causation is explained in the RBB report:

> "37 In simple terms correlation refers to the degree to which two variables or series change together over time. For instance, if two variables are said to be highly positively correlated, this means that those variables move closely together over time such that, for instance an increase in one coincides with a similar increase in the other."

[327] The report points out that in the present case, there are other important factors that might be expected to have an impact on trauma cases, either in complete isolation or in combination with the consumption of alcohol. To this end, the report notes that the first (full) liquor ban was implemented on 26 March 2020, and on the same day a twenty-four-hour curfew, restrictions on gatherings as well as a ban on inter-provincial travel restrictions were put in place. This lasted up to the 30th of April 2020, after which a less restrictive curfew from 20h00 pm until 5h00 was put in place until the end of May 2020, whilst gatherings and interpersonal travel restrictions were eased, though only to a limited extent. Mr Murgatroyd states that whilst Professor Parry seeks to compare to fall in cases in cases between the periods and during the first (full) ban, "these comparisons are unlikely to be probative of the effect of the liquor ban since the assessment does not control for changes to gathering and movement restrictions."

[328] The report also highlights that when the first (full) liquor ban was lifted on 1st June 2020, such that there were only restrictions on the sale of alcohol during certain hours and days of the week, curfew measures were also lifted and inter-provincial travel restrictions eased. Thus, so continues the report, the comparisons of trauma cases during and after the first ban (as presented for instance by Sentinel and the letters from the provincial governments) are unlikely to constitute credible evidence regarding the specific impact of the ban, given that this comparison does not cater for the lifting of other lockdown measures at the same time. Likewise, when the second (full) ban was

implemented on the 12th July 2020, a curfew from 21h0 to 04h00 was also reinstated (there having been no curfew immediately prior to the date). Thus, the observed fall in trauma cases when the second full ban was imposed will again, not be probative given the presence of other restrictions.

[329] In the same vein, so continues the report, when the second (full) liquor ban was lifted on 18th August 2020 (such that there were only restrictions to the sale of alcohol during certain hours and days of the week), restrictions on social gatherings were significantly eased and the remaining restrictions on inter-provincial traveling were lifted. Again, therefore "the assessments such as those presented in the December and January Sentinel Reports relating to the increase in trauma cases after the lifting of the second (full) ban do not provide credible evidence of the effect of the ban itself."

[330] The report notes that when the third (full) ban was implemented on the 29 December 2020, on the same day all social gatherings were prohibited, (from social gatherings up to 100 people indoors and 25 people outdoors having been allowed previously). Therefore, the reductions in trauma cases in the weeks following the time when the third (full) ban was implemented as cited in the answering affidavit, are again not probative of the effect of the ban itself.

[331] The report concludes that:

> "60 Many of the above changes to other lockdown measures can be reasonably expected to have affected trauma cases in the same direction as would the liquor ban. This alone means that it is inappropriate, and indeed misleading, to seek to attribute all or most of observed reductions in trauma cases to the liquor ban. As explained above, a more detailed analysis would be required in order to see whether such a conclusion could be reached.
>
> 61. Moreover, the available evidence indicates that these changes can reasonably be expected to have had a substantial effect on trauma cases. This suggests that if a more detailed analysis could be undertaken, it could well

indicate that, in fact, the imposition of liquor bans had a much more limited impact."

[332] The Report further highlights that the importance of other policy measures on trauma case numbers is acknowledged in multiple sources, including the respondents' answering affidavit and its annexes. It states for instance that:

332.1 multiple studies show significant reductions in trauma admissions in countries which implemented movement and gathering restrictions but not a liquor ban, such as the United States, Germany and Australia.

332.2 the letter from the Premier of the Western Cape annexed to the answering affidavit requesting the Minister of Health to apply restrictions such as curfews and limits to gatherings to reduce the trauma cases in the province.

332.3 paragraph 40.9 of the answering affidavit (with reference to the December Sentinel Report) asserts that "[t]he relaxing of retail alcohol sales and extension of night time curfew, in particular, saw a 36.2% reduction in trauma *admissions*."

332.4 the December Sentinel Report asserts that "[t]he extension of night time curfew to 12am and the relaxation of retail alcohol sales to include Friday has effectively resulted in additional 30% increase in average (median) daily trauma cases and a significant additional 64% increase in weekend trauma cases presenting to hospitals."

[333] With regard to the January Sentinel Report and the December Sentinel Trauma Report, Mr Murgatroyd states that although they (the reports) seek to disentangle the effect of the liquor bans from other sources, the attempt ignores the potential for trauma cases to be affected by a range of other important factors. According to the RBB report, the December Sentinel Report fails to recognise that despite there being no change in other lockdown restrictions at the same time as the introduction of the second liquor ban, a curfew from 21h00 to 04h00 was introduced.

The evidence of the respondents' expert witnesses

[334] At issue is the correlation and causation of the alcohol bans. Professor Parry 's opinion on the issue may be summarised thus: applying the Bradford Hill criteria for causation, the controls on alcohol consumption occurred before the drop in trauma presentations, tougher restrictions during the different phases of the lockdown result in greater levels of reduction in trauma presentations, and removing the full sales ban resulted in trauma presentations rising rapidly. There is a specificity in that natural causes are not affected by the bans. According to Professor Parry, there is even a biological pathway through which the alcohol bans affect trauma presentations through the agent "alcohol". The same can be said for restrictions on mobility: they also fulfil the criteria for mobility to be causally related to reductions or increases in trauma presentations.

He summarises thus:

> 334.1 the liquor sales bans and the restrictions on mobility, are causally related to trauma presentations.
>
> 334.2 The fact that another intervention affects the outcome (trauma presentation) does not invalidate an intervention (the temporary sales ban) from also causally impacting on that outcome.

[335] Professor Parry disputes the contention in the RBB report that in essence, the alcohol sales ban had little or no impact on trauma presentations and that it is all about the government's restrictions on mobility and, by implication that the alcohol sale bans were an unnecessary addition. In his opinion, the RBB report does not provide any empirical evidence for reaching its conclusions. Instead, according to him, there are multiple experienced and attending physicians who recorded that when the alcohol sales bans were lifted their facilities were once again filled with intoxicated persons, and when the bans were imposed those persons were largely absent. Professor Parry does not accept the suggestion in the RBB report that the State must disentangle the impact

of the temporary suspension from all other factors that can reasonably be expected to affect trauma case numbers.

[336] Professor Parry is of the view that not only is it not possible to engage in a disentangling exercise during the pandemic, such an exercise is unnecessary prior to any decision being taken to impose a temporary suspension on liquor. He advances two reasons for this contention:

> 336.1 Whilst it can be accepted that the effect of the alcohol sales bans and curfews are not related, he cautions that the relationship should not be exaggerated. He further explains that curfews for example mean that people cannot stay out late drinking at on-site liquor outlets, but the additional four hours of curfew after the December suspension was imposed cannot substantially explain the 51% drop in trauma presentations. According to him, that is clearly the effect of the December temporary suspension of liquor sales, a position shared by the Western Cape Government.
>
> 336.2 The disentangling exercise sought by the applicants is a near impossibility particularly in times of a crisis of unprecedented proportions because, in order to apply the model advanced by the RBB, he would have to 'test' the approach in relation to each member by singularly imposing such measure – without any other measure being in place – at a time when trauma units are under stress for purposes of ascertaining whether one measure is more effective than the other. This approach, so opines Professor Parry, would be reckless when regard is had to the already existing overwhelming evidence establishing causation.

Dr Makgetla

[337] Dr Neva Makgetla is a Senior Economist, from the Trade and Industrial Policy Strategies, which is an independent, non-profit, economic research institute. She filed two reports wherein she considers the impact of the temporary alcohol bans on the

economy, both directly and indirectly as well as the economy-wide losses which can be mitigated in the long-term. She filed a further report, pursuant to the applicants' RBB report.

