



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 700/2022

In the matter between:

DEMOCRATIC ALLIANCE

APPELLANT

and

**MINISTER OF CO-OPERATIVE
GOVERNANCE AND
TRADITIONAL AFFAIRS**

FIRST RESPONDENT

**SPEAKER OF THE NATIONAL
ASSEMBLY**

SECOND RESPONDENT

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

THIRD RESPONDENT

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

FOURTH RESPONDENT

Neutral citation: *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs* (700/2022) [2024] ZASCA 65 (30 April 2024)

Coram: MOLEMELA P, PETSE DP, MAKGOKA, MBATHA AND MOLEFE
JJA

Heard: 15 August 2023

Delivered: 30 April 2024

Summary: Constitutional law – section 27 of the Disaster Management Act 57 of 2002 – constitutional challenge – whether delegation of plenary legislative power impermissible – whether declaration of state of disaster in effect a *de facto* state of emergency – whether parliamentary oversight of the executive during state of disaster constitutionally compliant.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Musi JP, Matojane and Windell JJ sitting as court of first instance):

The appeal is dismissed and there is no order as to costs.

JUDGMENT

Molemela P, (Petse DP and Mbatha and Molefe JJA concurring)

Introduction

[1] At the core of this appeal is the constitutional validity of s 27 of the Disaster Management Act 57 of 2002 (the DMA). The constitutional challenge occurred in the context of the Coronavirus (Covid-19) outbreak, which was declared as a global pandemic by the World Health Organisation. In one of several judgments in which this Court had occasion to pronounce on the Covid-19 pandemic, it said:

‘The seriousness and the magnitude of the threat to life brought about by the pandemic cannot be exaggerated. It is not melodramatic to say that it posed, and continues to pose, the biggest threat to this country since the Spanish influenza pandemic of the immediate post-World War I years a century ago. It had the potential, and continues to have the potential, to cause devastation on a scale that, only a short while ago, people could not have begun to imagine. Drastic measures were required and an excess of caution was called for, especially given the limited knowledge about Covid-19, even among experts in the field of epidemiology.’¹

¹ *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) para 140 (*Esau*).

Background

[2] The first outbreak of Covid-19 was identified in Wuhan, in the Hubei Province in China, during December 2019. On 30 January 2020 the World Health Organization declared the outbreak a public health emergency of international concern and, on 11 March 2020 declared it a pandemic. On 15 March 2020, the Minister of Co-Operative Governance and Traditional Affairs (the Minister) in this country issued a Notice declaring a National State of Disaster on account of the Covid-19 pandemic.² On 18 March 2020, the Minister made regulations embodying a national public health response to the Covid-19 pandemic (the Covid-19 regulations). On 23 March 2020, the fourth respondent (the President) announced a national lockdown in South Africa, commencing on 26 March 2020. Consequently, on 25 March 2020, the Minister amended the regulations in order to bring about a nationwide lockdown.³ The country moved between five ‘alert levels’ restricting movement and economic activity, alert level five being the most restrictive of the alert levels, and level one the least restrictive.⁴ The lockdown regulations were extensive, and in some respects, they placed unprecedented restrictions on many constitutionally guaranteed fundamental rights and freedoms. On 29 April 2020, the Minister published the disaster management regulations. These regulations were subsequently amended in order to ease the lockdown restrictions in line with the alert levels in the risk-adjusted strategy. Thereafter, the Minister promulgated regulations as and when the need arose in accordance with the alert levels or the easing of restrictions.

[3] During alert level four lockdown, the Democratic Alliance (the DA) filed an application⁵ seeking an order declaring s 27 of the DMA to be unconstitutional and invalid.

² Government Notice No 313 published on 15 March 2020.

³ Disaster Management Act 57 of 2002: Amendment of Regulations issued in terms of s 27(2) in Government Notice No 398, GG 43148 published on 25 March 2020.

⁴ See Government Notice No 480 GG 43258.

⁵ The relief sought was set out as follows in the Notice of Motion:

‘1. Condonation is granted for the applicant’s non-compliance with the prescribed forms, time periods and service requirements and leave is granted for this application to be heard as one of urgency in terms of Uniform Rule 6(12).

2. Section 27 of the Disaster Management Act 57 of 2002 (‘the Act’) is declared to be unconstitutional and invalid.

Although the DA's application was filed at the high court, the DA simultaneously sought direct access to the Constitutional Court, which application was subsequently dismissed by that Court on the basis that it was not in the interests of justice for that Court to deal with the matter at that stage. The application was opposed by all the cited respondents, namely the President, the Minister, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces. In the high court, the DA's application

3. In order to remedy this unconstitutionality, and with effect from the date of the order, section 27 of the Act is ordered to be read as if a new section 27(4A) has been added immediately after section 27(4), reading as follows:

“(a) A copy of any declaration of a national state of disaster and any regulation or direction made or issued under section 27(2) shall be laid upon the Table in Parliament by the Minister as soon as possible after the publication thereof.

(b) The National Assembly may at any time –

(i) by resolution disapprove of any such declaration, regulation or direction; or

(ii) by resolution make any recommendation to the Minister in connection with such declaration, regulation or direction.

(c) Any such declaration, regulation or direction shall cease to be of force and effect as from the date on which the National Assembly resolves under subsection (b)(i) to disapprove of such declaration, regulation or direction, to the extent to which it is so disapproved.

(d) The provisions of subsection (c) shall not derogate from the validity of anything done in terms of any such declaration, regulation or direction up to the date upon which it so ceased to be of force and effect, or from any right, privilege, obligation or liability acquired, accrued or incurred, as at the said date, under and by virtue of any such declaration, regulation or direction.

(e) The provisions of subsections (a) to (d) apply equally to an extension of a national state of disaster in terms of section 27(5)(c).

4. The first respondent is directed to table before the National Assembly within three days of this order:

4.1 the declaration of the national state of disaster in GN 313 GG 43096 of 15 March 2020;

4.2 the regulations issued in terms of section 27(2) of the Act published in GNR 480 GG 43258 of 29 April 2020 ('the COVID regulations'); and

4.3 all directions and regulations issued under the COVID regulations (including all directions and regulations that remain valid under regulation 2(3) of the COVID regulations).

5. It is declared that none of the declarations, regulations and directions made in terms of section 27 of the Act prior to the date of this order are invalidated only by virtue of the orders in paragraphs 2 to 4 (inclusive) above.

6. Paragraphs 2 to 5 of this order are referred to the Constitutional Court for confirmation.

7. Those respondents opposing any part of the relief sought are directed to pay the applicant's costs, jointly and severally, one paying the other to be absolved, including the costs of two counsel.'

came before a specially constituted court of three judges (Musi, JP, Matojane J and Windell J) (the full court) sitting as a court of first instance within the contemplation of s 14(1)(a) of the Superior Courts Act 10 of 2023.

[4] The majority judgment (Musi JP and Windell J) found that the delegation of power to the Minister in terms of s 27 of the DMA falls within constitutional bounds and contains sufficient safeguards to render it constitutionally valid. It inter alia expounded as follows regarding the provisions of the DMA:

'It is clear from the definition of disaster that it may be a sudden or progressive natural or man-made catastrophe, that causes great damage or loss of life. It may be an anticipated or uncertain calamity. It must however be of such magnitude that it is beyond the resource capabilities of those affected by it. In such circumstances uncertainties and imponderables abound when it comes to planning and implementing a prevention or mitigating strategy.

The applicant correctly accepted that it was impossible for Parliament to predict in advance what the precise nature of a national disaster would be and for it to provide a clear policy framework to deal with such a disaster.

A disaster can be sudden, widespread and cause immense damage if it is not arrested timeously or its potential to cause damage minimized speedily. Parliamentary law-making processes are not geared towards making laws speedily. Disasters will always affect provinces. The process for Parliament to pass an ordinary Bill affecting provinces is also a long drawn out process.⁶ The constitutional public access and involvement processes of Parliament may also impede an effective and rapid response to a disaster. Since it is impossible for Parliament to legislate, in advance, ways and means to deal with sudden foreseen or unforeseen calamities, it is best for it to delegate some of its functions. There is no other realistic way of ensuring effective governance during disasters. The executive would be better placed to deal rapidly, comprehensively and effectively with disasters in a way that Parliament cannot do. Parliament might conceivably not even be in session when a sudden disaster strikes.⁷

⁶ Section 76 of the Constitution.

⁷ Paras 37- 40 of the judgment of the full court.

[5] The majority judgment concluded that the DMA contains sufficient restraints on the Minister's powers because such powers must be exercised in pursuit of 'certain stated positive goals', as well as 'negative constraints'. This conclusion was predicated on six characteristics of the DMA, which that court considered to be sufficient constraints on the Minister's exercise of the powers conferred by s 27 of the DMA. These characteristics will be discussed later in this judgment.

[6] In his dissenting judgment, Matojane J (the minority judgment) pointed out that he would have upheld the application. Relying on the maxim *delegare non potest delegare* (a delegate is prohibited from sub-delegating powers unless authorised to do so), he found that s 27(2) of the DMA constitutes an excessive delegation of legislative power by Parliament to the Minister. The dissenting judgment found that the scope of the discretion conferred on the Minister is broad and open-ended, with insufficient guidance provided as to how to exercise that power. It concluded that the process of executive law-making lacks transparency, public participation and debate of the parliamentary process and reduced accountability in the exercise of delegated legislative power. On those bases, the minority judgment would accordingly have held that s 27(2) is unconstitutional. Aggrieved by the majority decision, the DA applied for leave to appeal to this Court against the majority judgment. On 25 March 2022 the full court unanimously granted leave to appeal.

Issues to be determined

[7] The DA's application raised the following issues for determination by the full court. First, whether s 27 of the DMA is unconstitutional because it constitutes an impermissible delegation of plenary legislative power by Parliament. Second, whether the aforesaid provision is unconstitutional because it permits the creation of a *de facto* state of emergency without following constitutional requirements for the declaration of a state of emergency. Third, whether the same provision is unconstitutional because it fails to require the National Assembly to exercise its oversight role required by ss 42(3) and 55(2) of the Constitution. In the event of a finding of unconstitutionality on any of the three issues

raised, the fourth issue arising would be the determination of a just and equitable remedy. In this Court, the DA persisted with the same issues.

[8] The salient submissions of the DA

Broadly stated, the DA contended that the finding of the majority judgment was erroneous in a number of respects. The DA contended that the fact that individual exercises of subordinate legislative power can be challenged under ordinary administrative-law principles cannot mean that parliament's delegation of that power is necessarily permissible. If this were so, every delegation would be permissible, because every exercise of subordinate legislation is susceptible to legal challenge.

[9] The DA contended that it is not only the responsibility of civilians to ensure that public acts are lawful – by taking the executive to court every time it acts unlawfully. Relying on *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*,⁸ the DA contended that Parliament also has a responsibility to ensure that the powers it delegates are framed so as to minimise the chances of the exercise of those powers infringing constitutional rights. On this score, it contended that the powers conferred on the Minister in terms of s 27 of the DMA are untrammelled and therefore constitute a delegation of plenary legislative powers to the Minister. The DA argued that the fact that the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights.

[10] Furthermore, the DA contended that the majority judgment failed to consider that s 27 of the DMA permits the Minister to make contentious decisions without the democratic input of parliament. The DA contended that the respondents' detailed explanation regarding how parliamentary processes worked did not demonstrate that the Minister was or is sufficiently accountable to Parliament in relation to the passing of any

⁸ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936; 2000 8 BCLR 837 (CC) (*Dawood*).

of the Covid-19 regulations. It asserted that the respondents' allusion to the consultations and discussions by the Executive and the relevant Cabinet member with the leaders of the opposition parties and various members of the portfolio committees in parliament could not help them resolve the fundamental problem that none of these consultations and engagements are required by the DMA. The DA further contended that given the breadth of the powers conferred on the Minister, it was constitutionally required that the DMA ensure that the National Assembly has the power, by resolution, to disapprove and undo the regulations enacted by the Minister. The DA contended that without such a power, proper parliamentary oversight is not assured.

[11] The DA further asserted that its case never was that, as a matter of fact, Parliament was completely supine during the pandemic. Rather its case was that s 27(2) of the DMA gives the Minister more power than the Constitution permits because it amounts to an impermissible delegation of power and in effect an abdication of Parliament's oversight role, and because it also permitted a simulated state of emergency.

The salient submissions of the respondents

[12] The essence of the respondents' submissions in respect of the contention that the state of disaster is akin to a state of emergency is set out hereunder. The respondents submitted that states of emergency and states of disaster are fundamentally different legal animals. They asserted that a state of emergency is limited to the direst of circumstances. Thus, it may only be declared when the "life of the nation" is under threat. Additionally, it must be necessary to restore "peace and order". Unless these requirements are met, the declaration of a state of emergency would be unlawful. According to the respondents, states of disaster, on the other hand, cover a wide range of different circumstances. This, they argued, is apparent from the definition of a disaster. While a disaster may take many forms, and may threaten lives and the well-being of communities, it does not involve a threat to the life of the nation, nor does it disrupt security, peace and order.

