

SABWIL HUMAN RIGHTS COURT
(HELD ON 11 DECEMBER 2020 AT ZOOM SOUTH AFRICA

CASE NO. 1112/2020

In the matter between:

MASHABA, Thandi

First Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

Second Respondent

MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS

Third Respondent

and

ABAFAZI EQUALITY INSTITUTE

Amicus Curiae

HEADS OF ARGUMENT OF THE *AMICUS CURIAE*

1. INTRODUCTION

The alcohol ban and limitation on the applicant's right to dignity are constitutional and valid because they are rationally connected to slowing the rate of infection and limiting the spread thereof. The regulations satisfy the "rationality test," and the limitation of rights guaranteed in the Bill of Rights contained in the Constitution is justifiable in an open and democratic society based on human dignity, equality, and freedom.

2. CONSTITUTIONALITY OF THE LIQUOR BAN

On the eve of Thursday, 29 April 2020, the Minister of Cooperative Governance and Traditional Affairs, Dr. Dlamini-Zuma, published the Alert Level 4 Regulations.

Regulations 26 is relevant for this case:

26 Sale, dispensing, or transportation of liquor

- 1) The sale, dispensing, and distribution of liquor is prohibited.
- 2) The transportation of liquor is prohibited, except where alcohol is required for industries producing hand sanitizers, disinfectants, soap, alcohol for industrial use, and household cleaning products.
- 3) The transportation of liquor for export purposes is permitted.

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

Further, in terms of the Disaster Management Act 57 of 2002 (DMA), power is given to the Minister of Cooperative Governance and Traditional Affairs.

3.

Section 36 (1) of the Constitution sets out the criteria for the limitation of rights. The limitation must be employing a law of general application and determining what is fair and reasonable is an exercise in proportionality, involving the weighing up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society founded on human dignity, equality, and freedom.

4.

Dealing with the liquor ban first, section 27(2)(l) of the DMA indicates that the Minister may issue regulations or directions concerning "the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area."

Considering the nature of the pandemic, it is apparent that the Minister is within her powers to regulate alcohol sales, even though it amounts to a complete ban.

The Disaster Management Act authorizes the ban, and as long as it is rationally related to the purpose of the declaration of the disaster, it will be valid.

The ban can be considered a strategic mistake as it may have contributed to the general hardening of attitudes towards the lockdown, thus turning a public health emergency into a matter of law and order in the eyes of the public.

The rising Covid-19 cases and the increasing number of people being admitted to hospital illustrate that the Minister made a rational decision.

5.

Alcohol has multiple side effects on the individual and society, which have become the primary concern during the lockdown. There is a strong link between alcohol use and intimate partner violence in many foreign countries. During the lockdown, reports of domestic abuse have soared across the world.

6.

It may be said that the ban on alcohol significantly reduces domestic abuse cases during the lockdown. The state has the legal obligation to protect the health of an individual from the ill consumption of liquor and safeguard the people from the acts of domestic violence

However, the lockdown's legal purpose is not to address domestic abuse but rather to stop people from becoming infected with Covid-19.

It is still conceivable that fewer domestic incidents would mean less pressure on trauma wards and less pressure on the medical staff. This is a valid argument in a social framework but does not meet the legal threshold of proportionality.

7.

The Enactment of the regulations by the Minister was subject to certain limitations provided for in terms of the act, including that such Enactment should be to the extent that it was necessary for:

- Assisting and protecting the public;
- Protecting property;
- Preventing or combating disruption; or
- Dealing with the destructive and other events of the disaster.

8.

Relying on this construction of section 26 (1) and section 26(2) constitutes a notable limitations clause that displaces section 33 as far as the limitation of free economic activity is concerned.

However, the argument that liquor generates revenue would not stand valid when the country's health infrastructure is fighting an unprecedented global pandemic and the act of government to lift the ban is contrary to the preamble of the DMA talks about the effective management of the disaster.

The lifting of the ban on liquor sales would be counterproductive to the government's efforts to curb the virus's spread by making an alcoholic consumer more prone to the virus.

9.

The regulations, therefore, must be rationally related to the purpose for which the power was conferred. This is referred to as the "rationality test." If there is no rational connection as set out above, the limitation of rights that the regulations require would not be permissible in section 36 of the ConstitutionConstitution.

The government must take every decision to reduce the unnecessary burden on the health system of the country so that people who are

unknowingly contracted with the virus can use the facilities in the best possible manner.

10.

The decision of the Minister is rational following the objective test as to whether the means justify the ends. Under the circumstances, the means justify the ends. The Minister has demonstrated that the limitation of the Constitutional rights already mentioned has been justified in the context of section 36 of the Constitution."

Implicitly, the means could justify the ends where such means constituted a permissible limitation of South African citizens' rights.

11. Limitation on the right to dignity

Indeed, there is a core to the individual conscience so intrinsic to the human personality's dignity that it is difficult to imagine any factors that could justify the state is penetrating it.

12.

The implementation of lockdown on the applicants' dignity and well-being is not seriously disputed. The applicant experienced an almost total loss of control over her life. She felt trapped, hopeless, and oppressed. The applicant resented it as an invasion of their capacities and rights to structure her financial ability for her family.

13.

The lockdown measures should be implemented in a manner that respects the applicants' dignity, and that is consistent with all of the other provisions of the ConstitutionConstitution. In particular, the measures must not infringe on the applicants' other constitutional rights. Measures implemented to flatten the pandemic curve will pass the reasonableness test because they are implemented solely in the interest of public health and safety.

14.

The imposition of the alcohol ban is a justifiable limitation placed on the applicants' right to dignity. As per the ConstitutionConstitution, the applicant has the constitutional right to earn a basic income; however, the limitation is justifiable because the government implemented measures such as the solidarity fund to ensure that individuals' basic needs were met.

15.

The right to privacy, which encompasses the right to choose how to live one's daily life, is also justifiably infringed by lockdown regulations. The lockdown regulations and alcohol constitute reasonable limitations on the applicants' access to the basic income. The impact of the rules on

the applicants' dignity and well-being have been set out above. The Minister offers an acceptable justification for the regulations. They were implemented in the interest of national public health and to flatten the curve of the pandemic. The social implications of not having the lockdown measure justify subjecting the applicants to be unable to sell alcohol during the lockdown period. Alcohol cannot be considered a necessity, and hence the sale and consumption expose individuals to the unnecessary risk of contracting the virus.

16.

The limitation of the right to dignity is justifiable in the interests of human dignity and equality, which are founding values of the Constitution, and national unity, which is an essential and legitimate state objective.

17. Conclusion

The regulations mentioned above are rationally connected to the objectives of slowing the infection rate and limiting the spread thereof. The regulations satisfy the "rationality test," their limitation of rights guaranteed in the Bill of Rights contained in the Constitution are justifiable in an open and democratic society based on human dignity, equality, and freedom.