IN THE SABWIL HUMAN RIGHTS COURT
(ZOOM South Africa)

Case No: 1112 / 2020

In the matter between:

MASHABA, Thandi	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

FILING NOTICE: THE APPLICANT'S HEADS OF ARGUMENTS

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DATED AT JOHANNESBURG THIS 4th DAY OF DECEMBER 2020

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TO: THE CHIEF REGISTRAR OF THE SABWIL HUMAN RIGHTS COURT

AND TO: COUNSEL FOR THE RESPONDENTS

AND TO: COUNSEL FOR THE AMICUS CURIAE

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Factual Background

The Applicant in this matter is Thandi Mashaba, a 45-year-old single mother of four children and the sole proprietor of the Sax Shebeen. In response to the pandemic, and following the example and the lessons learned from other countries that had grappled with the disease, the South African national government declared a state of national disaster on 15 March 2020 and, on 23 March 2020 the President declared a national 21-day lockdown. Among other things, during the initial lockdown period the sale of alcohol and the operating of any restaurants, shebeens or taverns was prohibited. The imposition of the lockdown left Ms Mashaba distraught. Without the income from the Sax Shebeen, Ms Mashaba would not have enough to support her family. If nothing were done, they would starve. Ms Mashaba therefore took the decision to ignore the lockdown. She continued her operations unlawfully and kept the shebeen open every night, as before. After her stock ran out, Ms Mashaba either purchased further alcohol illegally or brewed her own. Ms Mashaba was arrested on the 8 of May and charged with a contravention of Regulation 24(2), Regulation 26, and Regulation 31 of the Level 4 Lockdown Regulations. Ms Mashaba has brought an application challenging the constitutional validity of the Level 4 Lockdown Regulations. The National Director of Public Prosecutions has abided by the decision of this Court. The President and the Minister have jointly opposed the application. They ask that the relief sought be dismissed. Alternatively, if it is found that the lockdown regulations are unconstitutional, that the order be suspended for a period of three months for government to be afforded an opportunity to rectify the defect in the regulations.

1.1 Do the lockdown regulations infringe the right to dignity enshrined in section 10 of the Constitution?

(1) The Applicant submits that the lockdown regulations in question do violate the right to human dignity. Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.[1] In *S v Makwanyane and Another*, Chaskalson P said that the rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights.[2]

(2)Thus, the right to dignity overlaps with the normative zones of other constitutional rights, such as the right to life, occupational freedom - the right to choose and practice a trade and earn a living and other socio-economic rights.[3] The section 10 right to human dignity can therefore be infringed by legislation or conduct which violates the personal rights in the Bill of rights which overlap with the right to human dignity.

(3) The court in *Advance Mining Hydraulics v Botes* quoted with approval the writings of Schater by stating that, infringement of human dignity relates to conduct and ideas that directly offend or denigrate the dignity and worth of an individual.[4] Submissions are made below to the effect that the lockdown regulations cause the denegation of the dignity and worth of an individual by establishing the following:

- That individual occupational freedom is a fundamental component of human dignity; hence the violation of the former constitutes the violation of the latter;

[1] Constitution of the Republic of South Africa 1996.
[2] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 144.
[3] Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367.
[4] *Advance Mining Hydraulics v Botes* 2000 2 BCLR 119 (T) para 127B.

- The regulations restrict the right to earn a living in a manner that violates the right to human dignity;

- That the lockdown regulations violate the right to trade in a way that infringes on the right to human dignity.

1.1.1. Occupational freedom is a fundamental component of human dignity

(4) The Applicant submits that occupational freedom is a fundamental component of human dignity. Therefore, a restriction on that freedom can constitute a violation of the right to human dignity.

(5) Occupational freedom is the right to choose and practice a trade, occupation or profession;[5] and the freedom to pursue livelihood.[6] In *Affordable Medicines Trust and Others v Minister of Health and Another* the court affirmed the relationship between occupational freedom and the right to human dignity by stating that work is part of one's identity and constitutive of one's dignity.[7] In the *Pharmacy case*, A Judgement of the German Constitutional Court,[8] pronouncing on a constitutional provision which is evidently phrased in a manner similar to section 22 of the South African Constitution held that,[9] the relationship between a person and his work/trade/occupation/profession is the

[5] Section 22 of the Constitution of the Republic of South Africa 1996.
[6] *Committee on Economic, Social and Cultural Rights General General Comment No.18 GE. 06 – 40313 (E) 080206.* Herein after referred to as General Comment No.18.
[7] *Affordable Medicines Trust and Others v Minister of Health and Another* 2005 CCT 27/04 para 59.
[8] 7 BVerfGE June 11, 1958 377 1958 (*Pharmacy Case*).
[9] Article 12(1) of the German Constitution 1919.

foundation of a person's existence through which that person simultaneously contributes to the total social product.

