

**IN THE SABWIL HUMAN RIGHTS COURT
(ZOOM South Africa)**

Case number: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 SHEET: RESPONDENTS' HEADS OF ARGUMENT

1. Attached hereto is the Respondent's Heads of Argument

DATED AT JOHANNESBURG ON THIS 4TH DAY OF DECEMBER 2020

Counsel for the Respondents

MILLI BHILA SC

TAZLYN LEE

TO:

THE REGISTRAR OF THE ABOVEMENTIONED HONOURABLE COURT, SABWIL
HUMAN RIGHTS COURT, SANDTON

AND TO:

THE PRESIDING OFFICERS OF THE ABOVEMENTIONED HONOURABLE
COURT, JOHANNESBURG

AND TO:

COUNSEL FOR THE APPLICANT

AND TO:

COUNSEL FOR *AMICUS CURIAE*

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RESPONDENT'S HEADS OF ARGUMENT

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A. LIST OF ABBREVIATIONS

CESCR	Committee on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
J. Law Biosci	Journal of Law and Biosciences
OHCHR	United Nations Human Rights Office of the High Commissioner
SAHRC	South African Human Rights Commission
SAAPA	South African Alcohol Policy
UN	United Nations
WHO	World Health Organisation

B. BACKGROUND

1. The World Health Organisation declared a world health public emergency in January 2020, COVID-19.
2. The Respondents declared a national lockdown on 23 March 2020, as a response to the pandemic as well as to prevent the spread of the virus in South Africa.

The sale of alcohol was banned throughout the country and the operation of restaurants, taverns and shebeens was prohibited.
3. The Applicant is an owner of a renowned shebeen with local and international guests.
4. The Applicant disregarded the lockdown regulations set by the Respondents', and continued to sell and brew illegal alcohol, as a result she was arrested.
5. The Applicant claims that lockdown regulations infringe her right to dignity.
6. The Applicant also claims to be unaware of the Solidarity Fund phased in by the Respondents.

7. The Respondents state the lockdown regulations regarding the ban on the sale of alcohol is necessary to curb the spread of the virus and that the national lockdown was targeted towards the entire country, not just the applicant.
8. Furthermore, the Respondents make the argument that section 36 of the Constitution justifies the infringement of section 10, as well as section 27(3) to justify the lockdown regulations as a means to control the pandemic and prepare the health care system.

C. INTRODUCTION

9. The applicant has brought forth an application to the court which states that:
 - Her right to dignity enshrined in section 10 of the Constitution has been infringed upon as a result of the lockdown regulations.
 - The lockdown regulations are unconstitutional and should be regarded as invalid.
10. We respectfully submit that the application as well as the relief sought be dismissed on the basis of the necessity of the lockdown regulations to curb the spread of the Corona-virus pandemic.
11. Our submission will discuss the following issues:
 - The lockdown regulations do not infringe the right to human dignity as stated in section 10 of the Constitution.
 - The right to trade is subject to the limitation clause, section 36.
 - To the extent the human dignity has been infringed, section 36 of the Constitution justifies the limitation.
 - The effect on the constitutionality of the regulations due to existence of the Solidarity Fund.

- Analysing the rationality of the decision to implement the lockdown regulations.
- An appropriate remedy.

D. ARGUMENTS

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

12. According to the Committee on Economic, Social and Cultural Rights, State parties should take a range of urgent measures to protect Covenant rights. In particular, responses to the pandemic should be based on the best available scientific evidence to protect public health.
13. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) states that “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and are not discriminatory”.
14. Following the declaration of a pandemic, the third respondent, the Minister of Governance and Traditional Affairs, promulgated regulations in terms of s27(2) of the Disaster Management Act. The Act was drafted as an immediate response to the pandemic, not only to flatten the curve but by protecting the right to life,¹ the right to health,² by limiting the right to freedom of movement.³
15. In the *South African Informal Traders* case, *City* infringed upon the applicants' right to human dignity when they failed to follow prescribed procedure on evictions. This resulted in the applicants' inability to receive income. The defect in the decision by *City* meant that children had a direct and ongoing adverse effect to their rights to basic education, nutrition, shelter and basic healthcare services. *City* conceded to not have met the prescripts required by the statutory provision. The court stated

¹ Constitution of the Republic of South Africa, 1996 section 11. (Hereinafter referred to as the Constitution.