[338] Dr Makgetla's view is that the RBB's ideal of proving causality runs the risk of confusing causality and correlation as it ignores the critical importance of correlation in both natural and social sciences as an initial indication of a potential causal relationship. Furthermore, it ignores the extensive literature on decision making during public health emergencies. According to Dr Makgetla whilst correlation may not equal causation it is effectively what all non-experimentalist resort to in developing and defending causal claims. Furthermore, it ignores that in a crisis it is often impossible to apply all of the available tests. She further states that based on the extensive and authoritative literature emanating from the WHO and the European Centre for Disease Control the position may be summarized thus:

> 338.1 Decision-making during public health emergencies has to combine all of the available evidence, which encompasses not just quantitative studies but also qualitative research, case studies and the experience of other countries and/or diseases.
>
> 338.2 Where the evidence is not definitive, decision-makers have to rely on logic and theoretical insights.
>
> 338.3 The available evidence should be considered, not only around the nature of the disease, but also around the cost and benefits of different measures, as well as their effectiveness and practicality.
>
> 338.4 In order to improve decision-making over time and minimize the risk of sustained errors, processes should also be set up to improve policies over time.

[339] Dr Makgetla further states that the WHO concluded that public health authorities have little choice but to make the best of available evidence, especially in the early

phases of a disease outbreak resulting from a novel pathogen. The evidence may include the experiences of medical health personnel and other affected persons; available but imperfect or incomplete data; international experience or information relevant institutions. In her opinion, causality may have to be inferred from a combination of experience, logic, theory and the available information, both qualitative and quantitative, because an emergency often does not leave either time or resources to set up experiments or generate statistics suitable for rigorous analysis. Moreover, given that at the time of the institution of the present proceedings, because the bans had only been introduced on three occasions, most of the statistical tests to examine causality would not be applicable. She surmises that an analysis of the mechanisms of causality, however – in this case- factors that lead to a spread of COVID-19 – point universally to the importance of super-spreader events linked to bars and entertainments that include consumption of alcohol.

[340] Dr Makgetla further states that in her view, the preferred approach would be, consistent with the WHO recommendation, to review the available evidence on the packages used to control past surges in order to find ways to minimize costs and maximise benefits.

[341] Regarding the impact of the ban on the economy, Dr Makgetla states that it is virtually impossible to separate out the economic impact of the alcohol bans from other factors depressing consumer demand on the economy. According to her evidence, the economic benefits of alcohol restrictions during the pandemic come not only from the reduction in COVID-19 transmission, but, inter alia, the reduction in trauma cases tended to by the healthcare system. In her opinion, weighing the restrictions on alcohol to the economic costs of an inactive alcohol industry should not merely be seen as a trade-off, but rather an investment to enable future growth, which requires greatly improved control of COVID-19.

<u>Professor Matzopoulos</u>

[342] Professor Matzopoulos, an honorary Professor at the University of Cape Town School of Public Health, is very critical of the RBB report on which the applicants' case is premised. He states that is not aware of the author of the report having published any reports in relation to alcohol related matters in South Africa. In addition, the RBB report is not available through standard platforms through which scientific research is disseminated. His further concern is that the RBB report may not have been subjected to traditional double-blind peer review. Furthermore, Professor Matzopoulos is concerned that the report is commissioned by the alcohol industry, which is a party to these proceedings. He states that because the report was seemingly commissioned only for the purposes of the litigation (and on behalf of, inter alia, SAB which part of the alcohol industry), there would not have been a comprehensive study protocol setting out the aims, objective, hypotheses and analysis plan *a priori* that has been reviewed by an appropriate scientific authority if this protocol exists at all. According to Professor Matzopoulos, these are basic quality thresholds that, in his opinion, have not been satisfied. For this reason, in his expert opinion, any inference drawn from this research should be treated with extreme caution.

Dr Ismail

[343] Dr Muzzammil Ismail is a Public Health Medicine Registrar based at the Epidemiology and Surveillance Unit at the Western Cape Department of Health. In response to the causation and correlation challenge posed in the RBB Report, Dr Ismail points out that the relationship between alcohol availability and trauma presentations is causal because it meets the Bradford Hill criteria for causality. He states that the contention that either the alcohol ban or the restrictions in terms of mobility lead to the decrease in trauma presentations is flawed. In his opinion, the temporary suspension on alcohol had a substantial impact on the demands on the health system. Ultimately, so goes his opinion, the combination of measures served to reduce the demands on the health system to the extent that was evidenced.

[344] Dr Ismail explains that the pattern of trauma presentations shows clear spikes over weekends, which aligns with the validated experience of clinicians who deal with

alcohol-related trauma every weekend. It also aligns to evidence from the Western Cape Injury Mortality Profile 2018 Report which looked at previous data from the province that clearly depicts that over 68% of homicides occur over weekends and over 70% of these homicides victims test positive for the presence of alcohol in their systems. Furthermore, during the complete alcohol bans, these weekend spikes show the most dramatic decrease, which then demonstrates a clear case of causation. Besides, so states Dr Ismail, there is a mass of global literature which analysed and exposed the relationship between alcohol policy in terms of availability, without any restriction on movement, and its link to external causes of mortality.

[345] Dr Ismail refutes the applicants' argument that 'other policy measures' substantially contributed to the increases and decreases in trauma presentations and states that:

> 345.1 the applicants provide no evidence-base to prove causality, nor data to support the alleged impact from these "other measures", and as such this assertion falls to be rejected.
>
> 345.2 alcohol related trauma is a well-established phenomenon and is known (based on a significant international evidence-base and affirmed by the WHO) to be causally linked to trauma and violence. A denial of this substantial role in this regard, particularly in the absence of evidence is reckless. He reiterates that alcohol plays a profound and significant role in causing trauma presentations.

[346] Dr Ismail is one of the authors of the Sentinel Trauma Report. Noting from the Sentinel Trauma Report, he states that the second (full) alcohol ban initially occurred in lockdown Alert Level 3. He states that on 12 July 2020, an amendment to the level 3 regulations was imposed as a result of the front-line health-care worker experience and the information at the time which showed a complete stark increase in alcohol related trauma incidents. The amendment saw a complete ban in alcohol and an establishment of curfew from 21h00 -04h00. Dr Ismail says that prior to this period, there was no

formal curfew in place, but there were significant restrictions on night-time economic activity and on movement outside one's home, (e.g. stipulations and conditions from moving out of one's home, non-allowance of on-site consumption of food and beverages at point of sale, and non-allowance of entertainment activities). He concludes that this limited change in movement but significant change in alcohol availability lends itself to a means of separating out the two effects. Furthermore, the decrease of trauma presentations at hospital on average of 33% and between 40-50% on the weekend trauma peaks, following the July Alert Level 3 amendment is primarily on account of the alcohol ban and, to a far smaller extent the change in movement.

[347] Dr Ismail further points out that the second (full) alcohol ban on 18 August 2020 coincided with a change to Alert Level 2 and a one hour decreased in the night-time curfew from 21h00-04h00 under Alert Level 3 of 22h00 to 04h00. According to Dr Ismail, with the minimal change in curfew hours and significant change in alcohol availability after the second (full) ban was lifted, the Sentinel Trauma Report saw an average increase of 43% in trauma presentations. The Report also saw an immediate increase in Interpersonal Violence of 55%. He concludes that from a sociological, biological and evidence-based perspective the increase was far better explained by the non-availability and subsequent availability of alcohol and its relation to alcohol-related trauma. Furthermore, so states Dr Ismail, the imposition of the third alcohol ban saw significant declines in trauma presentations, particularly on New Year's Day. He states that when regard is had to the usual impact of alcohol on New Year's Day, this highlights the effect more clearly. Most importantly, this occurred within an adjusted Level 3 lockdown that, inn fact allowed most other economic activity. Thus, the complete flattening of weekend trauma peaks in January shows clear causation between the availability of alcohol, and trauma presentations.

The approach in application proceedings

[348] The respondents contend that in assessing the RBB Report against the respondents' evidence, the test generally applied in motion proceedings as enunciated

in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[56] is applicable. It is so that in motion proceedings where a disputes of fact arise on the affidavits, a final order may be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such an order. This is so unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched, or so clearly untenable that the court is justified in rejecting it merely on the papers. The respondents rely for this proposition on *Media24 Books (Pty) Ltd v Oxford University Press Southern Africa(Pty) Ltd*[57] wherein the court said the following:

> "[36] Media24 chose not to pursue this case by way of trial. Nor did it ask for the matter to be referred to oral evidence. in asking for it to be decided n the affidavits alone, it therefore bound itself to the long established approach described in Plascon Evans. That meant that the case could not be determined simply on weighing of the probabilities as they emerged from the affidavits. The facts deposed to by OUP's witnesses had to be accepted, unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. A finding to that effect occurs infrequently because courts are always to alive to the potential for evidence and cross-examination to alter its view of the facts and plausibility of the evidence." (internal footnotes omitted)

[349] According to the respondents, based on these principles, and because the applicants have not applied for a referral of any disputes to oral evidence, the facts asserted by the respondents must be correct. This is so even if the evidence is that of expert witnesses.