(6) The fundamentality of occupational freedom to human dignity is well propounded, by international consensus. The Committee on Economic, Social and Cultural Rights commenting on Article 6 of the International Covenant on Economic, Social and Cultural Rights which guarantees occupational rights stated that article 6 underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.[10]

(7) Evidently, one's work or trade and the freedom to practice it thereof, goes beyond the right to provide materially for oneself, but enables individuals to live profitable, dignified and fulfilling lives. Given this relationship that exists between occupational freedom and the right to human dignity, it must be said that the regulations violate section 10 of the Constitution if the regulations abrogate or restricts occupational freedom in a manner that impairs one's ability to live a dignified and fulfilling life free from positive humiliation and degradation - And the Applicant so submits that the regulations do.

1.1.2. The regulations restrict the right to earn a living in a manner that violates the right to human dignity.

(8) The Applicant submits that, the right to earn a living as is a fundamental component of the right to human dignity, hence the violation of the former constitutes the violation of the latter. The constitutional court in *Minister of Home Affairs and Others v Watchenuka*

[10] General Comment No.18.

and Another held that the ability of people to earn money and support oneself and one's dependents is an important component of the right to human dignity, without it one faces humiliation and degradation.[11] The reasoning of the court seems to suggest that when a restriction of the right to practice a trade and earn a living culminates to the restriction of one's ability to live without positive humiliation and degradation it constitutes a violation of human dignity.

(9) Regulations 24(2) 26 and 31, read together, have the effect of prohibiting and criminalising the sale of alcohol and the operating of shebeens. These prohibitions have the obvious effect of abrogating the Applicant ability to operate her business, or practice her trade in order to earn a living and support herself and her dependants. The degrading and humiliating effects are apparent: It is common cause that, the Applicant and her four dependants, three of them who are minors are solely dependent on the income generated from the shebeen. If she does not operate the shebeen, they will have no other source of income.

(10) Furthermore, as a result of regulation 31 which criminalises the sale of alcohol and the running of shebeens, sole proprietors of shebeens are at risk of arrest, prosecution and conviction of the offence of breaking lockdown regulations simply because they seek to engage in economic activities for the purposes of sustaining themselves and their dependants and living a life without humiliation and degradation induced by poverty which is an essential aspect of their human dignity as human beings.

[11] *Minister of Home Affairs and Others v Watchenuka and Another* 2004(2) BCLR 120 (SCA) para 32

(11) The regulations and the perpetual alternating risks of, on one hand, wallowing in poverty, destitution and starvation and on the other prosecution, arrest and fines builds insecurity and vulnerability into the daily lives of women, single mothers whose sole source of income is from operating a shebeen, as is the Applicant. There can be no doubt that the existence of regulations which deprives the Applicant of her sole source of income for the purposes of sustaining herself and her dependants, condemning her to poverty, destitution and starvation, degrades and devalues the Applicant and other similarly placed women. As such the regulations are a palpable invasion of their dignity, as they are a restriction upon their ability to live without positive humiliation and degradation in violation of the right to human dignity as enshrined in section 10 of the Constitution.

1.1.3. The regulations violate the right to practice a trade in a manner that offends the right to human dignity.

(12) The Applicant therefore submit that the lockdown regulations in as far as they preclude the Applicant from operating her shebeen business violate the right to practice a trade in a way that infringes the section 10 right to dignity.

(13) To be able to choose and practice a trade is in this case a badge of dignity and personhood, it is a fundamental component of human dignity. To restrict one's ability in that regard, as the regulations do, is a violation of their right to human dignity and personhood. The constitutional court, in *Affordable Medicines Trust and Others v Minister of Health and Another,* held that, there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over

a lifetime of devoted activity; it is the foundation of a person's existence.[12] Thus, one's work is part of one's identity and is constitutive of one's dignity. In *Watchenuka* the court held that, the freedom to engage in productive work even where that is not required in order to survive is indeed an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association. The court further indicated that, self-esteem and the sense of self-worth the fulfilment of what it is to be human is most often bound up with being accepted as socially useful.[13]

