

Appendix Four

Country Survey: South Africa

By

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Contents

1.	INTRODUCTION	5
2.	DISASTER AND EMERGENCY MEASURES	5
3.	WHAT ARE THE MAIN IMPLICATIONS FOR NOT INVOKING A STATE OF EMERGENCY?	6
4.	STATE OF DISASTER LEGISLATION.....	7
4.1.	<i>State of disaster declaration</i>	8
4.2.	<i>State of disaster regulations</i>	9
5.	STAKEHOLDER AND PUBLIC ENGAGEMENT.....	9
6.	DECISION MAKING BODY AND AUTHORITY DURING A NATIONAL STATE OF DISASTER.....	11
6.1.	<i>Who decides to extend, remove or limit the State of Disaster?</i>	11
6.2.	<i>Who makes decisions in relation to the content of the regulations promulgated?</i>	12
7.	ANNEXURES	14

1. Introduction

The first COVID-19¹ case in South Africa was reported by the South African National Institute of Communicable Diseases (NICD) on 5 March 2020 and the first death was recorded on 27 March 2020.² Since the detection of COVID-19, South Africa has had to implement a variety of health and other measures. In response to the COVID-19 pandemic, the government declared a state of disaster on 15 March 2020 in terms of the Disaster Management Act³ and promulgated a set of measures to curb the spread of infections. Ranging from Level 5 as the most restrictive to Level 1 as the least restrictive, government regulated services, and the movement of people and goods. The government introduced strict measures on 26 March 2020, including ordering a nation-wide lockdown for an initial period of 21 days.⁴ The state of disaster has been extended on numerous occasions and the regulations promulgated thereunder adjusted and amended based on a Risk Adjusted Strategy.⁵ This survey report provides an overview of the South African government's response to the COVID-19 pandemic from the period between March 2020 - February 2021.

2. Disaster and emergency measures

The legal framework provides for two mechanisms being a state of emergency and a state of disaster.⁶ A state of emergency is constitutionally mandated and applies where the 'life of the nation is at threat' and the declaration is necessary to 'restore peace and order'⁷ whereas a state of disaster is statutorily mandated (Disaster Management Act) and the term 'disaster' is broadly defined, given the unknown

¹ COVID-19 is the name given by the World Health Organization (WHO) on February 11, 2020 for the disease caused by the novel coronavirus SARS-CoV2.

² SA records first coronavirus-related death' *IOL News* 27 March 2020 <https://www.iol.co.za/news/politics/sa-records-first-coronavirus-related-death-45642768>; <https://www.nicd.ac.za/first-case-of-covid-19-announced-an-update/>.

³ 57 of 2002.

⁴ President of South Africa, Mr. C. Ramaphosa, Statement on Measures to Combat Covid-19 Epidemic, 15 March 2020, Union Buildings, Tshwane, <http://www.dirco.gov.za/docs/speeches/2020/cram0315.pdf>

⁵ President of South Africa, Mr. C. Ramaphosa, Address on Escalation of measures to combat Coronavirus COVID-19 pandemic, 23 March 2020, Union Buildings, Tshwane. <https://www.gov.za/speeches/president-cyril-ramaphosa-escalation-measures-combat-coronavirus-covid-19-pandemic-23-mar>

⁶ Section 37, Constitution of South Africa ('Constitution'): A state of emergency may only be declared when the following two judicial requirements are met: (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and (b) the declaration is necessary to 'restore peace and order.' In terms of Section 1 of the Disaster Management Act a 'disaster' is defined as a 'progressive or sudden, widespread or localised, natural or human-caused occurrence which: (a) causes or threatens to cause death, injury or disease; damage to property, infrastructure or the environment; or 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.'

⁷ Section 37, Constitution,

magnitude of what a disaster may be.⁸ It is clear from the governing provisions, that the threshold to declare a state of emergency is reserved for the most serious form of threat to the country.

Some have questioned the government's decision to invoke a state of disaster instead of a state of emergency.⁹ This issue has also been the subject of litigation, with the fundamental argument being that the Disaster Management Act do not contain the necessary safeguards to citizens that the state of emergency provisions in section 37 of the Constitution do.¹⁰ The government has argued in court papers that a state of emergency has 'particular jurisdictional requirements limiting the circumstances in which the power may be exercised' and the circumstances under the COVID-19 pandemic did not warrant the enactment of a state of emergency as provided for under the Constitution – being it may only be declared when the 'life of the nation is under threat' and it must be necessary to restore 'peace and order.'¹¹ To date, litigation against the government's decision to impose a national disaster has been unsuccessful. See Annexure A for a schedule of relevant cases.