[350] The applicants contend that the respondents misunderstand and misapply the *Plascon-Evans* rule as the court in *Media 24* weighed and analysed all of the evidence.

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[56] 1984(1) SA 623 (A) 634-635.

[57] 2017 (2) SA 1 SCA 35-52

The facts in the present matter are somewhat peculiar in that the applicants' case as set out in the founding affidavit morphed into a different case when the RBB Report was introduced in the replying affidavit, and further supplementary answering affidavits were filed and attached to the replying affidavit. The applicants correctly point out that the court in *Media24* notwithstanding the reference to the *Plascon-Evans* rule fully evaluated all the expert evidence produced by the parties. I agree with the approach adopted in the main judgment that the court in Media 24 "went beyond merely accepting the evidence of the experts as facts alleged by the Respondent that can be accepted in the absence of oral evidence. The court in that case looked at the extent to which the expert evidence Respondent firmly and comprehensively set out a basis for refuting the expert evidence of Applicant, which was expressed in general terms and found that the Applicant failed to disprove the expert evidence of Respondent in Reply."

[351] The approach to the evidence therefore in *casu* shall be as set out in *Twine and Another v Naidoo & Another*[58]:

> "The court should actively evaluate the evidence. The cogency of the evidence should be weighed *"in the contextual matrix of the case with which (the Court) is seized.*" If there are competing experts, it can reject the evidence of both experts and should do so where appropriate. The principle applies even where the court is presented with the evidence of only one expert. There is no need for the court to be presented with the competing opinions of more than one expert witness on a disputed fact. There is no need for the court to be presented with competing opinions of more than one expert in order to reject the evidence of that witness." (internal footnotes omitted).

NECESSITY

[58] [2018] All SA 297 (GJ) at [[18]

[352] The applicants contend that the respondents have not shown that the impugned regulations are necessary as contemplated in section 27(3) of the DMA. Section 27(3) reads thus:

> "(3) The powers referred to in subsection (2) may be exercised only when to the extent that 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.

[353] According to the applicants, the word '*necessary*' must be construed narrowly and is a jurisdictional requirement which the respondents bear the onus of proving. The applicants rely for this interpretation on the Constitutional Court judgment in *Pheko and Others v Ekurhuleni Metropolitan Municipality*[59] wherein it was held that:

> "[37] This section must be interpreted narrowly. A whole wide construction may adversely affect rights in s 26. The language used in s 55(2) (d) is critical. The text must be interpreted in the context of the DMA as a whole, taking into consideration whether its preamble and other relevant provisions support the envisaged construction.
>
> [38] Properly construed and read in conjunction with other provisions, including ss 51(1), and 2(1) of the DMA, s 55(2)(d) does not authorise evictions or demolition without an order of court. On its wording, the DMA deals with 'evacuation'. The word "evacuate" is generally used to describe what is done in

[59] 2012 (2) SA 598 (CC) 2012 (4) SA BCLR 388

a situation where people's lives are at risk as a result of an impending "disaster". "Evacuate" means "to remove from a place of danger to a safer place". The people concerned therefore require immediate removal to a safe temporary shelter away from the disaster area, in order to preserve their lives." (internal footnotes omitted)

[354] It is common cause that the expressed rationale for the liquor ban is to release pressure on the healthcare system created by alcohol induced trauma. The applicants contend that the threshold of necessity:

> "[E]ntails an assessment of what trauma reductions the alcohol ban achieves over and above the other restrictions (such as curfews, social gatherings, work, inter- reduction is attributable to the alcohol ban over and above reductions caused by provincial travel etc.) In other words, the difference between the parties is not whether an alcohol ban in isolation would reduce trauma presentation; it is what other restrictions. This is what the RBB terms the "incremental" effect of the alcohol ban."

[355] According to the applicants the reason the exercise suggested above is necessary is that if trauma reductions are achieved by other means, then the alcohol ban is not necessary.

[356] The respondents contend that use of the word 'necessary' in section 27(3) should be interpreted more broadly because of the context, purpose and ambit of the DMA as a whole. To this end, the respondents rely on *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others COGTA*[60] where the full bench held thus:

> "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

[60] Case no 22311/2020[2021] ZAGPPHC 168 (24 March 2021)

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 against the pandemic."

[357] The respondents contend that the term necessary should be read as meaning "reasonably necessary" and not "strictly necessary" as ascribing a broader interpretation to the term 'necessity will:

357.1 be in accordance with the intention, purpose and import of the DMA itself;

357.2 not hamper constitutional rights because it would allow the COGTA Minister the leeway to deal with the pandemic, the furtherance of everyone's rights to life, access to healthcare and an environment that is not harmful. The respondents further highlight that it is an established principle that the rules of procedure (in this regard the impugned regulations) that are created in order to give effect to a right must facilitate rather than frustrate the exercise of the right as stated by the Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa and Others*[61], that . . . "[t]he mere existence of the right . . . without proper arrangements for its effective exercise, does nothing for a democracy it is both empty and useless;

357.3 the outer limits of the COGTA Minister's powers are already delineated in terms of the DMA itself and its scheme and there is no need to straitjacket those powers by ascribing further restrictions.

[358] The respondents further distinguish the *Pheko* on the basis that *"unlike in the case of Pheko, the COGTA Minister is not using her regulation –making powers of achieving an outcome that is not sanctioned by another Constitutional right . . ."*

[61] 1999 (3) SA 191 (CC) para 1. See also paras 123-124 'Reagan J dissenting)

[359] It is plain that the impugned regulations do have an impact on the rights enshrined in the Constitution, the question whether or not that is justifiable remains to be considered. Furthermore, the DMA is subject to the Constitution, it being the supreme law of the land. The rights asserted by the applicants, namely, freedom to trade the right to dignity, the right to privacy, the right to freedom and security of the person are fundamental rights. That being the case, and applying the decision in *Pheko*, the scrutiny applicable, should in my view be that of *"strictly necessary*". The strictly necessary test may not be applicable to every infringement, but if the right is fundamental, the higher scrutiny of 'strictly' necessary ought to be always be applicable. In *S v Makwanyane*[62] the Constitutional Court held that:

> "[109] . . .Where the limitation is to a right fundamental to a democratic society, a higher standard of justification is required, so too, where the law interferes with the 'intimate aspects of private life." (internal footnotes omitted)

[360] This strictly necessary test is not meant to interfere with the COGTA Minister's 'leeway' to deal with the pandemic, further everyone's rights to life, ensure access to healthcare and an environment that is not harmful. Rather, it acknowledges that where fundamental rights are impacted by a regulation, the burden to prove that the necessity of the regulation is on the respondents, then the Court must strictly scrutinize the necessity. Admittedly, the objectives sought to be achieved by the COGTA Minister are compelling.

CORRELATION AND CAUSATION

[361] The central issue in this matter revolves around whether correlation implies causation with regard to the alcohol ban and trauma presentation. In determining this issue, it is necessary to consider and assess the expert reports. In so doing, the principles applicable to expert testimony must come into play. As set out in the main

[62] S v Makwanyane and Another 1195(3) SA

judgment, in *Price-Waterhouse-Coopers Inc and Others v National Potato Co-operative Ltd & Another*[63]

> "[98] Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as 'hired guns'. In [T]he Ikarian Reefer Cresswell J set out certain duties that an expert witness should observe when giving evidence, Pertinent to the evidence of Mr Collett in this case are the following:
>
> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the Cour and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . .
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. . . An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion. . .
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

[63] Price Waterhouse Coopers Inc & others v National Potato Co-Operative Ltd & another (451/12)(2015)ZASCA (4March 2015) at [98]

These principles echo the point made by Diemont J A in *Stock* that:

> ‘An expert. . . must be made to understand that he is there to assist the Court. If he is to be helpful, he must be neutral. The evidence of such a witness is of little value where he, or she is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.” (internal footnotes omitted)

ANALYSIS EXPERT EVIDENCE

[362] The applicants contend that the major conceptual flaw in the second respondent’s affidavit and in the reports and other materials relied upon is that the assumption that because the period of alcohol bans coincides with drops in trauma presentations, it is the alcohol ban that is solely responsible for those drops. According to the applicants there are substantial shortcomings in the evidence regarding the correlation between alcohol availability and the number of trauma cases. These shortcomings, so goes the argument, led to the incorrect conclusion that the temporary alcohol bans have the effect of reducing the demands on hospitals. The applicants are also critical of the December Sentinel Report, the Mac Report and the evidence of the respondents’ expert witnesses as well as the Bradford Hill Criteria, which seeks to establish causality in the context of epidemiology and the public health.