(14) The Applicant in this case has taken up a trade as a sole proprietor operating a shebeen, the Sax Shebeen. It is not difficult to see from the facts how her work is part of her identity, self-esteem and sense of social usefulness, as contemplated by the Constitutional Court in the aforementioned *Watchenuka* case. A simple deduction unravels this. Notable is that:

- Four children, the eldest being 23 and a grandchild, two generations have grown to be dependent on the income generated from the shebeen, the Applicant has supported two generations through the shebeen, which means that the Applicant has to date dedicated well over half of her life time to her work, her trade;
- Furthermore, regardless of the lockdown people still frequented her shebeen, this simply speaks to the bond she has created with her clients and in a broader spectrum her sense of social usefulness;
- The shebeen has also grown to attract international regulars, this says nothing short of her hard work, devotion and lifetime commitment to her trade.

[12] *Affordable Medicines Trust and Others v Minister of Health and Another* para 59.
[13] *Minister of Home Affairs and Others v Watchenuka and Another* para 32.

(15) All of the above is an indication of a lifetime of devoted activity, a relationship between the Applicant and her work that shapes the Applicant human personality and indeed her sense of dignity. It is unimaginable to speak of the outworking of the Applicant inherent dignity without regard or mention of her work - her trade, it is inextricably part of her identity and indeed her dignity. Therefore, the prohibition imposed by the regulations on the Applicant in as far as they restrict her from practising her chosen trade is a deterrent to the Applicant sense of identity, self-esteem and being accepted as socially useful, it is therefore a violation of the Applicant right to human dignity enshrined in section 10 of the Constitution.

1.2. Is a section 22 right to trade limited?

(16) The Applicant submits that, Regulations 24(2); Regulation 26 and; Regulation 31 read together culminates in the limitation the section 22 right to trade. Section 22 of the Constitution provides that, 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.

(17) Section 22 consists of two elements which agreeably, as the German Court in the *Pharmacy case* held, constitutes two poles of a continuum. The first element is the freedom to choose an occupation, trade or profession. The freedom to choose an occupation cannot be limited except by a law of general application that is justifiable in terms of the criteria laid down in section 36 of the Constitution.[14]

[14] *Affordable Medicines Trust and Others v Minister of Health and Another* para 68.

(18) The second element is the regulation of the practice of a trade, occupation or profession by law and by implication the right to practice a trade thereof. In *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* the court held that, rationality is the minimum standard of legality for all legal regulation.[15] Thus the freedom to practice a trade cannot be limited except by law which is rationally related to a legitimate government purpose. In *Affordable Medicines Trust v Minister of Health* further developed this determination to encompass that where the regulation of a practice, viewed objectively, is likely to impact negatively on the choice of a profession, such regulation will limit the right freely to choose a profession guaranteed by section 22, and will therefore also be subject to section 36(1). And where the regulation of practice limits any of the rights in the Bill of Rights, will also be subject to section 36(1).[16]

(19) A similar approach was used in *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others,* the court reasoned that, though both the choice of trade (first element) and its practice (second element) are protected by section 22, the level of constitutional scrutiny that attaches to limitations on each of these aspects differs. Thus if a legislative provision would, if analysed objectively, have a negative impact on choice of trade, occupation or profession, it must be tested in terms of the criterion of reasonableness in section 36(1), if it does not, then the testing criterion will be the rationality test.[17] The first stage of inquiry in this case therefore, is whether

[15] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) par 90.
[16] *Affordable Medicines Trust v Minister of Health* par 80.
[17] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* [2017] ZACC 65.

regulations 24(2); 26 and 31 impose restrictions on the choice of a trade, occupation or profession, or only on its practice.

(20) Regulations 24(2); 26 and 31 have the effect of prohibiting the sale, dispensing, distribution and transportation of alcohol except for industries producing the products enlisted under section 26 (2) and for export purposes. It further has the effect of prohibiting the operating of businesses such as shebeens and similar establishments and the stopping of approval of special or events liquor licences for the duration of the national state of disaster.