3. What are the main implications for not invoking a State of Emergency?

Many have drawn attention to the serious implications for not invoking a state of emergency, emphasising that the state of disaster legislation falls short of the constitutional protections provided or under 37 of the Constitution, mainly, the parliamentary oversight safeguards – that a state of emergency declaration, including the extension thereof and the issuing of regulations and directions is subjected to oversight and approval of the National Assembly.¹² It has been argued that under the state of disaster legislation, the government may unilaterally and without any form of oversight promulgate and enforce regulations that abrogate human rights and restricts liberties and that there exist no restraints similar to those imposed by section 37 of the Constitution which would safeguard the rights of the citizens of the country.¹³ The court in *Freedom Front Plus v President of the Republic*

⁸ Disaster Management Act [No. 57 of 2002]

⁹ *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266; *De Beer and Others v Minister of COGTA* (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020)

¹⁰ *Freedom Front Plus v President of the RSA and Others; De Beer and Others v Minister of COGTA, Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others* (22311/2020) [2021] ZAGPPHC 168 (24 March 2021).

¹¹ *Freedom Front Plus v President of the RSA and Others*, para 59-60.

¹² *Freedom Front Plus v President of the RSA and Others; De Beer and Others v Minister of COGTA, Democratic Alliance v Minister of COGTA and Others*.

¹³ *Freedom Front Plus v President of the Republic of South Africa and Others*, para 57.

of *South Africa and Others* emphasised that despite these provisions not being imbedded in the Disaster Management Act, the courts still have the authority to review a declaration of a state of disaster, any extension thereof, and any regulations enacted thereunder under the courts ordinary powers to review the exercise of any public power.¹⁴ This power may be exercised under the principle of the rule of law entrenched in section 1(c) of the Constitution, and all the provisions of the Bill of Rights, including section 33 of the Constitution read with the Promotion of Administrative Justice Act.¹⁵ Therefore, should the state unjustifiably limit fundamental rights by the measures it adopts to deal with COVID-19, the courts may be approached for relief.¹⁶

4. State of disaster legislation

A disaster can be declared as either national, provincial or local.¹⁷ A disaster is categorised as a national disaster if it affects more than one province or a single province which is unable to deal with it effectively.¹⁸ The Disaster Management Act is the authority for all disaster management. The Act provides for an integrated and co-ordinated disaster management policy to manage disasters at all spheres of government (national, provincial and local).¹⁹ It also provides for the establishment of institutional arrangements, structures and forums to provide for an integrated and co-ordinated disaster management.²⁰

The Minister of Cooperative Governance and Traditional Affairs (the Minister) has jurisdiction over disaster management but Cabinet is responsible for the co-ordination and management of a national disaster.²¹ The National Disaster Management Centre (National Centre) plays a pivotal role in disaster management.²² The National Centre must determine whether an event should be regarded as a disaster as defined in terms of the Act.²³ The Minister has the authority to declare a national disaster if existing legislation and contingency arrangements do not adequately provide or other special

¹⁴ *Freedom Front Plus v President of the Republic of South Africa and Others*, para 66.

¹⁵ *Freedom Front Plus v President of the Republic of South Africa and Others*, para 66.

¹⁶ *Freedom Front Plus v President of the Republic of South Africa and Others*, para 60.

¹⁷ Section 23 (1) (b), Disaster Management Act, 2002.

¹⁸ Section 23 (6), Disaster Management Act, 2002.

¹⁹ Preamble, Disaster Management Act, 2002.

²⁰ i.e. Intergovernmental Committee on Disaster Management, National Disaster Management Advisory Forum, National Disaster Management Centre (National Centre))

²¹ Section 26 (1), Disaster Management Act.

²² Section 9, Disaster Management Act, 2002.

²³ Section 23 (1), Disaster Management Act, 2002. The National Centre must : (a) assess the magnitude and severity or potential magnitude and severity of the disaster; (b) classify the disaster as a local, provincial or national disaster; and (c) record the prescribed particulars concerning the disaster in the prescribed.

circumstances warrant the declaration of a national state of disaster.²⁴ If a national disaster has been declared, the Minister of COGTA may, after consulting the responsible Cabinet member, make regulations concerning a range of issues.²⁵ See Annexure B for the range of issues.