[363] With regard to the issue of correlation and causation, the respondents contend that:’

> 363.1 There is no legal basis for imposing a threshold of correlation and causation instead of correlation. This is particularly so at a time of an unprecedented pandemic.
>
> 363.2 Irrespective of whether the threshold is one of causation or correlation, on the evidence both these thresholds have been met.

[364] With regard to the respondent's first contention, it must be stated that the threshold of correlation and causation was recognized and applied in by the Court in *Media 24* as follows:

> "[28] The second important aspect of the evidence of Professor Dunne was to draw attention to the statistical principle usually summarised in the maxim that correlation does not imply causation. What this means is that the fact that there is a correlation between two things – in this case the example sentences – does not necessarily mean that the one is the cause or source of the other. In other words, the fact that there is correspondence between different example sentences does not establish that those that came into existence later in time, were copied from the earlier ones. That is merely a one possibility."

[365] Turning to the assessment of the expert evidence, it must be stated from the outset that as observedin the main judgment, the RBB casts aspersion on the credibility of the evidence on the efficacy of the liquor ban contained in the answering affidavit of the second respondent relies on the observed correlation between the implementation/lifting of the liquor bans and ignores the effect of other lockdown measures. It then concludes thus:

> "Thus, the evidence is unlikely to be probative as to the effects of the liquor ban."

This conclusion is impermissible as it is ultimately the court that must decide on the credibility and/or probative value of a witness's evidence. Evidence tendered by an expert witness must not encroach on the functions reserved for the court as this does not assist with the determination of the issues. Those aspects of the RBB report commenting on the credibility of lay witnesses will, for the purpose of this judgment be ignore.

[366] It is common cause between the experts that the liquor bans had an impact on trauma presentations. The real question is the apportionment of that impact or the

incremental impact of the liquor bans. The assessment of that impact necessitates an evaluation of the liquor bans that account for all or most of the trauma reductions. In terms of section 27(3) of the DMA, the respondents must show a causal link between the imposition of the impugned wholesale liquor ban and the reduction in trauma cases. The respondents in the first answering affidavit place reliance on the MAC report which estimates the likely impact of a further ban (after the first ban) on trauma cases at 49, 550 over an eight-week period saving 124-424 general ward bed days and 46 248 ICU bed days which in turn, would enable 17,755 more Covid-19 patients to be treated in general wards and, 12, 947 more Covid-19 patients to be treated in ICU wards. It specifically states that: “the estimated number of alcohol related trauma presentations over eight weeks would be 49,500 . . . These cases could be averted through a prohibition of alcohol sale.”

[367] The applicants object to the Ministerial Advisory Committee’s (“MAC”) ban impact multiplier and the assumed proportion of trauma cases that are alcohol related on several grounds, inter alia, that:

> 367.1 It reflects the assumed percentage reduction in the number of trauma cases that would arise if the liquor ban were imposed, but does not estimate it;
>
> 367.2 the multiplier is biased upwards causing it to significantly overstate the impact of the liquor ban on hospital trauma cases and therefore to overstate the hospital resources that will be saved by the imposition of such bans.
>
> 367.3`the MAC model is based on a very high degree of statistical uncertainty and that the starting point for the analysis of the total number of trauma presentations in 2020, is extrapolated from 1999 – 21 years earlier.

[368] In my view, very little reliance can be placed on the MAC report because the ban impact multiplier in the model is based on only five hospitals in the Western Cape, and the assumed proportion of trauma presentations that are alcohol related is based on

observations of only two hospitals in Johannesburg and the assumed fall as a result of three lockdown measures is based on observations from six hospitals (5 in the Western Cape and 1 in KwaZulu Natal). This is especially so when regard is had to the fact that ther are 605 hospitals in the country, of which 380 are public. This creates statistical uncertainty.

[369] In these papers, the applicants repeatedly emphasise that the requirement of a causal relationship between an action and an outcome is standard in economics and econometrics and that a high degree of correlation between a variable (in this case the liquor ban) and the outcome (trauma presentations) does not mean that a change in the former will have a causal impact on the latter. Where there are other correlating factors (such as curfews, and restrictions on gathering), the effects of these factors need to be disentangled. Dr Makgetla acknowledges and identifies statistical techniques that can be applied to non-experimental data, whilst Dr Parry suggests experiments that would be required to isolate the impact of the liquor ban. The method he suggests would in effect show how the imposition of the liquor ban would affect trauma cases in the absence of other measures. This would however, leave the real question unanswered to the extent that it does not include other restrictions. What is clear though, is that both Dr Makgetla and Dr Parry acknowledge that there must be some evidence of causation to support the proposition that the alcohol bans were “necessary” to decrease trauma presentations and therefore protect the capacity of the health service from the demands made on it by the pandemic.

[370] Regarding the Bradford Hill criteria, Professor Parry and Dr Ismail assert that the standard has been met. The applicants retort by stating that the criterion cannot be satisfied because the reduction in trauma presentations cannot be attributable to the liquor ban in the presence of other correlating policy measures. The Bradford Hill criteria are a group of nine principle that can be useful in establishing epidemiologic evidence of a causal relationship between a presumed cause and an observed effect.[64] They were established in 1965 by the English epidemiologist SIr Austin Bradford Hill. These criteria

[64] http://en.wikipedia.org/wiki/Bradford Hill criteria

include the strength of the association, consistency, specificity, temporal sequence biological gradient, coherence, experimental evidence, and analogous evidence.[65]

[371] The applicants contend that Professor Parry, Dr Ismail and Professor Matzopoulos' reliance on the Bradford Hill criteria is questionable because they are not a definite framework for determining causality nor are they the only set of criteria capable of determining causality, both across the disciplines or even within the public health field. According to the applicants, Dr Hill himself does not claim this. He says:

> "None of my nine viewpoints can bring indisputable evidence for or against the cause and effect hypothesis and none can be required as a sine qua non. What they can do, with greater or less strength, is to help us to make up our minds on the fundamental question – is there any other way of explaining the set of facts before us, is there any other answer equally, or more, likely than cause and effect?"[66]

[372] Professor Parry, Dr Ismail and Professor Matzopoulos assert that the criteria has been met because "there is specificity in that natural causes are not affected by the ban (i.e. only acute effects [injuries])". The applicants state that the condition of specificity has not been met. Besides, so goes the argument, there are now more sophisticated methods available to help determine causal inference and several statistical techniques which could also be employed to assess the impact of the liquor bans. The applicants state that the condition of specificity refers to the principle that the outcome of interest should be specifically attributable to the explanatory factor being examined, in other words, that the decline in trauma cases is specific or attributable to the implementation of the liquor ban.