[13] The respondents countered the DA's contention that s 27 of the DMA permits the creation of a *de facto* state of emergency without following the constitutional requirements for the declaration of a state of emergency. They contended that the very purpose of a state of emergency is to permit a suspension of the normal constitutional order, which is not the case in respect of the state of disaster. The suspension or derogation of rights does not simply mean the limitation of rights. Under a state of emergency, the Constitution actually permits all rights to be suspended, save for the few fundamental rights set out in the Table of Non-Derogable Rights, which may not be derogated. In other words, absent the safeguards in s 37, an individual could not go to court to pursue the protection of her fundamental rights. Under s 37(3), courts still retain the power to determine the validity of the declaration of the state of emergency itself, or any legislation enacted thereunder.

[14] As regards parliamentary supervision, the respondents asserted that the Constitution does not require the National Assembly to include specific mechanisms into individual pieces of legislation, for example a parliamentary veto or power to overturn any decision taken by the executive in the lawful exercise of its powers.

The applicable legislative framework

[15] It is settled law that Parliament has the power to delegate the power to make regulations in certain circumstances. A number of factors are taken into account when a court determines whether the legislature may validly delegate its powers to a member of the executive. These include the constitutional provision in question, the power that provision confers on the legislature, the nature and degree of the purported delegation, the subject matter to which it relates and, perhaps most importantly, the impact of the delegation on the fundamental principles on which the Constitution is based. *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000*,⁹ the Constitutional Court stated as follows:

⁹ *In re: Constitutionality of the Mpumalanga Petitions Bill, 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC).*

'A legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement the primary legislation. Ordinarily the functionary will be the President or the Premier or the member of the executive responsible for the implementation of the law. ... The factors relevant to a consideration of whether the delegation of a law-making power is appropriate are many. They include the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power.'¹⁰

[16] In *Affordable Medicines Trust v Minister of Health*,¹¹ the Constitutional Court held that, although Parliament was permitted to confer a discretion on those to whom it had validly delegated one of its powers, this discretion may not be so broad or vague that the executive authority was unable to determine the nature and scope of the powers conferred. In those cases in which the legislature has delegated broad discretionary powers to the executive, the courts will take into account, not only the factors set out above, but also the extent to which the legislature has provided clear criteria for the exercise of the discretionary power in question. If the legislature has provided clear criteria, the courts are more likely to find that the delegation is valid and vice versa.¹²

[17] In *Justice Alliance v President*,¹³ the Constitutional Court acknowledged that the primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. It reiterated the distinction made in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*,¹⁴ between delegation to make subordinate legislation within the framework of an empowering statute and assigning plenary legislative powers to another body. In the latter case, the Constitutional Court recognised that circumstances short of

¹⁰ Ibid para 19.

¹¹ *Affordable Medicines Trust and Others v Minister of Health and Another* 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) para 34.

¹² 7(2) *Lawsa* 3 ed para 26.

¹³ *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) para 61.

¹⁴ *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (CC) (*Executive Council*).

war or states of emergency could warrant that Parliament authorise urgent action to be taken out of necessity.¹⁵ The power and duty of the executive to respond to calamitous events is therefore manifestly consistent with the principles and factors articulated by the Constitutional Court.

[18] In *Dawood*¹⁶ the Constitutional Court held that, where the exercise of a broad discretionary power could infringe the bill of rights, it was ordinarily not sufficient for the legislature to simply state that the power must be read in a manner that was consistent with the Constitution. This was because such an approach would not promote the spirit, purport and objects of the bill of rights. Instead, the legislature had to provide clear criteria for the exercise of that discretionary power so that the bill of rights could take root in the daily practices of government. That said, the finding of the majority that *Dawood* is distinguishable from the facts of this case in that in *Dawood*, officials were given discretionary powers without any express constraints cannot be faulted.

[19] In this matter, there are circumscribed circumstances under which the Minister may exercise her discretion to make regulations. In *Smit v Minister of Justice and Correctional Services*,¹⁷ the Constitutional Court explained the term “plenary legislative power” thus: ‘Plenary power is the authority to pass, amend or repeal an Act of Parliament. Rabie and Erasmus define plenary legislative power as follows: “Plenary means of full scope or extent; complete or absolute in force or effect. Plenary legislative power, in the full sense of the phrase would be the power enjoyed by Parliament”.’

The relevant provisions of the DMA

[20] It is trite that a provision of a statute should not be interpreted in isolation but must be considered in the context of the whole Act. The long title of the DMA states that it is intended to provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters,

¹⁵ Ibid para 62.

¹⁶ *Dawood* fn 8 above para 54.

¹⁷ *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (1) SACR 482 (CC); 2021 (3) BCLR 219 (CC) para 31.

emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation; the establishment and functioning of national, provincial and municipal disaster management centres; disaster management volunteers; and matters incidental thereto.

[21] Section 1 of the DMA defines 'national disaster' as a disaster classified as a national disaster in terms of section 23. In terms of s 3, the DMA is administered by a Minister designated by the President. In terms of s 4, the Minister is the chairperson of the Intergovernmental Committee. This Committee 'must' give effect to the principles of co-operative government as laid down in chapter 3 of the DMA. This Committee is also accountable and must report to Cabinet on the co-ordination of disaster and must advise and make recommendations to Cabinet on issues relating to disaster management. It is also tasked with establishing a national framework for disaster management aimed at ensuring an integrated and uniform approach to disaster management in the Republic by all spheres of government,¹⁸ organs of state, statutory functionaries, non-governmental institutions involved in disaster management, the private sector, communities and individuals.

[22] The objective of a National Disaster Management Centre (National Centre), as set out in s 9 of the DMA, is to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities.¹⁹ The National Centre exercises advisory and consultative powers under ss 15 and 22 of the DMA. It can publish guidelines and recommendations in the national Government Gazette or a provincial gazette. In terms of s 15(1)(f), the National Centre must make recommendations to any relevant organ of state or statutory function on whether a national state of disaster should be declared in terms of s 27.

¹⁸ Also see s 26(3) of the DMA, which enjoins the Minister to act in close cooperation with other spheres of government.

¹⁹ Section 9 of the DMA.

[23] Consistent with the stated purpose of the DMA, s 23(1) vests the National Centre with the discretion to determine the magnitude and severity of the disaster and determine whether it qualifies as a local, provincial or national disaster. Further, it empowers the National Centre to reclassify a disaster at any time after consultation with the relevant disaster management centres, if the magnitude and severity or potential magnitude and severity of the disaster is greater or lesser than the initial assessment. As such, the provisions of s 15(1)(f) and s 23(1) serve as a precondition for the Minister's declaration of national disaster that expert institutions must determine whether a disastrous event (or the threat of such event) should be regarded as a disaster under the Act.²⁰ In this matter, too, the Minister's declaration of a state of disaster was preceded by a government notice²¹ issued by the head of the National Centre in terms of s 23(1)(b) of the DMA, in terms of which he classified the Covid-19 pandemic as a national disaster.

[24] Section 26 of the DMA provides as follows:

'26. (1) The national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27.

(2) The national executive must deal with a national disaster-

(a) in terms of existing legislation and contingency arrangements. if a national state of disaster has not been declared in terms of section 27(1); or

(b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2), if a national state of disaster has been declared.

(3) This section does not preclude a provincial or municipal organ of state from providing assistance to the national executive to deal with a national disaster and its consequences, and the national executive, in exercising its primary responsibility, must act in close co-operation with the other spheres of government.'

²⁰ The Notice in the Government Gazette declaring the State of Disaster stated: 'Considering the magnitude and severity of the Covid-19 outbreak which has been declared a global pandemic by the World Health Organisation (WHO) and classified as a national disaster by the Head of the National Disaster Management Centre, and taking into account the existing measures undertaken by organs of state to deal with the pandemic, I, the undersigned, Dr Nkosazana Dlamini Zuma, the Minister of Cooperative Governance and Traditional Affairs, as designated under Section 3 of the Disaster Management Act, 2002 (Act No 57 of 2002)...hereby declare a national state of disaster...'

²¹ GN 312, GG 43096 of 15 March 2020.

[25] Section 27 of the DMA provides as follows:

'27. Declaration of national state of disaster.

(1) In the event of a national disaster, the Minister may, by notice in the *Gazette*, declare a national state of disaster if—

(a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or

(b) other special circumstances warrant the declaration of a national state of disaster.

(2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning—

(a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;

(b) the release of personnel of a national organ of state for the rendering of emergency services;

(c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;

(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;

(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;

(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;

(g) the control and occupancy of premises in the disaster-stricken or threatened area;

(h) the provision, control or use of temporary emergency accommodation;

(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(k) the dissemination of information required for dealing with the disaster;

(l) emergency procurement procedures;

(m) the facilitation of response and post-disaster recovery and rehabilitation;

(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or

(o) steps to facilitate international assistance.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—

- (a) assisting and protecting the public;
- (b) providing relief to the public;
- (c) protecting property;
- (d) preventing or combating disruption; or
- (e) dealing with the destructive and other effects of the disaster.

(4) Regulations made in terms of subsection (2) may include regulations prescribing penalties for any contravention of the regulations.

(5) A national state of disaster that has been declared in terms of subsection (1)—

- (a) lapses three months after it has been declared;
- (b) may be terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and
- (c) may be extended by the Minister by notice in the Gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire.’

[26] Section 59 provides as follows:

‘59. (1) The Minister may make regulations not inconsistent with this Act-

- (a) concerning any matter that- (i) may or must be prescribed in terms of a provision of this Act; or (ii) is necessary to prescribe for the effective carrying out of the objects of this Act; and
- (b) providing for the payment, out of moneys appropriated by Parliament for this purpose, of compensation to any person, or the dependants of any person, whose death, bodily injury or disablement results from any event occurring in the course of the performance of any function entrusted to such person in terms of this Act.

...

(3) The Minister may, in terms of subsection (1), prescribe a penalty of imprisonment for a period not exceeding six months or a fine for any contravention of, or failure to comply with, a regulation.

(4) Any regulations made by the Minister in terms of subsection (1) must be referred to the National Council of Provinces for purposes of section 146(6) of the Constitution.’

[27] It is clear that the DMA creates and empowers a range of administrative bodies and authorises a variety of actions during the currency of a state of disaster.²² The

²² *Esau* fn 1 above para 11.

Minister, in her capacity as the Chairperson of the Intergovernmental Committee, plays a key role in those administrative bodies. Notably, s 26(3) enjoins the cabinet, in the exercise of its primary responsibility, to act in close co-operation with the other spheres of government.²³ It stipulates that the national executive in the national sphere of government (ie the President and his cabinet), is ‘primarily responsible for the co-ordination and management of national disasters regardless of whether a national state of disaster has been declared in terms of s 27’.²⁴ At the risk of stating the obvious, this means that even in circumstances where a state of disaster has not been declared, cabinet still carries the primary responsibility for the co-ordination and management of the state of disaster.

[28] Section 27(1) empowers the Minister to declare a national state of disaster by notice in the Gazette if existing legislation and contingency arrangements do not ‘adequately’ provide for the national executive to deal effectively with the disaster. Section 27(2) stipulates that once the state of disaster has been declared, the Minister is required to consult with the ‘responsible Cabinet member’ before making regulations that bear on that minister’s portfolio. So, for instance, before making a regulation concerning emergency procurement procedures, he or she must consult with the Minister of Finance.²⁵ In this matter, the Minister averred that she also consulted frequently with the Minister of Health. This Court, in *Esau*, aptly said the following:

‘In other words, even in times of national crisis, as this undoubtedly is, the executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution. The rule of law, a founding value of our Constitution, applies in times of crisis as much as it does in more stable times. And the courts, in the words of Van den Heever JA in *R v Pretoria Timber Co (Pty) Ltd and Another* should not, even when the legislature has conferred “vast powers” to make subordinate

²³ Ibid para 13.

²⁴ Ibid para 12.

²⁵ Ibid para 16; *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* [2022] ZASCA 89; [2022] 3 All SA 332 (SCA) para 91 (*British American Tobacco*).

legislation on the executive, “be astute to divest themselves of their judicial powers and duties, namely to serve as buttresses between the Executive and the subjects”.²⁶

[29] In *British American Tobacco* this Court had occasion to interpret the provisions of s 27(2)(n) of the DMA. It said:

‘The jurisdictional requirements for the exercise of the power under s 27(2)(n) are these. There must be a national state of disaster. The Minister must consult the responsible Cabinet member. The steps taken to prevent an escalation of a disaster, or to alleviate, contain and minimise its effects, must be necessary. Whether these steps are necessary turns on the objectively ascertained facts, and not on the subjective beliefs of the Minister. The power in s 27(2)(n), as in the case of *all the powers specified in s 27(2)*, must ‘be exercised only to the extent that this is necessary’ for the purposes specified in s 27(3). Moreover, the above interpretation is sensible.’²⁷ (Own emphasis.).