(21) The Applicant submits that, primarily, the regulations evidently seek to regulate the practice of a trade, namely selling of alcohol and the running of shebeens during the lockdown. However, viewed objectively, the regulations also impact negatively on the choice of occupation in that the regulation of the practice reaches the point where they are no longer able to do that work, their initial choice for an occupation is therefore denied to them with retrospective effect. In the *Affordable Medicines* case, this Court held that a law requiring medical practitioners who wished to dispense medicines to obtain a licence, did not have the effect of influencing negatively a person's decision whether to become a medical practitioner. This was because the provision did not purport to regulate entry into the medical profession, nor did it affect the continuing choice of practitioners as to whether to remain medical practitioners or not.[18] the court considered whether the legislation in issue did not present a legal barrier to entry into the profession, and that it did not impose an effective limit on that choice in that it would not deter persons from entering into the

[18] *Affordable Medicines Trust v Minister of Health* 69.

profession.[19] The regulations on the other hand do have an effect on the continued practice of the sale of alcohol and operating of shebeens as it prohibits such for the duration of the state of national disaster which is for what is known is an indefinite period of time. For the same reasons, the regulations viewed objectively would deter one from entering this occupation.

(22) Thus, the regulations have an effect on the choice of trade in the ordinary manner for those wishing to enter the business of the sale of alcohol and operating of shebeens; and the regulations also have an effect on the choice of trade retrospectively for those who are already in such a line of trade but cannot practice due to the prohibitions imposed by the regulations. Furthermore, the regulations do violate other rights in the Bill of Rights, mentionable, the right to human dignity. Thus, the limitation of section 22 by the Lockdown level 4 regulations must meet the section 36 threshold.

2. Is the infringement justified under section 36 of the Constitution?

(23) The Applicant submits that; the infringement is not capable of justification under section 36 of the Constitution. Section 36(1) of the Constitution provides that for a limitation to be justifiable it must be a limitation by a law of general application and it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This forms the two phased approach to the limitation test. The first stage seeks to determine whether the limiting provision or regulations are a law of general application. Whereas the second stage seeks to establish whether the limitation is

[19] *Affordable Medicines Trust v Minister of Health* 71.

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

2.1. The Regulations are law of general application

(24) The Applicant submit that, the right is limited in terms of a law of general application. As a general principle or rule this first requirement is met whenever a rule is accessible, precise, and not applied arbitrarily or in a way that discriminates unfairly between persons or groups of persons. In form, this means that the law must be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations. Whereas in substance, it means that, at a minimum, the law must apply impersonally, it must apply equally to all and it must not be arbitrary in its application.

2.2. The limitation is neither reasonable nor justifiable.

(25) The second stage of enquiry, which is the centre of contention in this matter, is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[20] The Applicant submits that the limitation of the rights is neither reasonable nor justifiable.

(26) As held by this particular court in *S v Bhulwana,*[21] this stage entails placing the purpose, effects and importance of the infringing legislation on one side of the scales, and the nature and effect of the infringement caused by the legislation on the other. The

[20] Section 36 of the Constitution.
[21] S v Bhulwana 1995(1) SA 509 (C).

Applicant contends, and will sequentially prove that the excessive substantial inroad into fundamental rights in this case must compel one to conclude that the limitation of the identified rights is neither reasonable nor justifiable in an open and democratic society based on human dignity, equality and freedom.

(27) This very court in *S v Makwanyane* held that, 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 right is 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[22]

(28) Section 36(1) lists five factors which agreeably corresponds with the factors discussed by the court in *S v Makwanyane*, to be taken into account when determining whether a limitation is reasonable and justifiable. A scrutiny of the limitation imposed by the regulations on the identified rights of the Applicant will vividly show that the limitations are not reasonable or justifiable.

2.2.1. The nature of the right to human dignity

(29) This factor requires an assessment of the importance of a particular right in the overall constitutional scheme. A right that is of particular importance to the Constitution's ambition to create an open and democratic society based on human dignity, freedom and

[22] *S v Makwanyane* 104.

equality will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement.

(30) In *S v Makwanyane*, it was found that the right of human dignity is fundamentally important and for that reason, the state needs a particularly compelling justification for the limitation of these rights.[23] According to the Constitutional Court the 'rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. 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.[24]

(31) In *S v Lawrence* Judge Sachs stated that indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the state.[25]

(32) Thus, the importance of the right to human dignity is apparent from the above decisions. As for the right to earn a living, this right is a component of the overall protection of human dignity. Given the importance of human dignity in the constitutional scheme, the right to earn a living, which is a fundamental component carries no less weight of importance.

2.2.2. The importance of the purpose of the regulations

(33) Reasonableness requires the limitation of a right to serve some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional

[23] *S v Makwanyane* 104.
[24] *S v Makwanyane* 144.
[25] *S v Lawrence* 1997 4 SA 1176 (CC) para 168.

democracy. Thus, a limiting measure must serve a purpose that all reasonable citizens would agree to be compellingly important. A limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable.