² Constitution, section 27.

³ Constitution, section 21.

that the applicants had clear undisputed rights, in terms of the By-Laws to do business in the areas that they did before being forcefully removed. The abuse of power by city is a clear infringement of the right to human dignity.

16. The promulgation of the lockdown regulations was not directed at the Applicant, to intentionally limit her rights or infringe her dignity but to serve a greater purpose of preserving life.
17. In *S v Makwanyane*, Chaskalson P recognised that although imprisonment inevitably impairs a person's dignity, the state undoubtedly has the power to impose this form of punishment as part of the criminal justice system. However, prisoners do not lose their rights on entering prison, on the contrary, prisoners retain all the rights to which every person is entitled under the Bill of Rights subject only to limitations imposed by the prison regime that are justifiable under s 33 of the interim Constitution. He further contends that the circumstances in which prisoners are placed necessarily mean that they will have to tolerate greater limitations of their rights, including their right to dignity, than other persons. Any limitations placed on the rights of prisoners' rights must be justifiable with reference to the objectives of placing them in prison which is to hinder them from that is the prevention of crime and the rehabilitation of the offender.⁴
18. The only time the applicant can claim infringement of her dignity was when she was arrested for contravening lockdown regulations 24(2), 26 and 31 to which her arrest was lawful. To claim infringement of human dignity because of her inability to earn an income, is not justifiable as she had alternatives that she could have resorted to before contravening lockdown regulations.
19. Lockdown regulations do not infringe the right to human dignity. The conduct of contravening lockdown regulations is what leads to infringement of the right to dignity through arrest which is inevitable.
20. *The Hola Bon Renaissance Foundation* brought an urgent application to the Constitutional Court to declare the lockdown. The Applicant submitted that, by declaring a lockdown, the President is violating the Constitutional rights of South African citizens including the right to freedom of movement, healthcare and food and that this was an abuse of power. The Constitutional Court dismissed the

⁴ Currie I *The Bill of Rights Handbook* 4th (2013 Juta) p151.

application arguing that the rights in the Bill of Rights can be limited under certain circumstances.

21. Section 27(3)(a) of the Disaster Management Act⁵ states that these regulations must only be exercised to the extent that it is necessary for the purposes of assisting and protecting the public.

II. Can section 22 right to trade be limited and section 10 be justified?

22. Constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.⁶ The respondents concede that the Lockdown Regulations, both in their original form and those as amended, have imposed severe restrictions on every person's constitutional rights.

23. Two questions are raised for a determination whether a limitation is justifiable are as follows:

- a. Whether a right in the Bill of Rights has been infringed by law or conduct of the respondent?
- b. The second question, which necessarily depends on a positive answer to the first is whether the infringement can be justified as a permissible limitation of the right?

24. Section 36 of the Constitution further states that the rights contained in Bill of Rights are subject to limitations in terms of the law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.

25. The following factors are taken into consideration:

- 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 between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

⁵ Disaster Management Act 57 of 2002.

⁶ Currie *The Bill of Rights* p151.

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.

26. It is important to note that for the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other 'realistically available' way in which the purpose can be achieved without restricting rights.⁷

27. In the case of *Muhammed Bin Hassim Mohamed*,⁸ the court stated that while no one right is more important than another, a limitations analysis involves the balancing of means and ends. This entails an analysis of all relevant considerations 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.

28. It is the respondents' position that urgent and drastic measures are necessary to curb the infection rate and to manage the healthcare system to prevent it from being wholly overwhelmed and collapsing.

29. The OHCHR stated that even in the absence of state of emergency. Restrictions, must meet the following requirements: • Legality, Necessity, Proportionality, and non-discrimination.

30. Legality: The restriction must be provided by law. This means that the limitation must be contained in a national law of general application, which is in force at the time the limitation is applied. The law must not be arbitrary or unreasonable, and it must be clear and accessible to the public.

⁷ Currie *Bill of Rights* p152.

⁸ *Mohammed and Others v the President of South Africa* 2020.