[30] It is clear from the passage quoted in the preceding paragraph that this Court did not consider that provision in isolation but in the context of the whole Act. The findings made by that court in its interpretive exercise in relation to that provision are therefore binding on this Court on the basis of the doctrine of *stare decisis*. Despite the fact that this Court emphasised that all the powers specified in s 27(2), must be exercised only to the extent that this is necessary for the stated purposes of the Act and not on the subjective beliefs of the Minister,²⁸ the DA in this matter, without arguing that this finding should not be followed because it is clearly wrong, submitted that the impugned regulations granted ministers ‘nearly unfettered regulatory powers that the catch-all section 27(2) granted the CoGTA Minister’. That submission clearly has no merit.

[31] The crisp question is whether, given the authorities cited above and the various provisions of the DMA, s 27 of the DMA amounts to plenary delegation of powers. It is to that aspect that I now turn.

²⁶ *Esau* fn 1 above para 5.

²⁷ *British American Tobacco* fn 25 above paras 91-92.

²⁸ *Ibid* para 99.

[32] It is clear from the aforesaid provisions that once the state of disaster has been declared in terms of s 27(1) of the DMA, the Minister is, during the subsistence of the state of disaster, obliged to consult with members of Cabinet for the relevant portfolio prior to making regulations, issuing directions, or authorising the issuing of directions.²⁹

[33] In *Esau*,³⁰ this Court dealt with an appeal concerning the constitutional validity of certain decisions taken by members of the executive and regulations made by the Minister in order to deal with the Covid-19 pandemic. The application brought by the appellants in the lower court raised several issues, including whether the Disaster Regulations of 29 April 2020 were consistent with ss 26 and 27 of the DMA, and whether certain of the regulations that had been published by the Minister were unreasonable and unjustifiable infringements of fundamental rights and were invalid on that account. This Court then said:

'Section 27(2)(n) is a general empowerment. It allows for regulation-making for purposes of 'other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster. Two further express curbs are placed on the regulation-making powers of the designated minister. First, in terms of s 27(2), he or she is required to consult with the "responsible Cabinet member" before making regulations that bear on that minister's portfolio. So, for instance, before making a regulation concerning emergency procurement procedures, he or she must consult with the Minister of Finance. Secondly, in terms of s 27(3), his or her regulation-making power may only be exercised to the extent necessary to achieve certain stated purposes. There are five permissible purposes. They are: "(a) assisting and protecting the public; (b) providing relief to the public; (c) protecting property; (d) preventing or combating disruption; or (e) dealing with the destructive and other effects of the disaster.'" ³¹

[34] It is of significance that the national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of s 27. The Minister is designated by the President. In terms of s 4 of the DMA, it is the President who establishes the intergovernmental committee on disaster management. In terms of s 27(2), the Minister

²⁹ Section 27(2) of the DMA.

³⁰ *Esau* fn 1 above.

³¹ *Ibid* para 15-16.

must consult the responsible cabinet member before making regulations or issuing directions that have an impact on that Minister's portfolio. In *Esau*, this Court summarised the President's exercise of executive authority as follows:

'In terms of s 85(1) of the Constitution, executive authority is vested in the President. Section 85(2) determines how that authority is exercised. It provides:

"The President exercises the executive authority, together with the other members of the Cabinet, by-

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing and implementing national policy;
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation."

In terms of this section, the Constitutional Court held in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, the exercise of executive authority 'is a collaborative venture in terms of which the President acts together with the other members of the Cabinet'. The consequences of this allocation of power in s 85(2) were spelt out in *Minister of Justice and Constitutional Development v Chonco and Others*. Ministers act collectively with the President and they are all 'collectively and individually accountable to Parliament under s 92(2) of the Constitution'. *That means that the entire collective is responsible for every decision, whether or not particular individual members were party to a particular decision.*³² (Own emphasis.).

This passage provides the broader context in which the Minister's exercise of the powers conferred by s 27(2) must be understood. Given this context and the structure of the DMA, including its provision for the involvement of other spheres of government, it appears that the Minister's discretion pertaining to the exercise of the powers envisaged in s 27 is not impermissibly wide, considering all the constraints bearing on the exercise of that power.

[35] Significantly, in *British American Tobacco*, this Court held that all the powers specified in s 27(2), must be exercised only to the extent that this is necessary for the

³² *Esau* fn 1 above paras 54-55.

purposes specified in s 27(3). As to whether these steps are necessary turns on the objectively ascertained facts, and not on the subjective beliefs of the Minister.³³ In the same judgment, this Court stated as follows:

‘Sections 27(2) and 27(3) do not assign to the Minister plenary legislative power: it does not grant the Minister the power to pass, amend or repeal an Act of Parliament. What is more, ss 27(2) and 27(3) provide a ‘clear and binding framework for the exercise of the powers.

...

At the outset, the approach to a justification analysis under s 36 of the Constitution in a time of national crisis such the COVID-19 pandemic, as stated in *Esau*, bears repetition: “[T]he executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution.”³⁴

[36] It is now convenient to explain what bearing the doctrine of *stare decisis* has on the analysis and conclusion of this matter. This matter happens to be one of several court challenges that were brought against some of the provisions of the DMA. It is necessary to preface this discussion with a passage from two judgments dealing with the doctrine of *stare decisis*, which is a doctrine that requires that courts ‘stand or abide by cases already decided’. The first one is a judgment of this Court and the second, a judgment of the Constitutional Court. This Court in *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal*³⁵ stated as follows:

‘The basic principle is *stare decisis*, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. . . . The doctrine of *stare decisis* is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion, to

³³ *British American Tobacco* fn 25 above para 91.

³⁴ *Ibid* paras 34 and 97.

³⁵ *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA).

protect vested rights and legitimate expectations as well as to uphold the dignity of the court. It serves to lend certainty to the law.’³⁶

[37] In *Ayres and Another v Minister of Justice and Correctional Services and Another*,³⁷ the Constitutional Court said the following:

‘As this Court noted in *Camps Bay Ratepayers’ and Residents’ Association*, the doctrine of precedent is “not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution”. Similarly, in *Ruta*, this Court held: “[R]espect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule.”³⁸

[38] As mentioned before, an important context taken into account in both *Esau* and *British American Tobacco* respectively is that in terms of s 26 of the DMA, in instances where a state of disaster has been declared, the National Executive *must* deal with the disaster in terms of existing legislation and contingency arrangements *as augmented* by the regulations or directions made or issued in terms of s 27(2). The Minister’s regulations remain subject to judicial review by the courts.³⁹

[39] The fact that the findings in *Esau* and *British American Tobacco*, respectively, pertaining to the general architecture of the DMA were made in the context of applying the s 36 limitation test does not render these findings less apposite in the current context. The DA made no submissions urging this Court to find any of those findings to be clearly wrong. As mentioned earlier, the full court identified certain restraints which led it to conclude that s 27 of the DMA does not delegate plenary legislative powers to the Minister because there are sufficient restraints which serve as guidance regarding how she must

³⁶ Ibid paras 3-4.

³⁷ *Ayres and Another v Minister of Justice and Correctional Services and Another* [2022] ZACC 12; 2022 (5) BCLR 523 (CC); 2022 (2) SACR 123 (CC).

³⁸ Ibid paras 16-17.

³⁹ *Esau* fn 1 above paras 7 and 88.

exercise her delegated authority. *Esau* and *British American Tobacco* respectively, made similar findings which are binding on this Court on the basis of *stare decisis*.

[40] It bears reiterating that none of the parties urged us to conclude that any of the findings previously made by this Court are clearly wrong. Having analysed the reasoning of this Court in *Esau* and *British American Tobacco* respectively, nothing persuades us to conclude that any of those findings are wrong. Therefore, these decisions are binding.

[41] In determining whether s 27 amounts to an impermissible delegation of powers, it will be helpful to juxtapose the various provisions of the DMA with the principles laid down in the Constitutional Court authorities which have been alluded to above. At the outset, it bears reiterating the trite principle that s 27 must not be interpreted in isolation but in the context of the whole Act having regard to its overarching purpose.⁴⁰ On the basis of the 10 factors mentioned below, which include the six factors enumerated by the majority judgment, there can be no doubt that s 27 does not confer overly broad delegated powers on the Minister.

[42] First, the general scheme of the DMA reveals a requirement for the Minister to constantly engage with several role-players in her decision making. Clearly, the exercise of her powers is part of a broader collaborative venture.⁴¹ This is one of the ways in which the Minister's delegated regulation-making authority is circumscribed. That being the case, the general scheme of the DMA is such that the extent to which the Minister's discretion in relation to the power delegated to her may be exercised in terms of s 27(1) is sufficiently guided by other provisions of the DMA itself.⁴² In that sense, the whole of the DMA provides a broad framework for the exercise of the Minister's powers.⁴³

⁴⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

⁴¹ See ss 23(3) and 23(8) of DMA.

⁴² *Executive Council* fn 14 above para 206.

⁴³ *British American Tobacco* fn 25 above para 97.

[43] Second, the Minister can only exercise her powers once the disaster has been classified as a national disaster by the head of the National Centre. It is evident from s 23 that this classification is required for purposes of ensuring that the primary responsibility for the coordination and management of the disaster is bestowed on the relevant sphere of government that would ultimately be responsible for the coordination and management of the disaster.

[44] Third, the Minister may declare a national state of disaster by notice in the Gazette if 'existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster' or if there are other special circumstances that warrant such declaration.⁴⁴ The Minister is thus not given *carte blanche* to whimsically declare a state of disaster. Fourth, the DMA's stated purpose is to implement urgent measures to address the disaster. The DMA therefore expressly advocates for rapid and effective interventions. Parliament's slow procedures would clearly inhibit the achievement of this goal.⁴⁵

[45] Fifth, the Minister must consult a cabinet colleague before making regulations or issuing directions that have an impact on that colleague's portfolio.⁴⁶ Sixth, the declaration of a state of disaster permissible under s 27 is for relatively short periods of time – three months.⁴⁷

[46] Seventh, the extension of the declaration of disaster is for one month at a time. A sensible interpretation of s 27(5) is that any extension of the national state of disaster would be for the attainment of the same stated purposes of the DMA. Thus, the extension of the state of disaster would also have to be 'necessary'.⁴⁸ In similar vein, the necessity to extend would also have to be objectively ascertainable on facts. I therefore share the majority of the full court's view that the power of extension of the national state of disaster

⁴⁴ Section 27 (1) of the DMA; *British American Tobacco* fn 25 above para 96.

⁴⁵ *Executive Council* item (e) para 206.

⁴⁶ Section 27(2) of the DMA; *British American Tobacco* fn 25 above para 91.

⁴⁷ *Ibid* para 206.

⁴⁸ *British American Tobacco* fn 25 above para 103.

is by clear implication subject to the same requirements as the original declaration of the national state of disaster terms of section 27(1).

[47] Eighth, all the powers specified in s 27(2), namely '(a) assisting and protecting the public; (b) providing relief to the public; (c) protecting property; (d) preventing or combating disruption; or (e) dealing with the destructive and other effects of the disaster,⁴⁹ must be exercised only to the extent necessary for the stated purposes of the Act and not on the subjective beliefs of the Minister.⁵⁰ Such powers must be exercised 'for the purposes specified in s 27(3)'. Thus, s 27(3) itself provides a further limitation and layer of scrutiny and compliance to the exercise of her regulatory powers.⁵¹

[48] Ninth, s 59 of the DMA provides that the Minister may make regulations if it is necessary to prescribe for the effective carrying out of the objects of the DMA. These include the integrated and coordinated disaster management policies that are focused on reducing the risk of disasters and mitigating their severity. Notably, such regulations must not be inconsistent with the provisions of the DMA.⁵² In *De Beer v Minister of Cooperative Governance and Traditional Affairs*,⁵³ the court acknowledged this principle by stipulating that since the lockdown regulations and directions were an exercise of public power, they could not go beyond the express provisions of the DMA.

[49] Tenth, ss 27(2) and 27(3) do not assign to the Minister the power to pass, amend or repeal an Act of Parliament.⁵⁴ On the basis of these factors, I conclude that s 27 does not constitute a delegation of plenary delegated powers.⁵⁵

⁴⁹ *Esau* fn 1 above paras 15 -16; *British American Tobacco* fn 25 above para 91.

⁵⁰ *Ibid.*

⁵¹ *Helen Suzman Foundation v Speaker of the National Assembly and Others* (32858/2020) [2020] ZAGPPHC 574 (5 October 2020) paras 70-71; *British American Tobacco* fn 25 above para 91.

⁵² Section 59 of the DMA.

⁵³ *De Beer v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (*De Beer*).

⁵⁴ *British American Tobacco* fn 25 above para 97.

⁵⁵ *Ibid* para 97.