The Minister may, however, only exercise these powers to the extent that this is necessary for the purpose of assisting and protecting the public, providing relief to the public, protecting property, preventing or combating disruption or dealing with the destructive and other effects of the disaster.²⁶ A national disaster declaration lapses three months after it has been declared and may be terminated by the Minister by notice in the Gazette before it lapses.²⁷ The declaration may also be extended by the Minister by notice for one month at a time before it lapses.²⁸

If one compares the legislative provisions on states of disaster to the constitutional provisions on states of emergency, it is clear that the Minister has considerable powers over the issuing of regulations, the extension and termination of the national disaster. In the event of a state of emergency, the National Assembly plays a pivotal role in overseeing the promulgation of regulations, including the extension and termination of a state of emergency. A state of emergency therefore has a number of robust checks and balances absent from a state of disaster.

4.1. State of disaster declaration

The constitutionality of the state of disaster declaration was challenged in a number of cases but in all cases, the Applicants were unsuccessful.²⁹ See Annexure A for schedule of cases. It is evident from the court submissions made by the government that, at least for now, all the above legislative prescripts and procedural elements (as required by the National Centre and the Minister) were complied with when the national disaster was declared.

²⁴ Section 27 (1), Disaster Management Act, 2002.

²⁵ Section 27 (2), Disaster Management Act, 2002.

²⁶ Section 27 (3), Disaster Management Act, 2002.

²⁷ Section 27 (5), Disaster Management Act, 2002.

²⁸ Section 27 (5), Disaster Management Act, 2002.

²⁹ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020); *Freedom Front Plus v President of the Republic of South Africa and Others*.

4.2. State of disaster regulations

As previously mentioned, South Africa introduced a COVID-19 Alert System to manage the gradual easing of the national disaster.³⁰ The "Alert Levels" refers to the levels of restriction that will be applicable nationally or defined area. Level five is the most restrictive and Level One the least restrictive.³¹ The restrictions contained stay at home orders; prohibitions on gatherings; suspension of visits by the public to facilities, faith-based institutions, public places and detention centres and limits on industries to perform certain economic activities. Amongst others, the restrictions impacted people's right to freedom (freedom of movement, right to leave the republic, citizen right to reside anywhere), equality, basic education, assembly, association, religion and to choose their trade, occupation or profession.³² Annexure C contains a summary of the main content of the regulation passed in terms of the national disaster and what prompted the changes.

There have been a number of court challenges contesting the constitutionality and legality of some of the regulations imposed under the state of disaster, however, most have not been successfully challenged and others are being appealed. Annexure A provides an overview of challenges to the state of disaster declaration and regulations.

5. Stakeholder and public engagement

Stakeholder engagement was more apparent after the state of disaster was declared than before it was declared. The magnitude of the situation and the extremely limited timeframe prevented any large scale and extensive public consultation – time was of the essence. The President's initial address to the citizens on COVID-19 was on the same date that the national declaration was gazetted.³³ Even though there were international and domestic media reports on COVID-19 since December 2019, there was little warning beforehand that a state of disaster could be declared and, more importantly, the extent of implications on social and economic activity. There is evidence, mostly contained in official press releases and media briefings that the state, after 27 March 2020, engaged in a range of consultations with members of the legislature, political parties, business, trade unions, community

³⁰ Directions Issued in Terms of Regulation 3(3) of The Regulations Made Under Section 27(2) of the Disaster Management Act, 2002 (act no. 57 of 2002): Criteria to Guide the Determination of Alert Levels. Available at: https://www.gov.za/sites/default/files/gcis_document/202008/43599rg11158gon867_0.pdf.

³¹ Section 1, Directions: Criteria to Guide the Determination of Alert Levels.

³² Sections 9(2), 17,18,21, 22 and 31 of the Constitution.

³³ President of South Africa, Mr. C. Ramaphosa, Statement on Measures to Combat Covid-19 Epidemic, 15 March 2020 at the Union Buildings, Tshwane.

constituency, premiers, mayors, representatives of the south African local government association, representatives of interfaith communities, oversight institutions and other stakeholders immediately after the national disaster declaration.³⁴ It is uncertain what model of consultation the South African government initially used to impose the national disaster, the lockdown and its subsequent extension.