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[65] https:\\neuro.psychiatryonline.org Ibid

[66] Sir Austen Bradford Hill 'The environment and disease: association or causation?' Journal of the Royal Society of Medicine, 2015 Volume 108 (1). P32-37, at p36 (first publishes in the JRSM Vol 58, Issue 5, May 1965

[373] It must be stated from the outset that the Bradford Hill criteria is merely a guideline for establishing causality and is not meant to be the be and all of causality. When one has regard to the Bradford Hill Criteria in the context of the present matter, it is difficult to find that the condition of specificity has been satisfied. This is so, as acknowledged by Professor Parry, because *"the same can be said of mobility, they also fulfil the criteria for mobility to be causally related to reductions and increases in trauma presentations."*

[374] In the light of the fact that other restrictions have an impact on the trauma presentations, and most importantly, were implemented concurrently alongside the liquor bans, even if the liquor bans meet the Bradford Hill criteria, it still does not provide a basis for attributing all, or even a significant part of the observed changes in trauma presentations to the alcohol bans themselves. In short, the Bradford Hill criteria do not purport to determine whether the liquor ban was the most important intervention or what its incremental impact over and above other interventions was. I reiterate that even if it were to be assumed that the Bradford Hill criteria established the relationship between liquor bans and trauma cases, there is no reason why the relationship between every other policy measure and trauma cases would also not satisfy the criteria. Put differently, since other restrictions are acknowledged to have impacted on trauma case presentations and were often implemented concurrently alongside liquor bans, this suggests the finding that the liquor bans meet the Bradford Hill criteria still does not provide a basis to attribute all or even a significant part of the observed changes in trauma presentations to the alcohol bans themselves.

[375] The respondents' experts criticise the RBB report on the basis that it provides no evidence that any of the other restrictive measures (i.e other than the liquor bans) had a substantive effect on the number of the trauma cases. They suggest that the first RBB report seeks to attribute the reduction in trauma presentations either largely or entirely to other restrictions. Both Professor Parry and Dr Ismail argue that mobility restrictions cannot explain a significant amount of the change in trauma presentations, Dr Ismail states that it was the liquor ban that has the "substantial impact", whereas other

measures “only served to show an added impact.” The applicants retort by highlighting the following in respect of mobility:

> 375.1 There are a variety of ways in which mobility restrictions (e.g, curfews) would impact on trauma presentations as they reduce motor vehicle travel and thus road-traffic trauma presentations.
>
> 375.2 Mobility restrictions reduce alcohol-related trauma cases, such as those caused by drunk driving, which are reduced by curfew and other mobility restrictions.
>
> 375.3 Multiple international studies covering the United States of America, United Kingdom, Germany and Austria show significant reductions in trauma admissions in countries that implemented movement and gathering controls, but did not introduce the liquor bans.

[376] The fact of the matter is that the evidence establishes that the drop in trauma presentations correlates to all the restrictions. Whether or not the alcohol bans had a substantial impact more than the others, thereby justifying its necessity in the context of the DMA, remains to be determined.

[377] I now turn to consider the Barron Impact Study Report.

[378] The respondents, as I have already alluded to, place much reliance on the Barron Report. The Barron Report evaluates the impact of the 12 July 2020 to 17 August 2020 nation-wide alcohol ban on mortality due to unnatural causes. According to the report, the wholesale alcohol ban reduced the number of unnatural deaths by 21 per day, or approximately 740 over the five-week period. This according to the report constitutes a 14% decrease in the total number of deaths due to natural causes.

[379] The Barron Report study dismisses the impact of the curfew imposed during the second alcohol ban but acknowledges that if the curfew affected unnatural mortality levels, then the result would be that their model would have estimated the combined

effect of the second alcohol ban and the curfew, rather than only the effect of the second ban. In support of dismissing the curfew, as a contributing factor to unnatural mortality, the Report advances three reasons, namely, that:

> 379.1 The curfew would have had no material impact given the fact that during the Alert Level 3, period immediately prior to the liquor ban, meeting in groups was already illegal; and people were not permitted outside their homes at night without a valid reason. However, just prior to the introduction of the second alcohol ban, while social gatherings were not permitted, people were still allowed to leave their places of residence to work, to attend to a learning institution, to enjoy a meal at a restaurant, and to engage in further leisure activities. Furthermore, the curfew introduced stricter limitations on mobility, such as prohibiting people from leaving their household at all without a valid permit, a contravention of which was subject to a fine of R1,500.
>
> 379.2 The introduction of the curfew would not have had a material impact because the starting time of the curfew was put back by one hour (from 21h00 to 22h00). It does this by adding a binary explanatory variable to the main model specification, and proceeds to find no statistically significant change in mortality levels due to the shortening of the curfew. It then extrapolates from this result to conclude that the curfew, more generally, had no appreciable impact since "if the curfew was effective in reducing mortality, one might expect that this shift to a later start-time to be associated with an increase in mortality levels.
>
> 379.3 The study draws an inference that after the second alcohol ban, (i.e. after 17 August 2020), unnatural mortality increased despite the ongoing curfew.

[380] The applicants contend that the Barron study is unreliable because it does not account for several factors that will affect unnatural mortality. According to the applicants the RBB Report identified tests that would disclose whether serial correlation

was present, and none of those were done in the study. The applicants further point out that the following implications of the Barron report:

(a) It undertakes two steps:

(i) It estimates the impact of the alcohol ban on unnatural deaths using the regression analysis. (According to the applicants the regression analysis means that the Barron report uses the same data series over time and does not account for several factors that will affect unnatural mortality.).

(ii) It then translates the estimated impact (i.e. unnatural deaths avoided due to the alcohol ban) into trauma presentations.

(b) In order to carry out the second step, the Barron study takes its estimate of 20.57 unnatural deaths per day less during the alcohol bans and multiplies it by 36 (the number of days of the ban) giving a total of 740.

[381] The upshot of the aforegoing is, according to the applicants, that the Barron study is flawed and unreliable because:

381.1 It fails to adequately account for the curfew – a significant omitted variable bias, that, by itself, completely undermines the reliability of the study;

381.2 It fails to address the very likely issue of serial correlation which means that, even if unbiased, it is not possible to test the estimates for their statistical significance, and therefore to have confidence in them.

380.3 The estimates suffer from a high degree of statistical uncertainty, making it impossible to conclude that the alcohol ban had any substantial impact (by itself) on trauma presentations.

[382] The difficulty I have with the Barron report is that if the curfew, which affects mobility, which in turn impacts on the trauma presentations, is not accounted for, the impact of the alcohol ban on unnatural deaths, is in my view uncertain. Furthermore, the fact that the putting back of the starting time of the curfew by one hour of a seven-hour curfew is not equivalent (in terms of impact on behaviour) to the removal of the curfew in its entirety. The curfew, is further in my view, a relevant variable that ought to have been included in the report as it correlates positively with the introduction of the alcohol bans. Its exclusion is likely to cause the model to overstate the true impact of the alcohol bans.

[383] The respondents, through Professor Moultrie sought to introduce evidence regarding the relationship between alcohol prohibitions and demand reductions in demand on hospital resources.

[384] Professor Moultrie states that "the evidence regarding the link between alcohol prohibitions and a natural demand for hospital resources is quite clear." In support of this Professor Moultrie refers at length to a report dealing with "unnatural deaths from 29 December 2020 to 27 March 2021." He opines that there is a significant link between alcohol bans and the reduced demand for hospital resources based on the fact that those periods of reduction observed in unnatural deaths (for example motor vehicle accidents, suicide, murder and culpable homicide) coincided with the periods of the alcohol ban. It will be recalled from the summary of the expert evidence that Professor Matzopoulos also refers to this correlation. Professor Moultrie and Professor Matzopoulos assert a significant link between the alcohol bans and the reduced demand for hospital resources derived from a reduction in unnatural deaths. Professor Moultrie tries to disentangle the liquor bans from other measures, for example he observes that natural deaths rose rapidly after the lifting of the first alcohol ban. Furthermore, he also observes that unnatural deaths fell after 12 July 2020 when the second alcohol ban was implemented. In similar vein, he states that there was a sharp decrease in natural deaths after the third full alcohol ban was implemented on 29 December 2020.

[386] Professor Moultrie's observations bring very little value to the justification of the liquor bans because, first, they do not take into account that on 1 June 2020, (the day of the lifting of the first alcohol ban), the nine-hour curfew ban was also completely lifted. Second, the observation regarding the decrease in unnatural deaths ignores the implementation of a seven-hour curfew (with not curfew having been in place immediately prior to the second full alcohol ban). As correctly contended by the applicants, unnatural deaths are a poor proxy for assessing the impact of the liquor bans on the demand for hospital resources because they do not imply any necessary demand on hospital resources without evidence of how many of those deaths were preceded by hospital treatment. Put in another way, they do not address the rationale for the alcohol bans – demands on hospital resources. For these reasons, a comparison of unnatural deaths during, and after the first alcohol does not yield credible results regarding the impact of the ban of alcohol itself. Besides, the respondents have never sought to justify the alcohol by way of reference to the number of unnatural deaths. Professor Moultrie has not expressed a view on the relationship between the alcohol prohibition and the demands on hospital resources.