[50] It is necessary to consider next the argument that s 27 is an impermissible delegation of legislative powers of ‘the second type’, on the basis that there is no explicit power granted to the delegatee to amend or repeal an Act of Parliament where the power is broad. The DA’s complaint on this aspect is that s 27(2) confers on the Minister the power to sub-delegate the issuance of directives to unspecified persons. The maxim *delegare non potent delegare*, on which the DA relies for its argument, does not constitute a blanket ban on sub-delegation of powers. This is for the simple reason that not every sub-delegation is impacted by that maxim, but only such delegations that are not, either expressly or by necessary implication, authorised by the delegated powers.⁵⁶ Whether or not sub-delegation is impermissible turns upon the construction of the empowering statute.⁵⁷

[51] Notably, in *AAA Investments (Propriety) Limited v The Micro Finance Regulatory Council and Another*,⁵⁸ the Constitutional Court recognised that Ministers may of necessity have to delegate their powers, which do not require the exercise of a political discretion, to officials in their respective Departments.⁵⁹ Ministers may therefore delegate certain limited functions to officials in their respective Departments. The nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate are included among the circumstances to be taken into account when considering whether a delegation is permissible.⁶⁰ The Minister’s power to sub-delegate must therefore be seen in that context.

[52] Having considered all the factors stated in the afore-stated authority and the broader construct of the DMA, I am of the view that the Minister may lawfully delegate powers which do not require the exercise of a political discretion to officials. Furthermore,

⁵⁶ *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D (*Attorney-General, OFS*). See also, for example, *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* [1997] 4 All SA 500 (A); 1998 (2) SA 19 (SCA) at 28B-D (*Frontier Safaris*).

⁵⁷ *Attorney-General, OFS* above at 639C-D. See also, for example, *Frontier Safaris* above at 31B-I.

⁵⁸ *AAA Investments (Propriety) Limited v The Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC).

⁵⁹ *Ibid* para 89.

⁶⁰ *Ibid* para 136.

the majority judgment's conclusion that the construct of the DMA permits a sub-delegation to Ministers who have knowledge about their respective portfolios and are therefore best suited to formulate policies and strategies for their respective Departments in order to mitigate the risk and effects of a disaster', cannot be faulted. This is because the national executive remains primarily responsible for the co-ordination and management of national disasters even during a national state of disaster.⁶¹

[53] Moreover, the view that s 27 does not constitute a delegation of plenary powers is fortified by the findings of the majority judgment of the Constitutional Court in *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others; Commissioner for the South African Revenue Service v Ambassador Duty Free (Pty) Ltd and Others; Minister of Finance v Ambassador Duty Free (Pty) Ltd and Others*.⁶² This matter concerned amendments effected by the Minister of Finance to Schedules 4 and 6 of the Customs Act and to Schedule 1 of the VAT Act. The amendments introduced a quota system to operate on a six-monthly cycle which sought to address the unauthorized resale of duty-free alcohol and tobacco products by diplomats and imposed VAT liability on importers, including duty-free retailers, in certain situations. The Minister published these amendments to Schedules 4 and 6 of the Customs Act and to Schedule 1 of the VAT Act relying on the powers conferred on him in terms of ss 75(15)(a)(i)(bb) of the Customs Act and 74(3)(a) of the VAT Act (the impugned amendments). These amendments were set to take effect on August 1, 2021.

[54] In terms of s 120, the Commissioner of the South African Revenue Service (SARS) was authorized to make rules regarding the payment of duties and other charges. To provide guidance, SARS had published rules promulgated in terms of section 120 of the Customs Act. Aggrieved by the impugned amendments to the Schedules as well as the rules, the retailers approached the high court seeking to review and set aside the impugned amendments. *Nu Africa* then filed an application to intervene, contending that

⁶¹ Section 26(1) of the DMA.

⁶² *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others; Commissioner for the South African Revenue Service v Ambassador Duty Free (Pty) Ltd and Others; Minister of Finance v Ambassador Duty Free (Pty) Ltd and Others* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC) (*Nu Africa*).

certain provisions in the Customs Act and the VAT Act were constitutionally invalid to the extent that they conferred on the Minister plenary legislative powers. A further complaint was that the delegation by the Minister to the Department of International Relations and Cooperation (DIRCO) authorising the amendment of the quotas was an unlawful delegation of authority because the delegation was to an unspecified functionary at DIRCO. The high court held that the Act did not empower the Minister to create the Schedules. Consequently, it declared certain sections of the Customs Act and VAT Act unconstitutional and invalid.

[55] The Commissioner of SARS countered *Nu Africa's* contentions, emphasizing the substance of delegated powers rather than their formal structure. The *Nu Africa* judgment, being the most recent Constitutional Court judgment on the issue of delegation of legislative powers, puts to bed any doubts that may have been harboured in relation to the scope of the delegation of the powers conferred by s 27 to the Minister. In endorsing parliament's delegation of powers to the Minister of Finance, the majority judgment of the Constitutional Court held that when determining whether a delegation constitutes an affront to the Constitution, 'the enquiry should be context-specific, and consideration should be given to the scope of the delegation, the subject matter to which it relates, the degree of delegation and the sufficiency of the constraints on the exercise of the discretionary powers conferred by the section'.⁶³ It distinguished *Executive Council*, pointing out that in that matter, it was the plenary nature of the delegated power that pointed to unconstitutionality. It held that the answer turned on what the relevant factors yielded based on the circumstances of each delegation. Furthermore, the majority found the Minister's delegation of the authority, to increase or decrease the quota of alcohol, to the Department of International Relations and Cooperation to be justifiable.

[56] *Nu Africa's* injunctions about the consideration of the context, the nature and scope of the delegation, the subject matter to which it relates and the sufficiency of the constraints are aspects that were traversed and determined in favour of the Minister by this Court in *Esau* and *British American Tobacco*, respectively, which have already been

⁶³ *Ibid* para 95.

discussed earlier in this judgment. As was the case in *British American Tobacco*. In *Nu Africa* too, the court took into account that the Minister did not have carte blanche to amend the legislation.⁶⁴

[57] It has already been found that the general architecture of the DMA encourages co-operative governance in that s 26(3) of the DMA enjoins the Minister to act in collaboration with other spheres of government in devising and implementing a rapid and effective response to disasters. Moreover, in *British American Tobacco*, this Court found that ss 27(2) and 27(3) provide a 'clear and binding framework for the exercise of the Minister's powers'.⁶⁵ In *Nu Africa*, the majority not only found the promotion of co-operative governance to be a relevant factor, but also found that such delegation 'actually enhances efficient governance, both of which are constitutional imperatives'.⁶⁶ Furthermore, it observed as follows:

'The Executive is in a much better position than Parliament to appreciate the day- to-day needs and demands of administering the matters contained within the Schedules to the Customs and the VAT Act. Parliament's delegation promotes co- operative governance and actually enhances efficient governance, both of which are constitutional imperatives. Parliament made the conscious choice that the prevailing circumstances dictated that the law-making work in the form of amending the Schedules be best left to the expertise and proximity of the Executive. In the circumstances, I see nothing constitutionally impermissible with that. This is especially so since Parliament retains sufficient oversight.'⁶⁷

[58] For all the reasons set out above, the DA's contention that s 27 amounts to an impermissible delegation of plenary powers falls to be rejected. Once the findings of this Court in *Esau* and in *British American Tobacco* as discussed above, are accepted to be correct, as they must, it becomes incongruous to simultaneously hold that s 27 is akin to a state of emergency, an aspect to be considered next.

⁶⁴ *British American Tobacco* fn 25 above para 97; *Nu Africa* fn 62 above para 23.

⁶⁵ *British American Tobacco* fn 25 above para 97.

⁶⁶ *Ibid* para 100.

⁶⁷ *Ibid* para 100.

Does s 27 of the DMA bring about a *de facto* state of emergency?

[59] It is imperative to understand the distinction between a state of disaster and a state of emergency. The DA asserted that the DMA permits the creation of a situation akin to a state of emergency insofar as it fails to provide for the parliamentary oversight role that s 37 of the Constitution has ordained for Parliament in an actual state of emergency. The DA emphasised that its complaint is not that a national state of disaster is the same concept in law as a state of emergency under the Constitution; it acknowledged that the two have different threshold requirements. It however contended that s 27 of the DMA permits a similar outcome to a state of emergency without the constitutional safeguards attendant on a state of emergency.

[60] The DA further asserted that s 27 of the DMA circumvents the strictures of s 37 of the Constitution because it permits the Minister to place the country under a state of emergency without being subjected to procedures and safeguards embodied in s 37. It is apposite to deal first with a misconception: the DA's contention that s 27 of the DMA permits a *de facto* state of emergency because that provision was used by the National Executive to 'suspend the South African constitutional order' is plainly misconceived. This is because the state of emergency itself does not permit a blanket suspension of the constitutional order. On the contrary, s 37(3) of the Constitution empowers the court to decide on the validity of any legislation enacted or action taken in consequence of a state of emergency.

[61] Moreover, it is clear from the provisions of ss 37(4)⁶⁸ and 37(5)⁶⁹ that only a limited derogation from the fundamental rights guaranteed by the Constitution is permissible,

⁶⁸ Section 37(4) that:

'Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that- (u) the derogation is strictly required by the emergency; and (6) the legislation- (i) is consistent with the Republic's obligations under international law applicable to states of emergency; (ii) conforms to subsection (5); and (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.'

⁶⁹ Section 37(5) provides that:

'No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise- (a) indemnifying the state, or any person, in respect of any unlawful act; (b) any derogation from this section; or (e) any derogation from

non-derogable rights mentioned in that provision remain protected. Once this fundamental distinction between a state of emergency and a state of disaster is understood, the complaint that the state of disaster is akin to a state of emergency but without the constitutional safeguards of s 37 loses its force.⁷⁰ Nothing in the DMA suggests that it permits a deviation from the normal constitutional order. The safeguards enunciated in s 37 therefore had to be seen against the backdrop of an appreciation that the provision in question legitimises a drastic reduction in constitutional protections in the first place.⁷¹ The same simply cannot be said for states of disaster as regulated under the DMA.

[62] It was held in *Esau* that the DMA applies when a disaster is not serious enough to justify the declaration of a state of emergency, but serious enough that the ordinary law cannot deal with it.⁷² Sight must not be lost of the fact that a limitation of rights is permitted in the ordinary course, even in the absence of a declaration of a state of disaster, provided the limitation complies with s 36 of the Constitution. Therefore, the limitation of certain fundamental rights during a state of disaster cannot, without more, be equated with the creation of a state of emergency. In the ordinary course, (ie where neither the state of emergency nor the state of disaster has been declared), any and all limitations on fundamental rights are capable of constitutional challenge. During a state of disaster, that competence of the courts to rule on the validity of regulations remains intact. Any limitation of fundamental rights arising from the regulations that have been passed may be challenged in court (and in some cases were so challenged).⁷³ In other words, the state of disaster does not upset the status quo insofar as the normal constitutional order is concerned. Where no such deviation is permitted, it is not necessary for the DMA to include a specific provision preserving the competence of courts to rule on the validity of regulations.⁷⁴

a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

⁷⁰ *Freedom Front Plus v President of the Republic of South Africa and Others* [2020] ZAGPPHC 266; [2020] 3 All SA 762 (GP) para 68 (*Freedom Front Plus*).

⁷¹ *Ibid* para 65.

⁷² *Esau* fn 1 above para 10.

⁷³ Compare: *British American Tobacco* fn 25 above; *Freedom Front Plus* fn 70 above; *De Beer* fn 53 above.

⁷⁴ *Freedom Front Plus* fn 70 above para 68.

[63] However, the Constitution permits all rights under a state of emergency, to be suspended, save for the prescripts in the Table of Non-Derogable Rights. In other words, absent the safeguards in s 37(3), during a state of emergency an individual would not be entitled to approach the court for purposes of testing whether the limitation of their rights is justifiable in terms of s 36 of the Constitution.

[64] The high-water mark of the DA's contention on this aspect is that the safeguard of extending the state of emergency only with the approval of Parliament, as set out in s 37(2) of the Constitution is absent in the DMA. Section 27(5)(c) of the DMA deals with extensions of a state of disaster. It provides that a national disaster may be extended by the Minister for one month at a time before it lapses or before the existing extension expires. A proper interpretive exercise demands that this provision be interpreted within the broader context of the DMA. That being the case, a sensible interpretation of s 27(5)(c) is that any extension of the national state of disaster must be for the attainment of the same stated purposes of the DMA. In *Esau*,⁷⁵ this Court concluded that the Minister may declare a state of disaster under s 27(1) 'only if' one of two preconditions is present, namely if 'existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster'; or if 'other special circumstances warrant the declaration of a national state of disaster'.

