



# SABWIL

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## SABWIL HUMAN RIGHTS COURT

(held on 11 December 2020 at 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*

**ABAFASI EQUALITY INSTITUTE**

*Amicus Curiae*

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## #s10 SHRC Case Scenario

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*While the following facts are inspired and informed by real events, for the purposes of ensuring that this topic is balanced and fair, the facts contained herein are not necessarily true or accurate. Kindly assume, for the purposes of this court, that the facts set out below are accepted as correct.*

- 1 Covid-19 is an infectious disease caused by a novel severe acute respiratory syndrome coronavirus. It was first discovered in December 2019 in Wuhan, China, and has since spread internationally. On 30 January 2020, the World Health Organisation declared the outbreak a public health emergency of international concern, and on 11 March 2020 it declared the outbreak a pandemic. There are at present more than 24,9 million cases reported internationally, and over 840 000 reported deaths caused by the virus.

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- 2 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. This lockdown was then extended, and subsequently a process of gradual reopening of the economy began.
- 3 Among other things, during the initial lockdown period the sale of alcohol and the operating of any restaurants, shebeens or taverns was prohibited. The ban on alcohol was revoked on 1 June 2020, but then reinstated on 12 July 2020. It was only lifted on 18 August 2020.
- 4 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, which she

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operates from the back of her home in Yeoville, in an area approximately 100 square metres in size. Thandi's four children, who are aged 23, 19, 14 and 9, all reside with her and are dependent on her income. Thandi's first grandchild, aged 2, also lives on the property with her and is dependent on her income.

5 Before the lockdown was imposed the Sax Shebeen was successful and was not only frequented by the locals but had also become a sensation among international backpackers that came to South Africa.

6 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.

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7 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. While the Sax Shebeen was not as busy as it was before the lockdown, it still obtained the patronage of approximately 30 to 60 people a night.

8 On 8 May 2020, following a sting operation, Ms Mashaba was arrested and charged with a contravention of Regulation 24(2), Regulation 26, and Regulation 31 of the Level 4 Lockdown Regulations, dated 29 April 2020. A copy of these regulations is annexed hereto for convenience.

9 Ms Mashaba was told that she was being charged for violating the lockdown regulations, and that she faced a penalty of six months' imprisonment or a

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fine. After consulting with her legal representatives, she has brought an application challenging the constitutional validity of the Level 4 Lockdown Regulations.

10 In her affidavit Ms Mashaba alleges that she was fully aware of the lockdown, the closure of shebeens, and the ban on the trade of alcohol. She avers that she made a conscious decision to disregard these laws because she had no other means for survival for herself and her family, including her children and grandchild. Faced with the prospect of starvation, she saw no choice but to continue operating the Sax Shebeen.

11 Ms Mashaba takes the view that the lockdown was not a suitable strategy for South Africa, particularly in the face of the poverty of many, including Ms Mashaba and her family. Government should have considered that the

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lockdown would place people like Ms Mashaba in the stark situation of having to choose between obeying the law and basic sustenance.

12 Ms Mashaba complains that her right to dignity enshrined under section 10 of the Constitution has been infringed by the lockdown regulations. This is because the regulations prevented her from earning a basic income. She argues that the lockdown regulations are therefore unconstitutional and should be struck down as invalid.

13 While 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 argue that the lockdown regulations, when properly seen in the context of pandemic and other measures adopted by government, do not amount to an infringement of the right to dignity. They argued that,

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unlike the scenario discussed in the current case law, there was no unlawful act that infringed Ms Mashaba's right to dignity. Furthermore, the lockdown was not directed against Ms Mashaba or even against shebeens in general, but rather at the entire economy, to flatten the curve and to ensure that lives were saved.

14 To the extent that there was an infringement of section 10 of the Constitution, the respondents argue that section 36 of the Constitution permitted this limitation. They argue that the lockdown regulations and the ban on the trade of alcohol were necessary to prevent a public health crisis in South Africa.

15 They point out that other countries such as Italy, the United Kingdom, and even the United States, had grappled with the pandemic and also

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implemented a lockdown to some degree or another, notwithstanding the fact that those countries had a public health system that was far superior to that of South Africa. If the economy was not shut down and if all residents were not compelled to stay home, except to engage in permitted activities, then the pandemic would easily overwhelm the South African public health system, which would result in untold loss of life. In this matter, government was constrained to find a balance between the right to dignity and the right to life enshrined under section 11 of the Constitution, as well as the right to health care services under section 27 of the Constitution.

- 16 In particular, the respondents rely on section 27(3) of the Constitution. They argue that if radical measures were not taken to control the pandemic, South Africa would quickly find its public health resources stretched thin. It would

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not be able to provide ventilators or professional care to those that required it.

- 17 The respondents note that the applicant's business was a clear example of one that could cause the virus to spread. Her shebeen served a variety of persons, including international tourists and locals. Despite its small size, it enjoyed substantial success. It was also located within a densely populated area within Johannesburg, which has been identified as one of the hotspots for the spread of the virus.

- 18 The respondents appreciate the hardship suffered by the applicant but point to the fact that legitimate alternatives were provided. She could have, and should have, approached the Solidarity Fund Trust instead of turning against the law.

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- 19 The respondents 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. They indicate that even though the ban on alcohol has been lifted and the Republic has since moved to level 2 restrictions, there may be a need to return in future to level 4.
- 20 In her replying affidavit Ms Mashaba explains that she did not know, and still does not know, how the Solidarity Fund Trust may be accessed, or what its requirements are for releasing funds. She argues that if government wanted to rely on the Solidarity Fund as an alternative, it should have been better promoted and made more accessible.

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- 21 The Abafazi Equality Institute, an NGO, has applied for leave to intervene as a friend of the court. It argues that the ban on alcohol had important implications during the lockdown that extended beyond mere public health concerns. It claims that alcohol is a known contributor to domestic violence, which on its own increased substantially during the lockdown period. It submits that the ban on alcohol acted as an important bulwark against what would have been an even greater increase in domestic violence incidents.
- 22 The Abafazi Equality Institute wishes to argue that these considerations constitute a further basis as to why the ban on alcohol was constitutionally valid, in that it further sustained, among other things, the right to equality, the right to dignity and the right to freedom and security of the person, among others. They submit that in determining this matter, the Court must balance these rights against the rights claimed by the applicant.

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23 Having read through the papers, the court has asked for submissions on the following points:

23.1 Do the lockdown regulations infringe the right to dignity enshrined in section 10 of the Constitution? Is a section 22 right to trade limited?

23.2 If so, is that infringement justified under section 36 of the Constitution?

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

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23.4 Is this Court empowered to consider whether, in addition to the attack on the constitutionality of the regulations, the decision was also irrational?

23.5 What is the appropriate remedy?



Ubuntu,

SHRC Chief Registrar

08 October 2020

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