[387] Turning to the probative value of the expert testimony, Professor Matzopoulos stated in his affidavit that he has grave reservations as to whether the RBB report has been subject to the traditional double-blind peer review process that is standard for most reputable journals and other academic formats. He also noted that the report is "not available through the standard platforms through which scientific research is disseminated". The above comment is clearly mistaken as peer review is not required for expert reports when they are made for litigation purposes. For this reason, the opinion of peers is not relevant as it is the Court that must decide on its probative value. In his affidavit he states that the first RBB report, is not worthy because it is *"not available through the standard platforms through which scientific research is disseminated."* It however cannot be said that the mistaken understanding, diminishes the probative value of his own evidence. But as I have already said, Professor Matzopoulos did not express a view on the relationship between the alcohol prohibition and the demands on hospital resources.

[388] Professor Matzopoulos also describes the respondent's approach concerning the liquor ban as "entirely reasonable and pragmatic". This conclusion is impermissible as the reasonableness of the second respondent's approach must be determined by this court. Expert testimony is not permitted to answer the ultimate question in litigation. However, this finding does not suggest that all of his evidence should be rejected, but that this aspect shall be ignored.

[389] Professor Parry in his second affidavit, rejects the notion that the exercise of disentangling the alcohol ban is necessary prior to any decision being taken to impose a temporary suspension on alcohol sales. He specifically states that "it was unnecessary for the Minister to disentangle the impact of the temporary suspension from all other factors that can reasonably be expected to affect trauma presentations." Professor Parry is fully entitled to hold this opinion, and there is nothing in his evidence that besmirches his testimony and it must be accepted its entirety as it complies with the principles relating to expert testimony.

[390] Insofar as Dr Ismail is concerned, it will be recalled that he is the author of both the December and the January Sentinel Reports. The January Sentinel Report came after the full alcohol ban of 29 December 2020 had been implemented, and it cannot therefore be used as justification for it, although to some degree, it may be statistically relevant for determining causation. The applicants contend that Dr Ismail is, because of his association with the two above-mentioned reports, is unable to discharge his primary duty to the court as an expert witness because he is in the unenviable position of having to defend his own work and is therefore not an independent witness, thus the probative value of his evidence is very low.

[391] Bell[67] opines that:

> "An expert's association with a particular side of an argument creates an inherent bias that is difficult to overcome. The process of extracting conclusions

[67] Bell E, Judicial Assessment of Expert Evidence (2010) Judicial Studies Institute Journal at p 77

> from particular facts may begin to look less like the objective analysis of a scholar and more like the persuasive argument of an advocate. Courts are cognizant of the fact that there is category of experts who have developed a 'scientific prejudice' and who, as a consequence, permit their convictions to lead their analysis. It is perfectly proper for a judge to be suspicious of a partisan and rigid expert."

Ultimately, a court will accept evidence of a witness if and when it is satisfied that such an opinion has a logical basis, in other words, the expert has considered comparative risks and benefits and has reached a 'defensible conclusion'.[68]

[392] It will be recalled that the nub of Dr Ismail's evidence regarding the impact of alcohol bans on weekends is that trauma presentations usually spike during weekends. To this end, he cites both anecdotal experience as well as the 2018 Western Cape Injury Mortality Profile. It must be accepted that anecdotal evidence by medical personnel as pointed out in the main judgment cannot be ignored. Dr Ismail states that "during the complete alcohol bans, these weekend spikes show the most dramatic decrease". As with other reports, the issue with the Sentinel Report is that it takes no account of the of inter-provincial travel, which is known to be particularly high during the period of assessment. For example, the January Sentinel Report compares the number of trauma presentations on the Day of Reconciliation (before the 29 December 2020 alcohol ban to New Year's day 2021 (two days after the implementation of the ban), and compares trauma presentations between New Year's day 2020 and New Year's day 2021. Dr Ismail notes the drop in presentations between these data sets and infers that public holidays in December cannot explain why trauma presentations were higher before the alcohol ban than after it. However, the applicants contend, correctly in my view, that the report loses sight of the fact that there three public holidays (Days of Reconciliation, Christmas Day and day of Goodwill) before the third alcohol ban (New Year's day) leading to increased mobility and therefore higher trauma presentations before the alcohol ban. Furthermore, the report does not take into account curfews and

[68] Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188

prohibitions on social gatherings imposed at the same time as the December 29 liquor ban. Dr Ismail has also not presented any evidence supporting his conclusion to the effect that most trauma presentations are not travel related and that most motor vehicle accidents resulting from alcohol intake are not in the course of long-distance travel, and therefore the inter-provincial travel cannot substantially explain the reduction in trauma presentations after the 29 December 2020 alcohol ban. In the December Sentinel Report, Dr Ismail cites the WHO's recommendations as support for the second respondent's position. The WHO recommendations well-intended as they are, are unhelpful in the determination of the issues in this application, namely, what reduction is attributable to the alcohol ban over and above reductions caused by other restrictions. Therein, lies the answer into whether the wholesale alcohol ban was necessary.

[393] Because of Dr Ismail's involvement in the Sentinel Report, I cautiously accept his evidence. However, I hold that it does not have much probative value, as it is does not take into account other measures such as curfews and travelling prohibitions. Neither does it unequivocally establish that alcohol is substantially responsible for trauma presentations.

[394] I have indicated in this judgment that the respondents filed further affidavits in attempt to prove "a causal connection" between the imposition of the full alcohol ban and the reduction of trauma cases. I emphasise that these constitutes ex post facto justification as the information contained therein was not considered by the second respondent when the alcohol ban of 29 December was implemented. I have said that the information may be relevant for statistical purpose. However, even the belated affidavits do not disclose a causal connection between the full alcohol ban and the trauma cases. In my judgment, whilst the correlation has been established between alcohol availability and trauma cases has been established, the causal connection between the imposition of the total alcohol ban has not been proved. It therefore is clear to me that the second respondent did not consider the issue of the causal connection at all when the decision was taken. It therefore is my judgment that the respondents have not shown that the impugned regulations were necessary as required by section 27(3) of the DMA. It follows that the respondents have failed to satisfy the requirements of

section 27(3) of the DMA. In the result, the decision to impose the alcohol ban of 29 December 2020 was unlawful and *ultra vires* of section 27(3) of the DMA.

THE CONSTITUTIONAL CHALLENGE

[395] All the applicants allege a violation of their constitutional rights. The respondents deny that there has been a violation of the applicants' constitutional rights. I deem it expedient to first give an outline of the Bill of Rights in the Constitution. Section 1 of the Constitution defines South Africa as a "democratic state" founded on "human dignity" and the advancement of human rights and freedoms, with the Constitution and the rule of law supreme. Section 2 provides that the Constitution "is the supreme law of the Republic" and that "law or conduct inconsistent with it is invalid" and that the obligations imposed by the Constitution must be fulfilled.

[396] Chapter 2 of the Constitution contains the Bill of Rights. Section 7 provides that the Bill of Rights "is a corner stone of democracy in South Africa, which enshrines the rights of citizens and affirms the democratic values of human dignity, equality and freedom. The State has an obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights which are subject only to limitations set out in section 36 of the Constitution. Section 8 provides that it applies to all law and binds the executive and all organs of state. Section 8(4) provides that a juristic person "is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

[397] In *Law Society of South Africa and Others v Minister for Transport and Others*[69], Moseneke DCJ, observed (in the context of a constitutional challenge to a statute) thus:

> "Unlike many other written constitutions, our supreme law provides for rigorous judicial scrutiny of statutes which are challenged for the reason that they infringe fundamental rights. The scrutiny is accomplished, not by resorting to the rationality standard, but by means of a proportionality analysis. Our Constitution

[69] 2011 (1) SA 400 (CC)at para 36

instructs that no law may limit a fundamental right except if it is of general application and the limitation is reasonable and justifiable in an open and democratic society."

[398] Against this backdrop I turn to consider whether there has been a violation of each of the applicants's rights.