[65] In *British American Tobacco*, this Court stated that s 27(2)(n) of the DMA specifically authorises the Minister to make regulations or issue directions concerning 'other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster'.⁷⁶

[66] This Court went on to conclude that the power in s 27(2)(n), as in the case of all the powers specified in s 27(2), must 'be exercised only to the extent that this is necessary' for the purposes specified in s 27(3). Thus, it follows logically that the

⁷⁵ *Esau* fn 1 above para 14.

⁷⁶ *British American Tobacco* fn 25 above para 88.

extension of the state of national disaster must also be subjected to the same rigours, ie the extension must be ‘necessary’.⁷⁷ In similar vein, the necessity to extend would also have to be objectively ascertainable on facts.⁷⁸ It therefore goes without saying that the majority judgment’s view that the power of extension of the national state of disaster is by clear implication subject to the same requirements as the original declaration of the national state of disaster terms of s 27(1). Consequently, the fact that the DMA does not have a provision matching s 37(3) of the Constitution, which expressly preserves the competence of the courts to decide on the validity of a declaration of a state of emergency or its extension, does not render it unconstitutional. For all the reasons mentioned above, the full court in *Freedom Front Plus*⁷⁹ correctly rejected the argument that s 27 of the DMA is unconstitutional to the extent that it permits the imposition of a state of disaster without the safeguards imposed for a declaration of a state of emergency.

Does s 27 of the DMA permit the executive branch of the state to exercise powers without parliamentary oversight?

[67] It is apposite to commence a discussion of this leg of the DA’s argument by quoting a passage from a decision of the Constitutional Court as to how it perceived the constitutional imperative of parliamentary supervision. In *United Democratic Movement v Speaker of the National Assembly and Others*,⁸⁰ the Constitutional Court stated as follows:

‘Members of Parliament have to ensure that the will or interests of the people find expression through what the State and its organs do. This is so because Parliament “is elected to represent the people and to ensure government by the people under the Constitution”. This it seeks to achieve by, among other things, passing legislation to facilitate quality service delivery to the people, appropriating budgets for discharging constitutional obligations *and holding the Executive and organs of State accountable for the execution of their constitutional responsibilities*.’⁸¹

⁷⁷ Ibid para 91.

⁷⁸ Ibid para 91.

⁷⁹ *Freedom Front Plus* fn 70 above para 65.

⁸⁰ *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (*UDM*).

⁸¹ Ibid para 38.

[68] The DA contends that the DMA does not make provision for effective oversight thereby violating the doctrine of the separation of powers. The DA asserted that the DMA fails to require the National Assembly to exercise the oversight role required by s 42(3) and 55(2) of the Constitution. It argued that holding the Executive accountable should not be at the benevolence of a particular parliament. Rather that parliament, as an institution, must be legislatively enjoined to do so by the DMA. First of all, it must be borne in mind that there is nothing in the DMA precluding parliament from executing its oversight function. As will be demonstrated, the DA's contentions pay little or no regard to the role played by parliamentary committees in which the DA is represented.

[69] In countering the DA's contentions, Parliament averred that it had, during the Covid-19 pandemic, exercised parliamentary oversight through the National Assembly's various Committees, as well as various select Committees of the National Council of Provinces. Part 10 of Chapter 12 of the National Assembly Rules deals with Portfolio Committees. These may be established by the Speaker of Parliament acting with the concurrence of the Rules Committee. Each Portfolio Committee consists of a prescribed number of members of Parliament and performs several functions. Parliament also asserted that it adopted specific rules to facilitate virtual sittings of the National Assembly as well as the National Council of Provinces. It set out in detail how members of the National Executive were called to account to parliament. The National Executive asserted that the Constitution, parliament's Oversight and Accountability Model and the rules of parliament enabled parliament to exercise its constitutional mandate to the full extent required by the Constitution. That evidence was not controverted. It is clear that all the different mechanisms of parliamentary oversight were not employed out of benevolence but out of compliance with parliament's own rules and Oversight and Accountability Model.

[70] During the exchange with the bench counsel for the DA was asked whether the role played by the Portfolio Committee during the state of disaster, alluded to in the respondents' papers, did not suffice as scrutiny of executive action. Counsel, correctly, in my view, submitted that this case is not about what the executive authority did or did not

do during the state of disaster pertaining to Covid-19 pandemic. It is rather about what the DMA obliges Parliament to hold the National Executive regarding the proclamation of a state of disaster, and stipulating how it is to be managed, once proclaimed. This, the DA submitted, is where the DMA falls short because it does not oblige Parliament to put adequate measures in place for its supervision of the National Executive. In the context of the facts of this case, this proposition is plainly unsustainable.

[71] The mere fact that the DMA does not, unlike the State of Emergency Act 64 of 1997 (SOEA), expressly provide for parliamentary supervision, does not mean that Parliament's supervision is ousted. This is because parliamentary oversight is constitutionally ordained in ss 42(3) and 55(2)(b) of the Constitution, both of which expressly provide for Parliament's supervisory role. Section 42(3) provides:

'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

[72] The requirement for the National Assembly to scrutinise and oversee executive action is self-evident. Section 55(2)(b) provides:

'The National Assembly must provide for mechanisms –

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of –

(i) the exercise of national executive authority, including the implementation of legislation; ...'

The question is whether these mechanisms exist. More about this later.

[73] In addition to the above, there are several provisions of the Constitution which serve to ensure that the executive is held accountable. Section 56 provides:

'The National Assembly or any of its Committees may –

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or institution to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
 (d) receive petitions, representations or submissions from any interested persons or institutions.’

[74] In terms of s 57(1) of the Constitution, the National Assembly may –

‘(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.’

[75] In *Economic Freedom Fighters v Speaker of the National Assembly*,⁸² the Constitutional Court observed that ‘both sections 42(3) and 55(2)(b) of the Constitution do not define the strictures within which the National Assembly is to operate in its endeavour to fulfil its obligations’. The court held that the National Assembly had the latitude to determine how best it should carry out its constitutional mandate. It said:

‘It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. . . . It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it.’⁸³

The clear provisions of s 42(3) and 55(2)(b) and the dictum in the preceding paragraph put it beyond question that the National Assembly indeed has the latitude to determine how it will exercise its oversight of the executive.

⁸² *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para 87.

⁸³ *Ibid* para 93.

[76] The DA baldly alleged, but did not put forth evidence to support its case, that the mechanics adopted by Parliament during the state of disaster to hold the Executive accountable, were inadequate. It failed to pay due regard to the provisions of Parliament's Oversight and Accountability Model, which documents parliament's own view of how the obligation of oversight ought to be executed.⁸⁴ In *UDM*, the Constitutional Court remarked that Parliament's scrutiny and oversight role blends well with the obligations imposed on the Executive by section 92 of the Constitution.⁸⁵ Section 92 of the Constitution renders the national executive accountable, collectively and individually, and stipulates that members of cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions, and that they must provide Parliament with full and regular reports concerning matters under their control.

[77] In clause 3.1.2 under the heading 'plenary processes for effecting oversight and accountability, the Oversight and Accountability' provides as follows:

'The procedure of putting questions to the Executive is one of the ways in which Parliament holds the Executive to account. Questions can be put for oral or written reply to the President, Deputy President and the Cabinet Ministers on matters for which they are responsible. Question time affords members of Parliament the opportunity to question members of the Executive on service delivery, policy and other executive action on behalf of both their political parties and the electorate.'

[78] It is necessary to discuss the measures that are in place to hold Parliament accountable. In *UDM*, the Constitutional Court explained the constitutional imperative of accountability as follows:

'The National Assembly indeed has the obligation to hold Members of the Executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority. There are parliamentary oversight and accountability mechanisms that are sufficiently notorious to be taken judicial notice of. Some of them are calling on Ministers to: regularly account to Portfolio Committees and *ad hoc* Committees; and avail themselves to respond to parliamentary questions as well as other question and answer sessions during a

⁸⁴ The contents of this document were alluded to in and annexed to the first respondent's answering affidavit.

⁸⁵ *UDM* fn 80 above para 39.

National Assembly sitting. It is also through the State of the Nation Address, Budget Speeches and question and answer sessions that the President and the rest of the Executive are held to account. These accountability and oversight mechanisms, are the regular or normal ones. There may come a time when these measures are not or appear not to be effective. That would be when the President and his or her team have, in the eyes of the elected representatives of the people to whom they are constitutionally obliged to account, disturbingly failed to fulfil their obligations. In other words, that stage would be reached where their apparent under-performance or disregard for their constitutional obligations is viewed, by elected public representatives, as so concerning that serious or terminal consequences are thought to be most appropriate. And that takes the form of removal from office.⁸⁶

[79] The above dictum not only spells out how the executive is held accountable in the normal course but also canvass how that accountability could pan out in the event of its under-performance. The *UDM* judgment therefore makes it plain that in a constitutional democracy such as ours the responsibility to protect constitutional rights in practice is imposed both on the legislature and on the executive and its officials.

[80] As stated in *UDM*, Parliament has to ensure that the will or interests of the people are considered, and this it does by, among others, holding the executive accountable for the execution of their constitutional responsibilities. Parliament's Oversight and Accountability Model, a document that came about following the recommendations of parliament's task team comprising members of both Houses of Parliament, was attached to the second respondent's answering affidavit as proof of how Parliament executed its oversight role. The authenticity of that document was not placed in dispute. Nor did the DA identify any shortcomings that could be said to have hampered parliament's oversight role in relation to the DMA.

[81] It must be borne in mind that none of the provisions of the DMA purport to bar parliamentary supervision. As such, the powers exercised by the Minister under the DMA remain subject to all the provisions of the Constitution and existing law. That being the

⁸⁶ Ibid paras 40-41.

case, the ordinary parliamentary oversight mechanisms remain intact and the exercises of powers by the Executive in terms of the DMA remain subject to this. An important consideration is that s 26(1) categorically states that the primary responsibility for the co-ordination and management of the state of disaster resides with the national executive regardless of whether a state of national disaster has been declared or not. The manner in which the National Assembly is enjoined to execute its functions is expressly provided for in the Constitution.⁸⁷

[82] The Executive is accountable to Parliament under the normal constitutional order. Thus, because s 27 of the DMA relates to a national state of disaster and not a state of emergency, Parliament continues to exercise its oversight role over the Executive during the state of disaster. It is a right that is enshrined in the Constitution and is thus available to be invoked by any member of Parliament. It is the purview of Parliament to determine what oversight mechanisms to employ in fulfilling its oversight role. The DA alleged that meetings and questions were not the same as ‘genuine oversight’ because some of the questions were simply not answered by members of the executive. Parliament’s Oversight and Accountability Model sets out an array of remedies designed to ensure full accountability, including summoning of members before the portfolio committees and disciplinary steps that may be taken against errant members. It is also open to aggrieved parties to review the conduct of those who fail to adhere to their constitutional obligations.⁸⁸ Aggrieved parties who choose not to invoke the available remedies cannot blame the DMA for their failure to do so.

[83] The Oversight and Accountability Model *inter alia* emphasises the value of public participation and alludes to available interventions at the instance of the members of the public. It states *inter alia* as follows:

‘The motivation for political delegations to undertake the management of the legislative and oversight programme of Parliament demands capacity, competence and collective action. . . . Against this backdrop, and in the context of sections 42(3) and 55(2)(b) of the Constitution, as

⁸⁷ See ss 42(3) and 55(2)(b) of the Constitution.

⁸⁸ *Freedom Front Plus* fn 70 above para 69.

well as various provisions which imply oversight functions of the National Council of Provinces, Parliament through the Joint Rules Committee established a Task Team on Oversight and Accountability comprising members of both Houses of Parliament, which studied the mandates relating to oversight emanating from the Constitution.

...

The conventional Westminster view on oversight, as inherited by many former British colonies, is often rather adversarial and in some instances oversight is professed to be the purview of opposition politicians and not the legislature as an institution. ... "In the South African context, oversight is a constitutionally mandated function of legislative organs of state to scrutinize and oversee executive action and any organ of state." It follows that oversight entails the informal and formal watchful, strategic and structured scrutiny exercised by legislatures.

...

In addition, and most importantly, it entails *overseeing the effective management of government departments by individual members of Cabinet in pursuit of improved service delivery* for the achievement of a better quality of life for all citizens. In terms of the provisions of the Constitution and the Joint Rules, Parliament has power to conduct oversight of all organs of state.

The appropriate mechanism for Parliament to conduct oversight of these organs of state would be through parliamentary committees. In conducting oversight, the committee would either request a briefing from the organ of state or visit the organ of state for fact-finding, depending on the purpose of the oversight. The committees would have to consider the appropriate means for conducting oversight to cover all organs of state.

Parliamentary committees are established as instruments of the Houses [of Parliament] in terms of the Constitution, legislation, the Joint Rules, Rules of the NCOP, Rules of the NA, and resolutions of the Houses to facilitate oversight and the monitoring of the Executive, and for this purpose *they are provided with procedural, administrative and logistical support- they are regarded as the engine rooms of Parliament. ... When a committee reports its recommendations to the House for formal consideration and the House adopts the Committee report, it gives the recommendations the force of a formal House resolution pursuant to its constitutional function of conducting oversight.*' (Own emphasis.).