(34) The regulations violate the right to human dignity and one of its fundamental components, the right to earn a living. They further have severe implications on the rights of children enshrined in section 28 of the Constitution. To justify the infringement of these rights the state must show that the regulations serve purposes that an open and democratic society based on freedom and equality would consider worthwhile and important.[26]

(35) According to the state, the regulations serve the purpose of flattening the curve so as to curb or minimise the spread of the virus. Are these purposes important to an open and democratic society based on freedom and equality? Certainly! Minimising the spread of the virus is an important purpose. The State is indeed entitled, and obliged, to take action to protect human life from the threat of COVID-19. Even where the purpose is worthwhile and legitimate, reasonableness further requires an enquiry into the extent and nature of the limitation and the relationship between the limitation and the purpose.

2.2.3. The nature and extent of the limitation

(36) This factor entails the assessment of the proportionality between the harm done by the regulations and the purposes the regulations seek to achieve. It begs the question, is the limitation a serious or relatively minor infringement of the right? This assessment is a

[26] *S v Mkwanyane* 117.

necessary part of the reasonableness and justifiability enquiry because proportionality means that the infringement of rights should not be more extensive than is warranted by the purpose that the limitation seeks to achieve. A law that limits rights should not use a sledgehammer to crack a nut. To determine whether the limitation does more damage to rights than is reasonable for achieving its purpose first requires an assessment of how extensive the infringement is.

(37) The Applicant submit that the harm done by the regulations is disproportionate to the benefits of the regulations. Thus, the limitation is therefore not justifiable. In assessing the proportionality this very court in *S v Makwanyane* assessed the degree of harm by inquiring how seriously does the limitation impact on the rights identified?[27] In this case, the Applicant submits that the degree of the harm inflicted by the regulations on the rights identified is severe.

(38) The primary purpose sort to be achieved by the Covid-19 regulations is common cause. It is to flatten the curve and curb the spread of the virus. The harm done by the regulations is the detrimental violation of the right to trade, earn a living and the right to human dignity. The effects of the regulations leave the clients exposed to destitution in that, they are precluded from earning income in the only manner in which they have been.
(39) The regulations completely prohibit the operation of shebeens and sale of alcohol, therefore it severely infringes the right to choose and practice a trade. Furthermore, the restriction further has equally severe consequential effects on the rights of children, their livelihood and well-being, and an active threat to the right to life and health pursuant to

[27] *S v Makwanyane* 236.

starvation and the inability to access health care facilities due to financial decapitation of the. The inroads that the regulations make on the right to choose and practice a trade, earn a living and dignity could not be more severe. For that reason, the limitations imposed by the regulations on the right to trade and human dignity are incapable of justification.

2.2.4. The relationship between the limitation and its purpose

(40) The Applicant further submits that; the limitation is incapable of justification because the causal connection between the regulations and the purpose the regulations seek to serve is remote to the point of insignificance.

(41) To be considered reasonable and justifiable, there must be a good reason for the infringement. Simply put, there must be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve. This requires the evident causal connection between the law and its purpose: the law must tend to serve the purpose that it is designed to serve. If the law does not serve the purpose it is designed to serve at all it cannot be a reasonable limitation of the right. Furthermore, the reasoning of Didcott J in *S v Makwanyane* shows that, the connection between the limitation and the purpose need not to be remote taking into consideration the severity of the limitation, it was reasoned that, those imposing the limitation bear the burden of satisfying that it indeed serves such a purpose, nothing less is expected from them in any event when human lives are at stake, lives which may not continue to be destroyed on the mere possibility that some good will come of it.[28]

[28] *S v Makwanyane* 184.

(42) The Applicant submits that, however legitimate the purpose is, there is no rational connection between the ends (curbing the spread of the virus) and the means chosen to achieve these ends, (the banning of alcohol and stopping the operation of shebeens). There is no satisfactory evidence establishing a connection between the spread of the virus and the operating of shebeens and that the prohibition of the latter has a bearing on the curbing of the spread is not well established as a scientific fact, The regulations therefore are unreasonable as they limit the right of human dignity on a remote possibility that some good will come out of the prohibition of the sale of alcohol and operation of shebeens.

2.2.5. The presence of less restrictive means to achieve the purpose.

(43) To be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to the costs of the limitation. The limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent. If a less restrictive alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred.