Freedom to trade

[399] The first applicant has outlined the impact of the total alcohol ban has allegedly had on its freedom to trade. Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation, or profession, freely. The first applicant alleges that based on this section, it has a right to manufacture and distribute beer and other alcoholic beverages as its chosen trade. Likewise, the second and third applicants assert their rights to engage in their chosen trade as a tavern proprietor and owner-driver respectively.

[400] In *Affordable Medicines Trust and Others v Minister of Health and Others*[70], the leading case in the interpretation of the rights in section 22, Ngcobo J (as he then was) captured the importance of the right as follows:

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

[70] 2006(3) SA 247 (CC) para 59

[401] It cannot be seriously disputed that the applicants have a right to engage in their chosen trade. The second respondent concedes that the impugned regulations partially impacted on the manner in which the applicants and others could carry on their business. However, it is plain from the wording of the regulations that they in fact prohibited the applicants from carrying on their businesses. The second respondent further avers that the impugned regulations merely regulate the practice of these chosen trades and therefore needs to pass only a rationality test. It seems that this averment is premised on *Affordable Medicines* where the Court held that it *"was difficult to fathom"* how a person who has chosen to pursue a medical profession could be "deterred from that ambition by the requirement that, if, upon qualification, he or she wishes to dispense medicine as part of his or her practice, he or she would be required, amongst other things to dispense medicine from premises that comply with good dispensing practice". It further held that restrictions on the right to practice a profession are subject to a less stringent test than restrictions on the choice of a profession.

[402] In *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others*[71] wherein the court concluded that section 20A of the Diamonds Act 56 of 1986 did not limit the freedom to choose one's profession as it only regulated the practice of the trade of diamond producing and dealing the court applied *Affordable Medicines*, held as follows:

> "Though both choice of trade and its practice are protected by section 22 the level of constitutional scrutiny that attaches to the limitations on each of these aspects differ. If a legislative provision would, if analysed have a negative impact on choice of trade, occupation, profession, it must be tested in terms of the criterion of reasonableness in section 36(1). If, however, the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of rights." (internal footnotes omitted).

[71] 2006(3) SA 247

[403] At this stage, the standard of scrutiny applicable is not relevant, suffice to state that the applicants have established that the total alcohol ban constituted an infringement on their rights to trade. Whether or not that is justified is another question.

Dignity and the right to work and earn a living

[404] The applicants allege that the wholesale ban violates their right to dignity in that their right to work and earn a living – something that is necessary for their survival has been infringed. The respondents contend that the applicants' "foundational basis for an infringement is lacking in the spirit of Ubuntu". The right to work and earn a living somewhat conflates with the right to trade. It cannot be denied that the wholesale alcohol ban deprived those for who earning a living or working depended on the sale, distribution and related jobs. In *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism*[72] the Supreme Court of Appeal reaffirmed the link between dignity and one's ability to earn a living. At paragraph 43, Navsa JA, said the following:

> "where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated. I can see no impediment to extending the principle there stated in relation to wage-earning employment. Put differently, if, because of circumstances, a [person] is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid."

[405] Counsel for the applicants contend that the repeated imposition of the wholesale ban on alcohol has threatened the very existence of the first applicant and the taverns, such as the one owned by Ms Sibiya and the consequence is that the employees of

[72] 2015(1) SA 151

these entities, many of whom rely solely on the income they earn from these entities will become jobless and destitute.

[406] Although the above remarks were made in the context of refugees, they are equally applicable to the facts in *casu*. It may well be that the applicant's foundational basis for the infringement lacks Ubuntu. However, this contention is relevant for the purpose of proportionality, for now, it suffices for the applicants establish an infringement.

[407] The second respondent further asserts that "while the purchase of alcohol may be the exercise of human autonomy which occurs in a private space (such as one's home) any impediment thereto does not constitute a breach of the right to human dignity". This contention applies particularly to the fourth applicant, Mr Mabaso. The applicants, and indeed the fourth applicant contend on the other hand that the mere purchase of alcohol involves "the exercise of human autonomy" *simpliciter*. The second respondent retorts that the total alcohol ban did not infringe the right to dignity, because any limitation is "incidental".

[408] The right to dignity is guaranteed in section 10 of the Constitution. In *Barkhuzen v Napier*[73], Ngcobo J stated the following

> "Self-autonomy, or the ability to regulate one's affairs, even to one own detriment, is the very essence of freedom and a vital part of dignity."

In *Beadica 231 CC and Others v Trustees of the Oregon Trus*t[74], affirmed this principle stating that the Constitution requires courts:

> "employ [the Constitution] and its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit

[73] 2007(5) SA 323 (CC) para 57

[74] 2020(5) SA 247 (CC) at para 71

individuals the dignity and autonomy of regulating their own lives." (internal footnotes omitted).

[409] It is plain from the aforegoing that when the right to self-autonomy is infringed, the right to dignity is compromised. I emphasise that the extent to which it may be permissible to sacrifice the right to dignity of certain individuals for the higher good of the country comes into play during the proportionality exercise.

The right to privacy

[410] The applicants allege that the total alcohol bans violated the right to privacy. More specifically, they say that by precluding the consumption of alcohol even within the confines of one's home, the wholesale ban unjustifiably infringes on the right to privacy. Furthermore, in so doing, the impugned regulation violated the rights of adult South Africans to enjoy an alcoholic beverage without interfering with the rights of anyone else.

[411] The second respondent disputes that the wholesale bans infringed on the right to privacy on the basis that any infringement is incidental. In addition, so goes the contention, the fourth applicant's right to privacy was not infringed because "in the context of a global health emergency, (similar to a war or natural disaster), it is common to sacrifice individual rights for the common good." The second respondent also notes that Mr Mabaso "expects to continue to enjoy the amenities and pleasures of his life as if South Africa is not grappling with a pandemic." Once again, the aforegoing averments are relevant for justification of a limitation.

[412] The second respondent's expert's, Professor Myers's response to Mr Mabaso's assertion of his right to privacy is somewhat puzzling. She ventures opinions on Mr Mabaso's mental health and perceived dependence on alcohol whereas she had not met or consulted with him, and even if she had, this would constitute confidential information. This part of her evidence is not only irrelevant for the purpose of an enquiry into whether the fourth applicant's rights have been limited by the wholesale ban of

alcohol, it also casts aspersions on her impartiality. Professor Myers concedes that "there were other evidence-based tools at the Government's disposal to reduce alcohol-related harms" but adds that "these alternatives are not readily available" because of the restrictions on mobility introduced by the Government "due to a number of factors."

[414] In *Minister of Justice and Constitutional Development and Others v Prince*[75], the Court explained that the right to privacy entails 'the right to be left alone'. In *Bernstein v Bester and Others NNO*[76], Ackermann J, articulated the right to privacy as follows:

> "A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere, the individual's activities then acquire a social dimension and the right of privacy becomes subject to limitation." (internal footnotes omitted)

[415] The respondent's contention that in a state of disaster certain individual rights may be sacrificed for the greater good is incorrect because a state of disaster does not suspend the Constitution, rights under it remain intact and limitations on them must be justified under the limitation clause. To this end, in *Freedom Front Plus v President of the Republic of South Africa*[77], the Court said the following:

> "The DMA does not permit a deviation from the normal constitutional order. It permits the executive to enact regulations or issue directions. It may well be that these regulations will limit fundamental rights. But the fundamental rights remain

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[75] 2018 (6) SA 393 (CC) para 45

[76] 1996 (2) SA 751 (CC) para 77

[77] [2020] All SA 782 (GP) para 65

intact in the sense that any limitation is still subject to being tested against section 36 of the Constitution. For this simple reason, it is not for the DMA to include a specific provision preserving the competence of courts to rule on the validity of the regulations. Under states of disaster, this competence remains intact. It is never removed or suspended to begin with."

[416] It follows therefore that the impugned Regulations, insofar as the fourth applicant is concerned limit the right to privacy. Whether or not that passes the s 36 constitutional requirement is yet to be determined.

JUSTIFICATION

[417] Section 36 of the Constitution provides thus:

"36. Limitation of rights

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 in an open justifiable 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 relationship between the limitation and its purpose; and

e. less restrictive means to achieve the purpose.