[84] It is evident from the above that parliamentary committees are designed for effective parliamentary, hence the Speaker of the National Assembly echoed the Oversight and Accountability's description of parliamentary committees as parliament's

'engine rooms'. Pierre de Vos et al in their work, *South African Constitutional Law in Context*⁸⁹ also consider the parliamentary committees to be engine rooms. They posit as follows:

'The various committees of parliament - especially the various portfolio committees that focus on the work associated with a specific government department – are seen as the engine room of parliament. Although members of the NA and the NCOP can ask questions of members of the executive and have a right to have their questions answered, either orally in each of the houses or in written form, portfolio committees *can call members of the executive and departmental officials to testify before them to oversee the work of the individual departments and to hold the members of the executive accountable.*'⁹⁰

It cannot be gainsaid that these views are consonant with the provisions of the Oversight and Accountability Model.

[85] The evidence of the second and fourth respondents regarding the breadth of the Oversight and Accountability Model and various committees and their roles, and joint rules and orders and committees created within the contemplation of ss 45 and 57 of the Constitution, has not been gainsaid. All that the DA stated in response was that such evidence is irrelevant. That evidence and the self-explanatory contents of the Oversight and Accountability Model disproves the DA's bald assertion that the fact that the Executive engaged with Parliament does not mean that Parliament has in place effective mechanisms to maintain oversight and accountability. The DA seeks to evade any engagement with these mechanisms by asserting that 'the constitutional validity of s 27(2) is an objective question'. This line of argument simply fails to take into account that context is an important part of the unitary interpretive exercise. The role of the Oversight and Accountability Model as well the powers wielded by various portfolio are valid considerations in assessing the extent of parliamentary supervision created because of constitutional imperatives cannot be wished away.

[86] In my opinion, the Minister's exercise of her regulation-making powers envisaged in the DMA in no way violates or erodes the constitutional imperatives of supervision and

⁸⁹ P de Vos et al *South African Constitutional Law in Context* 2 ed (2021).

⁹⁰ Op cit at 180.

accountability prescribed in s 42(3) and 55(2)(b)(i) of the Constitution, as the executive remains accountable to parliament even during a state of disaster; the Oversight and Accountability Model does not state otherwise.

[87] It follows that the respondents' assertion that parliamentary oversight through the activities of the Portfolio Committee, parliamentary committees and the rules of parliament all enable parliament to fulfill its constitutional mandate during a state of disaster, is unassailable. Against the background of the authorities discussed in the foregoing paragraphs, the DA's contention that s 27 of the DMA enables a situation in which 'government can grant itself dictatorial powers' lacks merit and, as a result, falls to be rejected.

[88] It bears mentioning that some of the DA's contentions were contradictory. By way of an example, the DA prefaced its arguments by emphasising that it 'does not seek to undo or imperil the Executive's ability to respond quickly and creatively to disasters'. It pointed out that it 'seeks to preserve that ability – but simultaneously ensure that Parliament be given the ability to readily influence and, if necessary, invalidate this response *after the fact*'. It then asserted that 'often, public participation did not occur at all'. However, the uncontroverted evidence of the first respondent completely blunts the sting of this contention. As stated before, the DA did not in any way discredit the evidence pertaining to the steps taken by the parliamentary committees and the assertions regarding how the participation of members of the public was facilitated.⁹¹ Against that background, and the express provisions of the DMA considered as a whole, the assertion that the DMA fails to facilitate public involvement is devoid of merit.

[89] There remains the DA's contention that parliamentary committees 'have no teeth'. Without any elaboration, the DA argues that 'even if an entire parliamentary committee were to disagree with the steps the Minister had taken, this would have no legal effect unless the minister of his or her own accord decided to change tack'. The DA does not

⁹¹ Compare *Esau* fn 1 above paras 94-95.

engage with various provisions of the Constitution which are designed to ensure the accountability of the members of Parliament. Instead, the DA merely asserts on insubstantial grounds that ‘the constitutional difficulty is that the DMA does not require such engagements or put in place mandatory mechanisms for them to occur’.

[90] The DA further contended that when the next state of national disaster is declared, the question of what engagements will occur will depend on the enthusiasm (or lack thereof) of the relevant Parliament and COGTA Minister’. This contention, as already indicated, fails to take into account various provisions of the Constitution that serve to ensure that parliament’s oversight role is maintained. It must also be borne in mind that in terms of s 56 of the Constitution, any interested persons or institutions may submit petitions and make representations or submissions to Parliament or its committees. In terms of s 59(1) of the Constitution the National Assembly must facilitate public involvement. In terms of s 59(2), the National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so. Public participation is therefore a constitutional imperative.

[91] Against the backdrop of all the oversight mechanisms alluded to under the heading of parliamentary supervision, as well as the safeguards that are built-in as constitutional imperatives, where the public is granted the space to engage with parliament, as well as the safeguards that are built in as constitutional imperatives, to insist that the same mechanisms will only be effective if they are expressly included in the DMA seems to be a classic example of putting substance over form.

[92] Moreover, as observed in *One Movement South Africa NPC v President of the Republic of South Africa and Others*,⁹² when any member of Parliament allows himself or herself to be party to a decision that they consider not to be in the interests of the people of South Africa, they betray the people of South Africa. In the same vein, however, that court, citing *UDM* with approval, acknowledged that s 102 of the Constitution makes

⁹² *One Movement South Africa NPC v President of the Republic of South Africa and Others* [2023] ZACC 42; 2024 (3) BCLR 364 (CC); 2024 (2) SA 148 (CC) para 37.

provision for members of parliament to address the executive members' remissness in their execution of their constitutional mandate. The following observation in *UDM* answers the DA's concerns regarding the alleged inadequacy of parliamentary oversight that is effected via parliamentary committees:

'The National Assembly indeed has the obligation to hold Members of the Executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority. There are parliamentary oversight and accountability mechanisms that are sufficiently notorious to be taken judicial notice of. Some of them are calling on Ministers to regularly account to Portfolio Committees and *ad hoc* Committees; and avail themselves to respond to parliamentary questions as well as other question and answer sessions during a National Assembly sitting.

...

These accountability and oversight mechanisms are the regular or normal ones. There may come a time when these measures are not or appear not to be effective. That would be when the President and his or her team have, in the eyes of the elected representatives of the people to whom they are constitutionally obliged to account, disturbingly failed to fulfil their obligations. In other words, that stage would be reached where their apparent under-performance or disregard for their constitutional obligations is viewed, by elected public representatives, as so concerning that serious or terminal consequences are thought to be most appropriate. And that takes the form of removal from office. The Constitution provides for two processes in terms of which the President may be removed from office. First, impeachment, which applies where there is a serious violation of the Constitution or the law, serious misconduct or an inability to perform the functions of the office. Another related terminal consequence or supreme accountability tool, in-between general elections, is a motion of no confidence,' which is envisaged in s 102 of the Constitution.⁹³

[93] For all the reasons set out above, s 27 of the DMA passes constitutional muster. It follows that the appeal has to fail. Under such circumstances, there is no need to address the issue of an appropriate remedy. All the parties are agreed that the *Biowatch*

⁹³ Section 102 of the Constitution provides:

(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.'

principle is applicable on account of the issues raised in this matter. Accordingly, there is no reason to deviate from that principle and no order as to costs will be made.

[94] In the result, the following order is made:

The appeal is dismissed and there is no order as to costs.

M B Molemela
President
Supreme Court of Appeal

Makgoka JA:

[95] I have had the benefit of reading the first judgment. I agree with its conclusion that s 27 of the DMA does not impermissibly delegate plenary powers to the Executive.

[96] There is a preliminary point to be disposed of before this aspect is considered. The Executive (the President and the Minister) objected to this ground of attack by the DA. It contended that the latter had accepted in its founding affidavit that the wide scope of the regulation-making powers conferred on the Minister by s 27 was justified. According to the Executive, the DA did not contend that the scope of delegation to the Minister, was in itself, unconstitutional. It contended merely that, given the wide scope of the delegation to the Minister, the section did not render the Minister's exercise of her powers subject to parliamentary supervision and control.

[97] The Executive asserted that the debate before the court below focused on the adequacy of parliamentary supervision of, and control over, the Minister's exercise of her regulation-making powers. By seeking to argue the delegation of power issue, the DA

was 'shifting ground', which according to the National Executive, was impermissible and unfair because the Executive were not called upon to justify the scope of the delegation.

[98] Three points need to be made in this regard. The first is that the DA pleaded the issue of impermissible delegation of power. It could well be that the debate before the court below focused on the adequacy of parliamentary supervision of and control over the Minister's exercise of her regulation-making powers. But the fact remains that the DA never formally abandoned the issue. In any event, where a point of law is apparent on the papers, a court is entitled to *mero motu* raise it and require the parties to deal with it.⁹⁴ Secondly, both the majority and minority judgments in the court below dealt with the issue. Lastly, despite its protestations, the Executive's heads of argument in this Court addressed the issue.

[99] In matters such as this, the overriding consideration is always that of prejudice. The Executive does not assert any prejudice, and I am unable to discern any. On these bases, the issue is squarely before this Court and we are therefore entitled to consider it.

[100] Subject to the remarks, I agree with the conclusion in the first judgment that s 27 of the DMA does not impermissibly delegate plenary powers to the Executive. However, I do part ways with the first judgment in its conclusion that s 27 passes constitutional muster even though there is no express provision in it for Parliament's role in s 27 when a state of disaster is declared or extended.

[101] I make two observations in this regard. First, the finding that s 27 does not impermissibly delegate plenary powers to the Executive, has no bearing on whether the absence of an express parliamentary role in the DMA renders the provision unconstitutional or not. This is a discrete constitutional challenge.

⁹⁴ *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); [2008] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC).

[102] Secondly, the first judgment concludes that the findings of this Court in *Esau* and in *British American Tobacco* render it 'incongruous to simultaneously hold that s 27 is akin to a state of emergency'. I disagree. An attack on the constitutional validity of s 27 of the DMA on the basis that it creates a situation akin to a state of emergency, was never before this Court in either of those cases. Similarly, the constitutional challenge to the section based on lack of parliamentary supervision was not before this Court in any of the cases.

[103] In each of them, this Court considered challenges to specific regulations promulgated in terms of s 27 of the DMA in response to the Covid-19 pandemic. No argument was advanced in any of them that the state of disaster is akin to a state of emergency, nor did this Court pronounce on that question.

[104] *Esau* concerned, among other things, an attack on regulations which limited among others, freedom of movement, freedom of trade, occupation and profession. It was argued that these were not reasonable and justifiable limitations for purposes of s 36 of the Constitution. This Court took into account the nature of the pandemic and the reasons proffered by the Executive for those regulations. It found that, although the impugned regulations limited fundamental rights when considered against the proportionality test in terms of s 36, they were justifiable limitations.

[105] A contrary finding was reached in *British American Tobacco*. There, a challenge was made to a regulation which prohibited the sale of tobacco products. This Court concluded that the regulation infringed on rights to dignity, bodily and psychological integrity, freedom of trade and deprivation of property, and was not justified in terms of s 36 of the Constitution. This Court also held that the regulation was not strictly necessary or essential to protect the public or to deal with the destructive and other effects of the disaster, as contemplated in s 27(3) of the DMA. Consequently, it dismissed the appeal by the Minister.

[106] It is therefore clear that both cases were decided in the specific context of the Covid-19 pandemic. In contrast, in this matter, the constitutional attack mounted by the DA is on s 27 of the DMA itself. It is contended that the absence of parliamentary control is unconstitutional as it, among other outcomes, brings about the same result as that of a state of emergency. Without a doubt, this is entirely different to the challenges in both *Esau* and *British Tobacco Association*. Although the Covid-19 pandemic was the catalyst to the application in the court below, a constitutional challenge to s 27 must be considered objectively, irrespective of how the Executive exercised its power in response to the pandemic.

[107] With these observations out of the way, I turn to the substantive issues. I understand the DA's contention to be this: s 27 of the DMA is unconstitutional because it does not make express provision for Parliament's role in the declaration or extension of a state of disaster. One of the consequences of such a lack of parliamentary control is that the section permits the creation of a *de facto* state of emergency without following the Constitution's requirements for the declaration of an actual state of emergency. In other words, a situation akin to a state of emergency is a *result* of a lack of parliamentary control in the DMA when a state of disaster is declared. Lack of parliamentary control is the cause, and a simulated state of emergency is the cause. Thus, the two are inextricably linked. Viewed in this light, I will not consider the two as separate and distinct grounds of attack, but in unison.

[108] Parliament's supervisory and oversight role over the Executive is provided for in ss 42(3) and 55(2) of the Constitution. The former enjoins the National Assembly to scrutinise and oversee Executive action. The latter provides:

'The National Assembly must provide for mechanisms –

- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of –
 - (i) the exercise of national executive authority, including the implementation of legislation; and

- (ii) any organ of state.'