(44) The purposes of the regulations as indicated above is to ‘flatten the curve and curb the spread of the COVID-19 virus. The Applicant concedes that this is a noble and important cause, however in the course of achieving these ends, the regulations imposes considerable costs: the detrimental and injurious violations of the rights to human dignity, its fundamental component, the right to earn a living, the rights of children such as the Applicant dependents and the threat to life by potential starvation.

(45) The Applicant submit that in the light of these costs, there are other methods of achieving this purpose without imposing the same costs on the most vulnerable in our society, the women and children. The regulations therefore cannot be, under any light, be seen to be reasonable and justifiable.

(46) Accordingly, the goal of flattening the curve could be as well served by placing the COVID-19 protocols, such as requiring those operating shebeens to fumigate their business premises, installing sanitising stations at the entrances, checking temperatures and barring those with signs and symptoms related to COVID-19, reducing the number of the people within the premises to that recommended by the relevant officials and regulating how much alcohol an individual may consume on the premises. These measures would have equally have been effective and would have come with lesser burden on the application and without substantial violation of the right to trade, earn a living and human dignity. In the absence of any evidence that the current regulations served the purpose of flattening the curve and curbing the spread of the virus more effectively and given its drastic effects, the less restrictive measures highlighted above, the latter, less restrictive method of achieving the purpose that must be preferred.[29]

3. Does the existence of the solidarity fund have any effect on the constitutionality of the regulations?

(47) The Applicant submits that, the existence of the solidarity fund does not remedy the unconstitutionality of the regulations. The regulations are unconstitutional in as far as they violate the right to trade and human dignity. For the solidarity fund to have an effect on

[29] *S v Makwanayne* 128.

the constitutionality of the regulations, it must positively redress the twofold violations to the right to human dignity inflicted by the regulations. This has not been and cannot be achieved for two reasons. In the first place, the solidarity fund does not alleviate the dehumanising and degrading situation the Applicant finds themselves in. The Solidarity fund has internal defects associated with access and administration which makes it ineffective. Secondly, the solidarity fund does not restore the right to human dignity impaired by the regulations in as far as one's work or trade is constitutive of their human dignity.

3.1. The internal defects of the solidarity fund make it ineffective in remedying the violation of the right to earn income.

(48) One of the objectives of the solidarity fund, which is relevant in this context is to provide humanitarian support to vulnerable households and communities who have been affected.

(49) The mandate, according to the Solidarity Fund Support of the Food Voucher Relief Programme September 2020 Summary Report is spelt out as:

> *In order to provide accelerated aid for South Africa's most vulnerable households and communities during the COVID-19 pandemic, the Solidarity Fund's Support Pillar focuses on promoting human welfare. More specifically, it aims to support the efforts of government and business to provide sustainable access to food and care, alongside other welfare interventions. Ultimately, through the Support Pillar, The Solidarity Fund is working to alleviate the negative societal impact of the economic disruption caused by Covid-19 restrictions.*

(50) This is an example of a noble cause laden with impracticalities which neutralises any positive effect its existence would have had on the constitutionality of the regulations.

- Fundamentally, Information regarding the fund was not sufficiently simplified and dispersed. The Applicant was not the only one who did not have knowledge of the existence of the fund and the process relating to applying for the funding.
- Furthermore, applying for the funding did not come with a guarantee that indeed one would receive such funding, according to the Food Voucher Relief Programme Summary Report, only 135 000 food parcels were prepared for distribution.
- The parcels were a far cry from assisting the recipients to live above humiliation and degradation. According to the report, the food parcels contained basic food products worth R700
- Accessing the money/ food parcels was encumbered by the long queues. The High Court has already pointed out the absurdity of this fact.[30]

3.2. The existence of the solidarity fund does not restore the right to human dignity impaired by the regulations

(51) Even if the solidarity fund was free of the defects identified above, it would not redeem the regulations from unconstitutionality in as far as the abrogative effect of the regulations on the right to practice a trade is an infringement on the right to human dignity. In principle it is the effect of the limitation on rights and not the effect of the limitation on a particular right-holder that is of concern. This is illustrated in *S v Meaker*, in which where the State had argued that the consequences of the application of a reverse onus

[30] *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* 2020 (11) BCLR 1349 (GP) para 7.2.

presumption in traffic legislation were trivial, usually entailing payment of a fine for a speeding or parking violation, The constitutional court, according to Cameron J, stated that there is no merit to such an argument and it is irrelevant to the assessment of the reasonableness of the limitation required by s 36.[31] It was the effect of the limitation of the right that had to be assessed, whether the penalties were relatively minor following a conviction obtained with the aid of the presumption. It trenches directly on the vehicle owner's rights whenever the vehicle is involved in the commission of an offence on a public road