31. •Necessity. The restriction must be necessary for the protection of one of the permissible grounds stated in the ICCPR, which include public health, and must respond to a pressing social need.
32. Strategies for containing the spread of COVID-19 that have been implemented in various countries to focus on social distancing, isolating, limiting the movement of citizens, and testing and quarantining of those who have tested positive.⁹ These measures are also at the heart of South Africa's response to the pandemic.
33. • Proportionality. The restriction must be proportionate to the interest at stake, it must be appropriate to achieve its protective function; and it must be the least intrusive option among those that might achieve the desired result.
34. When South Africa entered its third week of lockdown, the President was left with an option of either lifting the lockdown regulations that would likely result in the spread of a virus or extending the lockdown to assist the already congested public health system.
35. • Non-discrimination. No restriction shall discriminate contrary to the provisions of international human rights law.
36. The WHO and the UN made important recommendations to States in to do its best to preserve right to life and providing health care to every individual without discrimination, within its available means.
37. Before South Africa's liquor-free lockdown, modelling by the South African Medical Research Council suggests that trauma units nationwide saw about 35 000 weekly admission. To reduce alcohol harm, the South African Alcohol Policy Alliance with affiliates in Malawi with various African countries including South Africa supports the increases restriction on alcohol availability, in line with the WHO Global Strategy as the ban of alcohol sales has seen striking benefits and valuable lessons for regulation.¹⁰ The SAMRC modelling further highlighted that the

⁹ Stauton C, Swanepoel C & Labuschaigne "Between a rock and hard place: South Africa's Response" *J. Law Biosci* (2019) 5.

¹⁰ Kotze K "Could South Africa's lockdown 'experiment' help chart a path to a more sober and less violent country" 2020 *Bhekisa Centre for Health Journalism*.

instituted lockdown and banned alcohol as part of its bid to curb cases of the new coronavirus decreased hospital trauma admissions by 66%. The limitations placed on binge drinking culture in South Africa, mostly in drinking outlets has been associated with violent engagements which has now been reduced to contact crime, for which the majority of South African hospitals saw a decrease in patient numbers admitted because of assault, accidents and other injuries. The collapse of the healthcare system does not just affect those infected with COVID-19, it affects every citizen who urgently needs access to healthcare facilities for whatever medical reason, an imperative right as per s27(3) of the Constitution.

38. Although the ban on the sale of alcohol is not directed at the Applicant, the Applicant is an example of the dangers that her establishment adduces. She hosts international and local guests, the people visiting her establishment make use of various forms of transport, may even visit different areas before and after visiting the shebeen, this means that there is no way of knowing who contracts the virus. The other effects experienced are as a result of the sale of alcohol are the consequences of abuse of alcohol which increase alcohol trauma related matters. Together with various or similar establishments, there is no guarantee of social distancing thus there is no way of knowing the people who will contract the virus, thus congesting the public health system.
39. The certainty that a prohibition of alcohol sales in South Africa has reduced pressure on emergency care units and lowered mortality, health professionals lobby for restrictions to remain until the crisis is over to ensure that health services can concentrate on dealing with covid-19 and other patients.¹¹ It is imperative to delay the spread of the virus in order to prevent the healthcare system from being overloaded, which in turn, may result in even more deaths. It buys time for new diagnostic to be developed and rolled out, for new treatments to emerge and a vaccine to be developed.
40. The Muhammed case states that “it is imperative to delay the spread of the virus in order to prevent the healthcare system from being overloaded which, in turn, may result in even more deaths. It buys time for new diagnostic to be developed

¹¹ Kotze K Could South Africa's lockdown 'experiment' help chart a path to a more sober and less violent country 2020 *Bhekisa Centre for Health Journalism*.

and rolled out, for new treatments to emerge and a vaccine to be developed. The only way to ensure this is to enforce strict social distancing measures”.¹²

41. It is the respondents’ position that whilst the Lockdown Regulations entail serious rights limitations, the limitation on the right to trade is reasonable and justifiable limitation and are thus constitutionally permissible under section 36 of the Constitution. The limitation of rights in issue here is based on a policy adopted by Government with the aim of achieving a particular outcome, flattening the curve to save lives.
42. It is also justifiable to state that limiting human dignity to prevent the spread of the virus is not arbitrary or unreasonable, it is for the greater good of everyone because it puts less pressure on the public health system, which means that the right to life and health care are protected and on a better balancing scale, as stated in *Mohammed* that an analysis for limitations is required and balancing the means and end.