[109] In the context of the issues in this case, Parliament's supervisory role over the Executive must be considered against the powers given to the Minister in the DMA to declare a state of disaster. Section 1 of the DMA defines a 'disaster' as:

'a progressive or sudden, widespread or localised, natural or human-caused occurrence which—

- (a) causes or threatens to cause—
 - (i) death, injury or disease;
 - (ii) damage to property, infrastructure or the environment; or
 - (iii) significant disruption of the life of a community; and
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.'

[110] Section 27(1) empowers the Minister to decide that any of the things mentioned above, are present. In other words, she decides what constitutes a state of disaster. In terms of s 27(1)(a) and (b), she decides that: (a) a national disaster has occurred; and (b) existing legislation and contingency arrangements do not adequately provide for the effective response to such a national disaster, and that 'other special circumstances warrant the declaration of a national disaster'. The phrase 'special circumstances' is not defined in the DMA.

[111] Once she decides on all the above, the Minister may declare a state of disaster. In terms of s 27(5), she is empowered to extend the state of disaster for a month at a time. There is no limit to the times she can extend the state of disaster. Of course, the Minister's exercise of her power in s 27(2), and conceivably in terms of s 27(5), is subject to s 27(3), which requires her to do so only to the extent that is necessary for the factors mentioned in the latter subsection, namely: (a) assisting and protecting the public; (b) providing relief to the public; (c) protecting property; (d) preventing or combating disruption; or (e) dealing with the destructive and other effects of the disaster. But in truth, as to whether those factors in s 27(3)(a) to (e) are present, is entirely up to the Minister. These are undoubtedly wide and extra-ordinary powers, which give the Minister the latitude to make far-reaching decisions.

[112] However, the DMA does not require the Minister to obtain Parliament's approval. She is not required to obtain such approval when she decides to either: (a) declare a state of disaster; (b) enact state of disaster regulations; or (c) extend the state of disaster. She is not obliged to inform Parliament about any of these, until after a year, as provided in s 24(2). This section obliges her to, once a year, submit a report to Parliament on the activities of the National Disaster Management Centre (NDMC). This is merely a reporting exercise, since there is no provision for Parliament to either ratify or reject any of the activities undertaken by the Management Committee. It is simply for Parliament to note the Minister's report. Given the breadth of the powers endowed to the Minister by s 27, this is not sufficient.

[113] This is where the DA's contention about a simulated state of emergency needs to be considered. I do this by contrasting the powers conferred on the Minister, and their effect, against those in respect of a state of emergency. This brings me to the constitutional and legislative framework relevant to a state of emergency, namely, s 37 of the Constitution and the SOEA (the State of Emergency Act).

[114] Section 37(1) of the Constitution sets out the jurisdictional factors to be met for the declaration of a state of emergency. It empowers the President to, in terms of a statute, declare a state of emergency only if: (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency, and (b) if such declaration is necessary to restore peace and order.

[115] Section 37(2) provides for the effective date, duration and extension of a state of emergency. It provides that a declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only: (a) prospectively; and (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly.

[116] Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. Such a resolution may be adopted only following a public debate in the Assembly.

[117] Section 37(3) provides for the justiciability of the State's powers in a state of emergency. In terms thereof, any competent court may decide on the validity of: (a) the declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

[118] The most far-reaching provisions are those contained in s 37(4), which authorises derogation from the Bill of Rights. It reads:

'Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—

(a) the derogation is strictly required by the emergency; and

(b) the legislation—

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.'

[119] Lastly, section 37(5) tempers the State's power during a state of emergency. It provides that no Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise: (a) indemnifying the state, or any person, in respect of any unlawful act; (b) any derogation from this section; or (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable-Rights, to the extent indicated opposite that section in column 3 of the Table. That Table identifies only the right to human dignity, and the right to life as being non-derogable in their entirety.

[120] The State of Emergency Act constitutes legislation envisaged in s 37(1) of the Constitution. In terms of s 1(1) thereof, the President may by proclamation in the Gazette declare a state of emergency in the Republic or in any area within the Republic of South Africa. In terms of s 1(2), the President is enjoined to state briefly, the reasons for the declaration of the state of emergency. Section 1(3) provides that the President may at any time withdraw the proclamation by like proclamation in the Gazette.

[121] Section 2(1)(a) of the SOEA empowers the President to make emergency regulations in respect of the Republic or of any area in which the state of emergency has been declared, for as long as the proclamation declaring the state of emergency remains in force. Such regulations must be necessary or expedient to: restore peace and order; make adequate provision for terminating the state of emergency; or deal with any circumstances which have arisen or are likely to arise as a result of the state of emergency. In terms of s 2(1)(b) the President is required to, in addition to the publication of the regulations in the Gazette, 'cause the contents of the regulations to be made known to the public by appropriate means'.

[122] Section 2(2)(a) provides for the matters in respect of which the emergency regulations may be made by the President. They include the power to delegate 'persons or bodies . . . to make orders, rules and bylaws for any of the purposes for which the President is authorised by [the] section to make regulations, and to prescribe penalties for any contravention of or failure to comply with the provisions of such orders, rules or bylaws'.

[123] Section 2(3) circumscribes the State's exercise of power in a state of emergency and tempers the emergency regulations in certain instances. It provides that:

'No provision of this section shall—

(a) authorise the making of any regulations which are inconsistent with this Act or section 37 of the Constitution; or

(b) authorise the making of any regulations whereby—

(i) provision is made for the imposition of imprisonment for a period exceeding three years;

(ii) any duty to render military service other than that provided for in the Defence Act, 1957 (Act No. 44 of 1957), is imposed; or

(iii) any law relating to the qualifications, nomination, election or tenure of office of members of Parliament or a provincial legislature, the sittings of Parliament or a provincial legislature or the powers, privileges or immunities of Parliament or a provincial legislature or of the members or committees thereof, is amended or suspended.'

[124] Section 3 provides for parliamentary supervision over the proclamation of a state of emergency. This is central to the DA's contention. I will revert fully to it.

[125] The lapsing of emergency regulations is regulated in s 4(1), which provides that any regulation, order, rule or bylaw made in pursuance of the declaration of a particular state of emergency, or any provision thereof, shall cease to be of force and effect:

'(a) as from the date on which the proclamation declaring that state of emergency is withdrawn by the President under section 1(3);

(b) as from the date on which the National Assembly –

(i) resolves not to extend the declaration of that state of emergency; or

(ii) resolves under section 3(2)(a) to disapprove of any such regulation, order, rule, bylaw or provision, to the extent to which it is so disapproved; or

(c) as from the date on which the declaration of that state of emergency lapses as contemplated in the said s 37(2)(b), whichever is the earlier date.'

[126] Section 4(2) provides that the provisions of subsection (1) shall not derogate from the validity of anything done in terms of any such regulation, order, rule, bylaw or provision up to the date upon which it so ceased to be of force and effect, or from any right, privilege, obligation or liability acquired, accrued or incurred, as at the said date, under and by virtue of any such regulation, order, rule, bylaw or provision.

[127] From the above exposition of s 37 of the Constitution and State of Emergency Act, on the one hand, and of the DMA, on the other, the most conspicuous difference is that the declaration of a state of emergency is, in terms of s 3 of the State of Emergency Act,

subject to parliamentary supervision, whereas there is no such supervision when a state of disaster is declared. But there are other differences, which are set out below.

[128] First, a state of emergency is provided for in the Constitution, whereas a state of disaster derives from an Act of Parliament – the DMA. Second, the declaration of a state of emergency is made by the President, whereas a state of disaster is declared by the Minister.

[129] Second, the purpose of a state of emergency is to restore peace and order when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency. For a state of disaster, it must be that existing legislation and contingency arrangements do not adequately provide for the Executive to deal effectively with a disaster, or that other special circumstances warrant the declaration of a national state of disaster.

[130] Third, in a state of emergency, the powers to make emergency regulations reside with the President, whereas in a state of disaster, the power to make regulations lies with the Minister. Fourth, the duration of a state of emergency is 21 days, unless Parliament resolves to extend its declaration. A state of disaster endures for three months and may be extended by the Minister.

[131] Fifth, the extension of a state of emergency may only be effected after debate in the National Assembly, whereas under the DMA, the Minister is empowered to extend a state of national disaster without reference to the National Assembly. Sixth, courts are expressly empowered to pronounce on the validity of the declaration of a state of emergency, incidental regulations and action. There is no such provision in the DMA for a state of disaster.

[132] Seventh, in a state of emergency derogation from the Bill of Rights is expressly permitted in certain circumstances. The derogation from the Bill of Rights is not expressly permitted in a state of disaster. Eighth, the State's powers are circumscribed during a

state of emergency in that the State is not indemnified for unlawful acts, and that the derogation from the Bill of Rights is circumscribed. There is no similar provision in respect of a state of emergency.

[133] I revert to s 3 of the SOEA. It sets out Parliament's role in the declaration of a state of emergency. It provides as follows:

'Parliamentary supervision

(1) A copy of any proclamation declaring a state of emergency and of any regulation, order, rule or bylaw made in pursuance of any such declaration shall be laid upon the Table in Parliament by the President as soon as possible after the publication thereof.

(2) In addition to the powers conferred upon the National Assembly by section 37(2)(b) of the Constitution . . . the National Assembly may –

(a) disapprove of any such regulation, order, rule or bylaw or of any provision thereof; or

(b) make any recommendation to the President in connection with any such proclamation, regulation, order, rule, bylaw or provision.'

[134] Because there is no similar provision for Parliament's role in the DMA when a state of disaster is declared, or extended, the DA had initially contended in its founding affidavit that this breaches the doctrine of separation of powers, and is therefore, invalid and unconstitutional. Subsequent to the launch of the application, *Freedom Front Plus*⁹⁵ was handed down, in which similar arguments were rejected. This had the effect that the court below was bound by *Freedom Front Plus* unless it found it to be clearly wrong. As a result, the DA did not pursue the *de facto* state of emergency and lack of parliamentary supervision issues in the court below. But it reserved its right to raise them in this Court, which it did.

[135] As mentioned, the DA's overarching complaint was that the absence in the DMA of express safeguards similar to those found in s 37 of the Constitution, rendered the DMA unconstitutional. It said that those safeguards are necessary for the exercise of Executive power because of the severe restriction on fundamental rights inherent in a

⁹⁵ *Freedom Front Plus* fn 70 above.

state of emergency. The DMA, with its capacity to similarly restrict fundamental rights, and achieve a similar outcome as in a state of emergency, does not have such safeguards. The DA asserted that the absence of these safeguards in the DMA has the effect that the DMA does not withstand constitutional scrutiny.

[136] In this Court, the National Executive contended that *Freedom Front Plus* was dispositive of the DA's assertions. For its part, the DA asserted that the case was wrongly decided, and urged us to overturn it. It is to that judgment I now turn. The applicant in that matter was Freedom Front Plus, a registered political party with seats in the National and Provincial Legislatures. In its judgment, the court identified as a weakness, the assumption by the applicant, that the same derogation of rights may occur under a state of disaster as under a state of emergency because the DMA does not have the same safeguards as s 37 provides for in the case of states of emergency.

[137] The court below juxtaposed a state of emergency with a state of disaster as follows:

'That states of emergency and states of disaster are fundamentally different legal animals is patently clear. The jurisdictional requirements of states of emergency spell this out. A state of emergency is limited to the direst of circumstances. It may only be declared when the "life of the nation" is under threat. Additionally, it must be necessary to restore "peace and order". Unless these requirements are met, the declaration of a state of emergency would be unlawful.

States of disaster, on the other hand, cover a wide range of different circumstances. This is apparent from the definition of a disaster. While a disaster may take many forms, and may threaten lives and the well-being of communities, it does not involve a threat to the life of the nation, nor does it disrupt peace and order.'⁹⁶

[138] The court went on to explain the rationale for the derogation from fundamental rights during states of emergency, as being the protection of the constitutional order itself, and ultimately, restoring the constitutional state. This, it said, explained 'why the jurisdictional requirements under s 37(1) are so strict', and the safeguards in s 37 are built in.

⁹⁶ *Freedom Front Plus* fn 70 above paras 59-60.

[139] Turning to the DMA, the court reasoned that it ‘does not permit a deviation from the normal constitutional order’, but merely permits the executive to enact regulations or issue directions, which ‘may well limit fundamental rights’. But, said the court, ‘the fundamental rights remain intact in the sense that any limitation is still subject to being judicially tested against s 36 of the Constitution’. The court stated that this was the reason why the DMA did not need to contain the safeguards found in s 37 of the Constitution because the court’s power to rule on the validity of regulations was ‘never removed or suspended to begin with’.