The state, however, continued public engagement after the state of disaster declaration through media briefings on COVID-19 using various platforms including television networks, websites, webinars and all social media platforms. These engagements were, and continues to be, helpful keeping the public up to date on developments. Nonetheless, the public had limited involvement with the content of lockdown regulations. The first of such involvement was initiated on 25 April 2020, when the Minister announced that she intended initiating a public participation process on what economic and social activities should be permitted at each level of the lockdown, to be implemented with effect from 1 May 2020.³⁵ The public was given two days to make submissions.³⁶ This possible lack of public consultations was raised in *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* to attack the constitutionality of the state of disaster and ensuing regulations.³⁷ The court dismissed the Applicants' case and ruled that the Disaster Management Act

³⁴ PMG Report of the meeting of the Portfolio Committee on Portfolio Committee on Cooperative Governance and Traditional Affairs of 21 April 2020, President of South Africa, Mr. C. Ramaphosa, Address by President Cyril Ramaphosa to the Joint Sitting of Parliament on South Africa's Economic Reconstruction and Recovery Plan, 15 October 2020 at Parliament, Cape Town, The Presidency (2020) *President Cyril Ramaphosa meets political party leaders on Coronavirus Covid-19 lockdown national response*, Press Release, 20 May 2020, President of South Africa, Mr. C. Ramaphosa, Address on Escalation of measures to combat Coronavirus COVID-19 pandemic, 23 March 2020, Union Buildings, Tshwane; President of South Africa, Mr. C. Ramaphosa, Address on Extension of Coronavirus COVID-19 lockdown to the end of April, 9 April 2020, Union Buildings, Tshwane, 'Ramaphosa meets with church leaders as country prepares to move to Level 3 of lockdown' *News24*, 19 May 2020, <https://www.news24.com/news24/southafrica/news/ramaphosa-meets-with-church-leaders-as-country-prepares-to-move-to-level-3-of-lockdown-20200519>; 'Ramaphosa seeks buy-in from religious leaders for Covid-19 vaccine roll out,' *News24*, 1 January 2021, <https://www.news24.com/news24/southafrica/news/ramaphosa-seeks-buy-in-from-religious-leaders-for-covid-19-vaccine-roll-out-20210111>; 'Ramaphosa discusses COVID-19 strategy with religious leaders,' *TheSouthAfrican*, 11 January 2021, <https://www.thesouthafrican.com/news/ramaphosa-discusses-covid-19-strategy-with-religious-leaders/>; Department of Cooperative Governance and Traditional Affairs (2020) *Minister Nkosazana Dlamini Zuma Convenes a Special MINMEC on COVID-19*, Press Release, 19 March 2020; Department of Cooperative Governance and Traditional Affairs (2020) *CoGTA Minister and SAHRC to Cooperate in furthering human rights*, Press Release, 14 July 2020; South African Government (2020) *President Cyril Ramaphosa addresses the nation on measures to curb Coronavirus*, Press release, 23 April 2020; 'Government promises to consider input as it seeks comment on lockdown regulations,' *EWN*, July 2020, <https://ewn.co.za/2020/07/14/govt-promises-to-consider-input-as-it-seeks-comment-on-lockdown-regulations>; <https://sacoronavirus.co.za/covid-19-risk-adjusted-strategy/>.

³⁵ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*, para 66-68.

³⁶ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*, para 66-68.

³⁷ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020), para 129.

does not provide for a public participation process before making disaster management regulations, but only requires that the Minister should consult relevant Cabinet members.³⁸ The court held that even if the Minister did make regulations without public participation, 'the exigencies of the crisis that she sought to regulate is of such a nature, that where the Disaster Management Act does not prescribe public participation, the public's check and balance on abuse of power still resides with Parliament to which the Minister is accountable for the exercise of delegated powers to make subordinate law.'³⁹

6. Decision making body and authority during a national state of disaster

6.1. Who decides to extend, remove or limit the State of Disaster?

Government is guided by a 'risk adjusted strategy',⁴⁰ based on a five-level 'COVID-19 Alert System,' which forms as a basis to guide Cabinet to extend, remove or limit the state of disaster to a particular area and also determines the applicable regulations.⁴¹ Overall, Cabinet is responsible for the co-ordination and management of a national disaster.⁴² However, the Minister of COGTA and the Minister of Health, in this instance, has been prescribed broader duties and responsibilities in the management of a national disaster. For example, a Ministerial Advisory Committee (a group of medical experts) is set up to advise the Minister and Minister of Health on the appropriate levels.⁴³ The Ministers in turn consult with Cabinet regarding the basis to extend, remove or limit the Alert level or the state of disaster to a particular area and the applicable regulations. The Disaster Management Act Regulations states that the Minister must upon the recommendation of the Minister of Health and in consultation with Cabinet, determine by notice in the Gazette, which of the Alert Levels apply at a national,

³⁸ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*, para 160-161.