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

[418] The way a court must approach a s 36 enquiry is set out in S v *Makwanyane* [78] thus:

> "[135] The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, "for an open and democratic society based on freedom and equality" means that that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality, the purpose for which the rights limited and the importance of that purpose to such a society, the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

LIMITATION:ANALYSIS

[419] I have in this judgment found that the applicants' constitutional rights have been violated. The applicants contend that the second respondent has not shown that the alcohol bans' s stated objective (i.e. to free up health resources for Covid-19 patients) could not be achieved through the use of other measures that fall short of a total ban on the sale of alcohol.

The importance and purpose of the limitation

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[78] Fn 12 above

[420] Counsel for the respondents emphasised that the main purpose of the impugned regulations is the respondents' duty to save lives in the face of the threat of the Covid-19 pandemic. It is undisputed that the rationale for the liquor bans therefore was to relieve the pressure on the healthcare system created by alcohol-induced trauma as the rate of the infections was rising rapidly and there was an increase in hospitalisations.

[421] I accept that, as already alluded to in this judgment that the limitation posed by the impugned regulations serves a legitimate and compelling government purpose.

The nature and extent of the limitation.

[422] With regard to the nature and extent of the limitation, I have already held that the impugned regulations encroach on the applicants' right to dignity, the right to privacy and the right to trade.

The relationship between the limitation and its purpose

[423] The respondents aver that there is evidence before court that the alcohol bans decreased trauma presentations in hospitals. In the section dealing with necessity in terms of section 27(3) of the DMA, I have set out why I consider the impugned provisions to be *ultra vires*. The principles applicable therein, are equally applicable to the proportionality considerations.

[424] To recap, I have held that the respondents did not prove that the wholesale bans of alcohol on its own had the effect of reducing the demands on hospitals, trauma and emergency units as there were other restrictive measures implemented. Put in another way, when the impugned provisions were invoked during December 2020, there was only correlation and no clear causal connection between the imposition and any reduction in trauma cases because of other restrictions which also had the same effect. That there was correlation between alcohol availability and trauma cases did not establish the requisite causation.

[425] With regard to the economic impact of the bans of alcohol, there is no dispute between the parties that the lockdown restrictions, have generally negatively affected the South African economy and the labour market. This is in fact the case worldwide. What is in dispute is the extent of that impact. According to the founding affidavit, the economic loss to the country as a result of the alcohol bans in summary includes:

(a) Lost taxes (VAT, CIT, PAYE), estimated at R25 billion in the 2020 calendar year.

(b) Job losses are estimated at 165,000.

(c) Cancellation of a R6 billion investment in the country by Heineken resulting in additional loss of 117,000 jobs.

[426] Insofar as the other applicants are concerned, I have already indicated that in the summary of the standing of the parties that the second applicant lost her means of livelihood, and so did six of her eight employees assisting her in her tavern. Likewise, the third applicant attests to the fact that in order for the business to meet its overheads, he has had to dig into his own savings, resulting in loss of about R1 500, 000.00 worth of savings. Insofar as the fourth applicant is concerned, when his right to privacy (the right to indulge in alcohol in the privacy of his own home) is put on a proportionality scale, I find that the purpose of the regulations as advanced by the respondents is far more important and weightier than the fourth applicant's right toprivacy. This is so because our constitution is communal, invoking as it does the values and spirit of Ubuntu, as correctly pointed out by the second respondent. Therefore, the limitation on the fourth applicant's right is justified.

Less restrictive means to achieve the purpose

[427] The Constitutional Court has emphasised that a limitation will not be proportional if other less restrictive means could have been used to achieve the same end.[79] And if it is disproportionate it is unlikely that the limitation will meet the standard set by the Constitution, for section 36 *"does not permit a sledgehammer to be used to crack a nut"*.[80] In *Albutt v Centre for the Study of Violence and Reconciliation and Others*[81]Ngcobo CJ explains the principle as follows:

"[51] The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And, if objectively, speaking they are not, they fall short of the standard demanded by the Constitution.

[428] On the question of proportionality, the second respondent states that:

> "As regards less restrictive means, I respectfully submit that there are no less restrictive means to achieve the purpose of the limitation. Mechanisms such as reducing trading hours or restricting points of sale or advertising are not feasible alternatives to the temporary suspension. They do not have the equivalent (or even near equivalent savings on increasing capacity in the health system as quickly as what a temporary suspension is able to do."

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[79] Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (2) SA168 CC para 95

[80] S v Manamela and Another (Director-General Justice Intervening (CCT25/99) [2000] ZACC 5 (14 April 2000)

[81] 2010 (3) SA 293 CC para 49-51

However, no evidence is put up in support of this averment. The second respondent further states that less restrictive measures "have been imposed earlier in the month with no desired result on the scale that was required."

[429] The respondents presented on this point the evidence of Dr Parry who stated that "a partial ban" (meaning a ban on on-premises liquor sales only) would increase trauma presentations by approximately 50% as compared to the full ban.

[430] Counsel for the applicants points out that Professor Parry's estimate is incorrect and the error arose because he assumes that the period in June 2020, involved a *"partial liquor sales ban"* whereas Regulation 44 of 28 May 2020 did not prohibit the sale of liquor for on-premises consumption and the country was in Alert Level 4. This assertion is uncontroverted by the respondents. According to the applicants, there therefore is no evidence supporting the respondents' contention there are no other less restrictive measures that could be effective in reducing the demand for trauma beds. The upshot of the aforegoing is that the second respondent has not discharged the burden to prove that the impugned regulations are proportionate or why other measures would not achieve the alcohol ban's stated goal.

[431] The respondent's expert witnesses, Dr Makgetla and Professor Parry say that the second respondent could not be expected to do an exercise showing that no other restrictive measures could be effective in reducing the demands on the trauma beds. The second respondent on the other hand accepts in her affidavit that proportionality requires her to assess whether the impugned regulation "invades the fundamental right as little as possible". It is important to note that section 36 (1) (e) of the Constitution requires that regard must be had to *"less restrictive means to achieve the purpose*". In *Teddy Bear Clinic*[82]the court said the following:

> "As a starting point, it is important to note that where a justification analysis rests on factual or policy considerations, the party seeking to justify the

[82] Fn 24 para 94

impugned law - usually the organ of state responsible for its administration must put material regarding such considerations before the court. Furthermore "[w]here the State fails to produce data and there are cogent objective factors pointing in the opposite direction the state will have failed to establish that the limitation is reasonable and justifiable." (internal footnotes omitted)

[432] The evidence in this matter establishes that other restrictive measures would be effective in reducing the demand for trauma beds. Whilst alcohol is but one of the factors increasing trauma presentations thereby burdening hospitals, no evidence establishes the extent to which alcohol bans, on its own reduces trauma presentations. This is exacerbated by the fact that the data provided by Professor Parry is incorrect as alluded to in this judgment. In my view, based on the evidence, there are clearly less restrictive means available for the achievement of the goals of the impugned regulations. Furthermore, with the first alcohol ban in March 2020, it is understandable that the second respondent could not have been expected to have done an exercise showing that no other restrictive measures could be effective as the pandemic was relatively new. The impugned regulations came into effect during December 2020 and constituted the third total alcohol ban. The second respondent did not only have to consider whether her stated objective could be achieved by other less restrictive measures, she also had to consider whether the economic costs attendant on a total ban could be mitigated by the use of less restrictive measures that fell short of a total ban. In the matter at hand, without extricating the impact of alcohol on trauma presentations, it is nigh impossible to find justification for the wholesale ban of alcohol imposed on 29 December 2020. This is particularly so because "a provision which limits fundamental rights must, if it is to withstand scrutiny, be appropriately tailored and narrowly focused."[83]

CONCLUSION

[83] Fn 29 para 98

[433] In conclusion, I have in this judgment held that the respondents the impugned provisions violated the applicants' constitutional rights, and that with regard to the first to the third applicants, the prohibition is not justified in an open and democratic society. I have also held that the respondents have failed to satisfy the requirement of necessity as envisaged in 27(3) of the DMA. It follows that I would issue the following order:

433.1 It is declared that Regulation 44 and Regulation 86 promulgated in Government Gazette No 1423 on 29 December 2020 by the Second Respondent are unlawful and have no force and effect.

433.2. The respondents are to pay the costs of this application including the costs of two counsel.

NDITA J

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