[140] The court further explained that this judicial power holds for the safeguard provided in s 37(5) of the Constitution, which prohibits the state from granting indemnities in respect of unlawful acts. Lastly, the court summarily dismissed the complaint about the lack of Parliament’s role where a state of disaster is declared in terms of the DMA, as follows:

‘Once the fundamental distinction between a state of emergency and a state of disaster is understood, this complaint loses its force. It is because of the constitutional deviations that are permitted under a state of emergency that parliamentary oversight is expressly included in s 37. Where no such deviation is permitted, it is not necessary to make special provision for parliamentary oversight. That oversight is a normal component of our constitutional framework .

. .’⁹⁷

[141] Concerning the last point, the court pointed out that the DMA did not render inoperable, Parliament’s role to scrutinise and oversee executive action as set out in ss 42(3), 55(2)(b)(i) and 92(2) of the Constitution. Accordingly, the court dismissed the attack on the constitutionality of the DMA.

[142] The court in *Freedom Front Plus* predicated its conclusion on two grounds. First, that a state of emergency and a state of disaster are conceptually different. Secondly, that a state of disaster did not render ss 42(3), 55(2)(b)(i), and 92(2) of the Constitution inoperable, and therefore Parliament can still hold the Executive accountable, even in the absence of an express provision for that role

⁹⁷ Ibid para 68.

[143] In my view, with respect to the first ground, the court mischaracterized the core of Freedom Front Plus' argument, which is also the DA's argument in the present case. The contention was not that a national state of disaster is conceptually the same as a state of disaster. It was about the fact that through a state of disaster, the Minister is empowered to issue regulations so broad and intrusive, as would be found in a state of emergency. The only difference is that the Minister achieves the same outcome but without having to comply with the onerous injunctions of s 37, especially those relating to parliamentary control.

[144] It is that mischaracterization of the argument that led the court in *Freedom Front Plus* to hold, wrongly in my view, that because the two are conceptually different, the DMA is constitutionally valid. This is at the heart of the court's judgment, which had a direct influence on the outcome and the order.

[145] As regards the second ground, the court reasoned that because the courts' power to pronounce on the validity of the state of disaster, and Parliament's power to hold the executive accountable, are extant, s 27 of the DMA is constitutionally compliant. I disagree with this reasoning. Whether a statute is constitutionally compliant, does not depend on whether it is justiciable or not. Nor does it depend on whether Parliament can hold the Executive accountable.

[146] It is correct that a state of disaster does not render ss 42(3), 55(2)(b)(i), and 92(2) of the Constitution inoperable, and therefore Parliament can still hold the Executive accountable. In our constitutional scheme, no legislation can permissibly render these provisions inoperable. Ordinarily, Parliament's supervisory role over legislation is inherent in these provisions, and therefore, does not have to be expressly spelt out. But s 27 of the DMA is no ordinary legislation. Like the State of Emergency Act, it gives the Executive extra-ordinary powers to severely limit fundamental rights. That explains why, for a state of emergency, the framers of our Constitution saw it necessary to make an express provision in s 3 of the State of Emergency Act, for Parliament's role when a state of emergency is declared. Absent this provision, the State of Emergency Act would most

certainly be unconstitutional, despite the presence of ss 42(3), 55(2)(b)(i), and 92(2) of the Constitution.

[147] Similarly, the fact that these provisions remain extant in a state of disaster, is no answer to the constitutional challenge to s 27 of the DMA based on the lack of an express role for Parliament when a state of disaster is declared under it. The powers conferred on the Executive by s 27 of the DMA and their far-reaching effect, remove the provision from the category of ordinary legislation and place it squarely in the category of extra-ordinary legislation, much the same as the State of Emergency Act. Because of this, Parliament's role, in addition to the role envisaged by ss 42(3), 55(2)(b)(i), and 92(2) of the Constitution must be provided for, and spelt out, as it is in s 3 of the State of Emergency Act.

[148] Having regard to all of the above, I conclude that *Freedom Front Plus* was wrongly decided, and this Court should overturn it.

[149] As a nation, we are fortunate that currently, we have a vibrant and robust Parliament. That may not always be the case. In the absence of an express provision for Parliament's role in the DMA, an Executive-friendly Parliament could decide to remain supine and do nothing to hold the Executive accountable in any form. This would allow the Minister, for example, to extend a state of disaster contrary to the provisions of s 27(3)(a)-(e). Under those circumstances, the promises of ss 42(3), 55(2)(b)(i), and 92(2) of the Constitution will ring hollow. The country would be in an unlawful and prolonged state of disaster until the decision is set aside by a competent court. By the time this is achieved, much damage might have been caused to the fabric of our constitutional democracy.

[150] The Executive's powers in the DMA severely limit fundamental rights as much as they do in a state of emergency. It is for this reason that Parliament's role should be clearly and expressly circumscribed in the legislation itself. In other words, when Parliament confers extraordinary powers on the Executive as s 27 does, it is required to put in place mechanisms to scrutinise and oversee the Executive action taken in terms of

the provision. This must include, at least: (a) a duty by the Executive to report to Parliament on what action has been taken pursuant to the provision; (b) Parliament's power to disapprove of the Executive's decisions. These are necessary to give effect to the injunction of s 42(3) of the Constitution.

[151] As mentioned, in respect of a state of emergency, the Constitution requires Parliament to exercise strict control over its declaration, and any extension thereof. I have already set out in detail those safeguards. One of the main reasons for this is that a state of emergency results in derogation of rights. Currie and De Waal point out that the hallmark of a state of emergency is the suspension of a normal legal order, including the widespread limitation of various human rights, to address the emergency.⁹⁸

[152] On a proper analysis of the regulations that may be enacted in terms of s 27(2), it is clear that save for the power of detention without trial permitted in s 37(4) of the Constitution, almost every restriction of rights available to the President in a state of emergency, is also available to the Minister in a state of disaster. The only power the Minister lacks is that of detention without trial, as allowed in s 37(4) of the Constitution. Thus, a *de facto* state of emergency can result following a declaration of a state of disaster, but without any parliamentary role and the safeguards of s 37 of the Constitution.

[153] The simple question is this: does s 27 of the DMA empower the Minister, through a state of disaster, to achieve a substantially similar result to a state of emergency? Although this requires an objective analysis of the provision, how the Executive responded to the Covid-19 pandemic gave a glimpse of what life would be like in a state of emergency, especially during the so-called hard lockdown period. A curfew was imposed; citizens were confined to their homes; businesses were precluded from operating; some citizens were arrested, and some killed, for violating the state of disaster regulations.

⁹⁸ | Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2013) chapter 33.

[154] This, in effect, amounted to the suspension of the normal legal order – emblematic of a state of emergency. This was achieved through the permissive s 27 of the DMA, instead of the elaborate and circumscribed provisions of s 37 of the Constitution, read together with the relevant provisions of the State of Emergency Act. Viewed in this light, s 27 of the DMA permits an unlawful suspension of the normal legal order – precisely the purpose of s 37 of the Constitution.

[155] South Africa is a signatory to various international instruments on human rights, which it is obliged to comply with. Some of the relevant instruments include the International Covenant on Civil and Political Rights (ICCPR),⁹⁹ which allows signatories in ‘time of public emergency’ to derogate from the Covenant, including limitations on human rights, ‘to the extent strictly required by the exigencies of the situation.’ South Africa is also a signatory to the African Charter on Human and Peoples’ Rights, which, significantly, does not provide for states of emergency, nor the possibility of derogations being made, even in the event of a civil war.

[156] In its analysis of how countries responded to the Covid-19 pandemic, the United Nations identified South Africa among the 15 countries where troubling allegations of police abuse were identified.¹⁰⁰ South Africa was described as having a toxic lockdown culture and police and other security forces are said to have used excessive and sometimes deadly force to enforce lockdowns and curfew measures.

[157] The author of a research paper makes the following observations about South Africa’s response to the Covid-19 pandemic:

‘The various reports of the excessive use of power by law enforcement and arguably unnecessary restrictions on the movement of goods and people, call into question whether South Africa is honouring its obligations as set out in international and regional instruments (ICPPR and African

⁹⁹ South Africa ratified the International Covenant on Civil and Political Rights on 10 December 1998, with entry into force in March 1999.

¹⁰⁰ <https://www.reuters.com/article/us-health-coronavirus-un-rights-idUSKCN2291X9>. The other countries include Nigeria, Kenya, the Philippines, Sri Lanka, El Salvador, Dominican Republic, Peru, Honduras, Jordan, Morocco, Cambodia, Uzbekistan, Iran and Hungary.

Charter on Human and Peoples' Rights). The human rights abuses that have been recorded to date, stand in stark contrast to the African Charter that holds that no derogation on human rights can be made. *This begs the question whether the country is in a state of disaster or a state of emergency.*¹⁰¹ (Emphasis added.)

[158] I make these points not to suggest that the Executive's response to the Covid-19 pandemic, and the regulations made under s 27(2) were unreasonable or disproportionate. What I endeavour to demonstrate is that a state of disaster brings about a situation akin to a state of emergency in which human rights can be derogated as would be the case in a state of emergency. All this happens without the people, through their democratically elected representatives in Parliament, having any say about it, either at the declaration of the state of disaster, or when it is extended.

[159] The point is that the extent to which s 27 permits the denudation of human rights is so intrusive that it ought to occur only with Parliament's approval, control and supervision. The fact that there is no role for Parliament under these circumstances, to my mind, offends the very essence of a constitutional democracy such as ours.

[160] I appreciate that a disaster is, by its very nature, unpredictable. It demands of the Executive to respond speedily and adequately to it. Time is of the essence. I accept that the Executive should have the necessary flexibility to meet the challenges of a disaster. I also accept that in suitable circumstances, the Executive should have the power to take urgent action inconsistent with existing laws, as the Constitutional Court pointed out in *Executive Council*.¹⁰² But it is because of the very drastic nature of such powers, and their impact on fundamental rights, that there should be legislated control and supervision of the Executive by Parliament.

¹⁰¹ Disaster Management Act Research Paper May 2020.

¹⁰² *Executive Council* fn 14 above para 62.

[161] Section 27 of the DMA makes no provision for Parliament's role in all circumstances, irrespective of the nature of the disaster. As pointed out in *Esau*, disasters, and their effect, differ. This Court explained:

'[I]n some cases, such as a flood or an earth quake, for instance, extremely urgent action may be required to manage the disaster, while in other cases, a long drought, for instance, more time for reflection, planning and consultation may be available to decision-makers. The definition of a disaster recognizes a sliding scale in the nature of disasters, ranging from the sudden to the progressive. . .'¹⁰³

[162] In my view, the normative position should be that the declaration of a state of disaster and the extension thereof, must have the imprimatur of Parliament. Where the nature of the disaster is such that this is not feasible, the Executive may well proceed to declare it without reference to Parliament. That should be the exception, rather than the norm. Where this is the case, Parliament should be consulted as soon as circumstances permit, for it to: (a) ratify the declaration of a state of disaster, and (b) approve any extension thereof.

[163] In the present case, Parliament sought to demonstrate that it indeed hold the Executive accountable during the Covid-19 pandemic. It pointed to what it considered extensive Parliamentary oversight exercised through the various portfolio committees of the National Assembly, as well as through the various select committees of the National Council of Provinces. It detailed engagements between these legislative bodies and members of the Executive.

[164] That may be so, and it is commendable. But it is not an answer to the question of whether s 27 is constitutionally valid. As mentioned, the constitutional validity of section 27(2) is an objective enquiry. It is not dependent on whether the engagements held in respect of a particular disaster were adequate or not. The fact is that those engagements are neither required by the DMA nor are there mandatory legislative mechanisms in place for them to occur. They occurred out of the goodwill of Parliament and its sense of duty.

¹⁰³ *Esau* fn 1 above para 97.

Formalizing the role of Parliament in the DMA would ensure that for future states of disaster, reliance is not placed on the goodwill and ardour of the relevant Parliament to hold the Executive accountable. If anything, the evidence by Parliament to demonstrate that during the state of disaster, it exercised its supervisory role, fortifies the view why that role needs to be expressly provided for in s 27 of the DMA.

[165] I conclude that the DMA permits the Minister, by fiat of s 27(2)(a)-(o), to achieve an outcome similar to a state of emergency without the constitutional safeguards attendant in a state of emergency. The absence of an express provision for parliament's role in all circumstances in a state of disaster offends the very essence of a democratic state such as ours based on the principles of transparency, accountability, and responsiveness, among others. It is, to my mind, unconstitutional.

[166] Had I commanded the majority, I would have upheld the Democratic Alliance's appeal with costs and declared s 27(2) unconstitutional and invalid based on lack of parliamentary supervision in a state of disaster. To remedy the defect, the Democratic Alliance proposed that there should be a read-in of s 24(4A) to provide for parliamentary control, in a similar manner that s 37(3) does, together with the power of Parliament to disapprove any declaration, regulation or direction. I would grant that order subject to a rider that where the nature of the disaster is such that obtaining prior parliamentary approval is not feasible, Parliament should be consulted as soon as circumstances permit for its ratification.

TM MAKGOKA
JUDGE OF APPEAL

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