(52) The court reasoned in relatively the same manner in the *Islamic Unity Convention* case. In this case, the court dismissed a contention that the impact of a limitation of free speech in a broadcasting code of conduct was minimal because broadcasters were free to 'opt out' of the code by adopting their own code of regulation. The code had the effect of limiting rights in an objective sense and the fact that a particular broadcaster could chose to opt out of being bound by the code was immaterial.[32]

(53) Furthermore, in *De Beers and Others v Minister of Cooperative Governance and Traditional Affairs*, where the Respondents had argued that all limitations on Constitutional rights had been recompensed by the government, the court held that, even if the government's attempt at economic relief functioned at its conceivable optional best, monetary recompense cannot remedy the loss of, inter alia, the right to human dignity.[33] It is on this basis then, that the Applicant, submit that the contention that the existence of the solidarity fund remedies the unconstitutionality of the regulations should be dismissed.

[31] *S v Meaker* 1998 (8) BCLR 1038 (W).
[32] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).
[33] *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* para 7.11.

(54) The regulations have the effect of limiting the rights to practice a trade, earn a living and human dignity, the fact that a solidarity fund was put it in place is immaterial because monetary recompense cannot remedy the right to human dignity.

4. Is this Court empowered to consider whether the decision was also irrational?

(55) The Applicant submits that, if per adventure it is found that the regulations do not unreasonably infringe on the right to human dignity and occupation freedom, the regulation be found to be unconstitutional on the basis that the decision to promulgate the regulations that ban and prohibit the sale of alcohol and the operating of shebeens was irrational.

(56) This court is also empowered to consider the rationality of the decision thereof. It is a necessity laid upon by the principle of legality. The promulgation of the lockdown regulations is a classic instance of the exercise of public power. The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.[34] In *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* the court held that rationality is the minimum standard of legality for all legal regulation.[35] It follows therefore, that to pass the constitutionality muster the decision to promulgate the regulations that impose a prohibition on the sale of alcohol and the running of shebeens, must be rationally related

[34] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) para 49.
[35] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 90.

to the achievement of the objectives of the process. If it is not, it falls short of the standard of legality that is demanded by the Constitution.

4.1. The decision was irrational

(57) The Applicant submits that the decision to ban the sale of alcohol and prohibit the operating of shebeens and the criminalisation of the aforementioned was both procedurally irrational and substantively irrational.

4.1.1. Procedural irrationality

(58) Procedural rationality is about testing whether, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.[36] Thus, the exercise of the power to promulgate the regulations must in relation to both the process leading up to the promulgation and the promulgation itself, be rationally related to the purpose for which that power was exercised. In *Democratic Alliance v President of South Africa*, the court held that the conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends.[37] In *Albutt v Centre for the Study of Violence and Reconciliation,* the means where found not to be rationally connected to the purpose because the procedure by which the decision was taken did not provide an opportunity for the victims or their family members to be heard, something which the court found to be central to the purpose/end. In the case before this court, the decision to ban

[36] *Law Society v President of the RSA* 2019(3) SA 30 (CC) para 64.
[37] *Democratic Alliance v President of South Africa* 2012 (12) BCLR 1297 (CC) para 36.

alcohol and close shebeens was arrived at through reliance by the Minister on biased expert evidence and reliance on recommendations of the World Health Organisation.[38]

(59) Such a process is irrational because the recommendations of the World Health Organisation are generalised to the effect that a 'first world country' receives substantially the same recommendations as a 'third world' country regardless of societal and socio-economic structural and substantial differences. This makes the decision to ban and prohibit the sale of alcohol and closure of shebeens to be a remote exercise far removed from the realities of the affected communities on the ground. For that reason, the decision to ban the sale of alcohol and prohibit the operating of shebeens is irrational because the procedure was modelled upon a farce to the exclusion of the reality faced by the people operating shebeens and selling alcohol to eek a living, whose well-being must be central to the exercise of power authorised by section 27 of the Disaster Management Act.[39]

4.1.2. Substantive irrationality

(60) The substantive rationality test focuses on whether the decision in itself is rational. The test is an enquiry of whether the means selected are rationally related to the objective sought to be achieved. The Applicant submits that, the decision is indeed in itself irrational because the closure of shebeens (selected means) is not rationally related to the flattening of the curve and curbing of the spread of the virus(objective). According to a publication in the *Business Maverick*, In South Africa there are more than 34 500, licenced