III. Does the solidarity fund have an effect on the constitutionality of lockdown Regulations?

43. In order to consider the above, it is imminent to highlight that the measures that have been recommended by the CESCR stating that States should take amongst other things such as providing water, soap and sanitizers to communities that lack them; implementing targeted programmes to protect the jobs, wages and benefits of all workers, including undocumented migrant workers, suspending evictions or mortgage bond foreclosures against people’s homes during the pandemic.
44. To make these possible, it further elaborated that accurate and accessible information about the pandemic is essential both to reduce the risk of transmission of the virus and to protect the population against dangerous disinformation. Such information should be provided on a regular basis, in an accessible format and in

¹² *Mohammed and Others v the President of South Africa* 2020.

all local and indigenous languages. States should also provide social relief and income support programmes to ensure food and income security to all those in need; taking specially tailored measures to protect the health and livelihoods of vulnerable minority group.

45. Section 27(1) of the Constitution provides for the right to have access to

- b) sufficient food water and water,
- c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Subsection 2 further provides for the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

46. The Solidarity fund is a measure taken by the government to combat covid-19 and support businesses affected by the lockdown regulations. The fund is an alternative which compliments what is being done in the public sector. The solidarity fund does affect the constitutionality of the lockdown regulations as the CESRC binds the state to find means to provide for social relief during this period.

IV. Rationality of Constitutional Regulations

47. In the *De Beer* case¹³, the court stated that when considering rationality, the means employed need to be rationally related to the purpose for which power was conferred and that measures need to be rationally connected to a permissible objective.¹⁴ Furthermore, in the *Pharmaceutical Manufacturers Association* case¹⁵, it was held that decisions must be rationally related to the purpose for which the

¹³ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* 2020 11 BCLR 21542 (GP)

¹⁴ *De Beer and Others* (n3) para 6.3 and 6.6

¹⁵ *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 3 BCLR 241 (CC); 2000 2 SA 674 (CC) paras 19–20, 44, 50 – hereafter *Pharmaceutical Manufacturers Association*.

power was given. The De Beer case also highlights that when regulations are attacked on the basis of rationality, Courts are obligated to examine the means to determine whether rationality is related to objective sought to be achieved.¹⁶

48. It is submitted that the lockdown regulations, particularly sections 24, 26(1) respectively, prohibit the functioning of establishments such as taverns and shebeens as well as the sale, dispensation and distribution of liquor.¹⁷ Furthermore, stating that persons who convene a gathering is liable to a fine or period of imprisonment.¹⁸ These regulations can be considered rational as they serve a greater purpose, rationality is a less restrictive means of achieving that purpose, as evidence suggests that prohibiting the sale of alcohol and gathering is one of the reasons the burden on the health care system is reduced. Furthermore, these regulations cannot be dismissed as saving lives should take precedence over freedom or earning a living.¹⁹

V. Appropriate Remedy

49. We humbly request the court for the following remedies:

- A declaration order, stating that the Level 4 Lockdown Regulations – specifically Regulations 24(2), 26 and 31 – do not infringe upon the right to human dignity.
- The relief sought by the applicant be dismissed.
- In the event that the court do not favour our response, we humbly request that a period of three months be awarded to amend the unconstitutional provisions.
- Party to Party costs be awarded.

¹⁶ *De Beer and Others* (n3) para 6.4.

¹⁷ Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002.

¹⁸ Regulations issued in terms of section 27(2) (n5).

¹⁹ *De Beer and Others* (n3) para 6.9

E. LIST OF AUTHORITIES

BOOKS

Currie I *The Bill of Rights Handbook* 4th (Juta 2013).

LEGISLATION

Constitution of the Republic of South Africa, 1996.

Disaster Management Act 57 of 2002.

CASES

De beer and Others v Minister of Cooperative Governance and Traditional Affairs 2020 11 BCLR 21542(GP).

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South African Traders Forum and Others v City of Johannesburg and Others 2014 (4) SA 371(C).

JOURNAL ARTICLES

Kotze K, "Could South Africa's lockdown 'experiment' help chart a path to a more sober and less violent country" 2020 *Bhekisa Centre for Health Journalism*.

Stauton C, Swanepoel C & Labuschaigne "Between a rock and a hard place: Covid-19 and South Africa's response" 2020 *Journal of Law and Biosciences* 1-12.

INTERNATIONAL INSTRUMENTS

International Committee on Economic, Social and Cultural Rights.

International Covenant on Civil and Political Rights.