[38] *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* para 6.11.
[39] Disaster Management Act 57 of 2002.

tavern owners with more than 200 000 dependents and more than 10 000 shebeen permit holders.[40]

(61) The irrationality of the decision to cut the means of sustenance for so much families is evident in that they are now forced to queue for hours and sometimes days for food or/and monetary handouts, food and/or money which they would have easily made without compromising their safety from contracting the virus through exposure in queues. This situation created by the regulations(means) is a diametric opposite of the objective. Because it cannot be said that there is a shred of rationality in a means that seeks to curb the spread of the virus by minimising interaction between people when by minimising interaction between a certain group of people(people who or would have frequented the shebeens), exposes, by the same measure, a certain group of people(the many shebeen and tavern employees and their dependents) by compelling them to queue for handouts, thereby interacting with people. For that reason, the decision to prohibit the operating of shebeens and similar establishments is irrational.

5. Remedies

5.1. Declaration of constitutional invalidity

(62) Section 172(1) of the Constitution provides that, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. The Applicant therefore, seeks before this court a remedy declaring the unconstitutionality of regulations 24(2); 26;

[40] S Planting '*Business Maverick'* dailymaverick.co.za/article/2020-0722-restaurants-and-taverns-collapse-hospitality-industry-desperate-to-starve-off-disaster/

31 on the basis that they unreasonably and unjustifiably violate section 22 and section 10 of the Constitution; or on the alternative basis of irrationality.

5.2. Suspension of the order of invalidity

(63) The Applicant accepts that any order of invalidity should be suspended for a period of 2 months to allow the Minister to remedy the defects. The Applicant seeks that during the period of suspension, an interim order to the effect that the vulnerable people such as the Applicant are protected from arrest and prosecution on the grounds of the regulations found to be invalid. This would constitute an appropriate relief in the light of the reasoning *in Fose v Minister of Safety and Security* where the court held that, in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.[41]

The Applicants therefore seek the following orders:

i. That Regulations 24(2); 26; 31 be declared unconstitutional

ii. That the sale of alcohol and operating of shebeens be declared lawful subject to appropriate social distances measures

iii. That the criminal records of those arrested for contravening 24(2); 26;31 be expunged

iv. That first to third respondents pay the costs of this matter including the costs of two counsel. In the event that any part of this application is unsuccessful, the Applicant should not be ordered to pay costs, in accordance with the *Biowatch principle*[42]

[41] *Fose v Minister of Security* 1997 (7) BCLR 851 (CC) para 19.
[42] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (11) BCLR 1105 (CC).

Signed at **JOHANNESBURG** on the __4th__ of __December __ 2020

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BIBLIOGRAPHY

Case Law

Advance Mining Hydraulics v Botes 2000 2 BCLR 119 (T)

Affordable Medicines Trust and Others v Minister of Health and Another 2005 CCT 27/04

Albutt v Centre for the Study of Violence and Reconciliation 2010 (5) BCLR 391 (CC)

Biowatch Trust v Registrar Genetic Resources and Others 2009 (11) BCLR 1105 (CC).

BVerfGE June 11, 1958 377 1958 (*Pharmacy Case*).

De Beer and Others v Minister of Cooperative Governance and Traditional Affairs 2020 (11) BCLR 1349 (GP)

Democratic Alliance v President of South Africa 2012 (12) BCLR 1297 (CC) para

Fose v Minister of Security 1997 (7) BCLR 851 (CC)

Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC).

Law Society v President of the RSA 2019(3) SA 30 (CC)

Minister of Home Affairs and Others v Watchenuka and Another 2004(2) BCLR 120 (SCA)

Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others [2017] ZACC

S v Bhulwana 1995(1) SA 509 (C).

S v Lawrence 1997 4 SA 1176 (CC)

S v Makwanyane and Another 1995 (3) SA 391 (CC).

S v Meaker 1998 (8) BCLR 1038 (W).

International Legal Instruments

Committee on Economic, Social and Cultural Rights General General Comment No.18 GE. 06 – 40313 (E) 080206.

International Covenant on Economic Social and Cultural Rights

International Covenant of Civil and Political Rights

Internet Resources

S Planting '*Business Maverick'* dailymaverick.co.za/article/2020-0722-restaurants-and-taverns-collapse-hospitality-industry-desperate-to-starve-off-disaster/

Legislation

Constitution of the Republic of South Africa 1996.

Disaster Management Act 57 of 2002.

German Constitution 1919.