³⁹ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*, para 164.

⁴⁰ This risk-adjusted strategy is guided by several criteria to extend, remove or limit the state of disaster including: the level of infections and rate of transmission, the capacity of health facilities, the extent of the implementation of public health interventions and the economic and social impact of continued restrictions.

⁴¹ Directions Issued in Terms of Regulation 3(3) of The Regulations Made Under Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002): Criteria to Guide the Determination of Alert Levels, published in GN No. 43599 on 7 August 2020. Available at:

https://www.gov.za/sites/default/files/gcis_document/202008/43599rg11158gon867_0.pdf. Section 3, Disaster Management Act Regulations, 2002 published in GN No. 43258 on 29 April 2020.

⁴² Section 26 (1), Disaster Management Act.

⁴³ Section 1 and 3, Directions: Criteria to Guide the Determination of Alert Levels. The Ministerial Advisory Committee is a committee appointed by the Minister of Health in terms of section 91 of the National Health Act, 2003 (Act No. 61 of 2003).

provincial, metropolitan or district level or in a hotspot.⁴⁴ The Alert Level determined to apply at a national level applies to all provinces, metropolitan areas and districts, unless a different alert level is otherwise determined.⁴⁵ However, the movement of persons may be restricted in and out of a hotspot.⁴⁶ The Minister may upon the recommendation of the Health Minister determine (by notice in the Gazette) a hotspot and apply additional restrictions.⁴⁷

6.2. Who makes decisions in relation to the content of the regulations promulgated?

In terms of the legislation, the Minister may promulgate regulations, but may only do so after consultation with the responsible Cabinet member.⁴⁸ Further, the Minister may only exercise such powers to the extent that this is necessary for the purpose of assisting and protecting the public, providing relief to the public, protecting property, preventing or combating disruption or dealing with the destructive and other effects of the disaster.⁴⁹

⁴⁴ Section 3 (1), Disaster Management Act Regulations, 2002 published in GN No. 43258 on 29 April 2020 as amended by GN No. 43364 of 28 May 2020.

⁴⁵ Section 3 (2), Disaster Management Act Regulations, 2002 published in GN No. 43258 on 29 April 2020 as amended by GN No. 43364 of 28 May 2020.

⁴⁶ Section 3 (3), Disaster Management Act Regulations, 2002 published in GN No. 43258 on 29 April 2020 as amended by GN No. 43364 of 28 May 2020. In terms of hotspots, the Regulations states that the Minister of Health must after consultation with the member of the Executive Council responsible for health of the relevant province identify a hotspot by considering: (a) the number of active cases per 100,000 population; (b) the rate of increase of active cases; (c) the availability of hospital beds and related resources; and (d) any other factor relevant for the purposes of containment of COVID-19.

⁴⁷ Section 3 (5), Disaster Management Act Regulations, 2002 published in GN No. 43258 on 29 April 2020 as amended by GN No. 43364 of 28 May 2020.

⁴⁸ Section 27 (2), Disaster Management Act.

⁴⁹ Section 27 (3), Disaster Management Act.

7. Annexures

Annexure A: Case schedule	
<p><i>Mohamed and two others v President of RSA and Others Case no 21402/20 in this Division on 30 April 2020</i></p> <p>Applicants challenged the ban on religious gathering during lockdown (Level 5). They allege the lockdown Regulations violate their rights to freedom of movement, religion, association and dignity.</p>	<p>The court dismissed the Applicants case. The court found that every citizen was called upon to make sacrifices to their fundamental rights during the COVID-19 pandemic and that the restrictions then in force, constituting a blanket ban on religious gatherings was not unreasonable or unjustifiable.</p>
<p><i>Fair-Trade Independent Tobacco Association v President of RSA and Others (21688/2020)</i></p> <p>The Applicants challenge the regulations on the prohibition on the sale of tobacco products, e-cigarettes and related products. The Applicants wants the court to declare cigarettes as essential and therefore unrestricted products.</p>	<p>The court emphasised that, in assessing the rationality of the regulations banning the sale of tobacco products, it had to consider whether a rational connection exists between a legitimate government purpose and the means selected by the state to pursue this purpose. The court dismissed the Applicants case and noted that the ban on the sale of tobacco products was both rational and necessary, and authorised by the Disaster Management Act. The court noted that the main reason for the ban on tobacco products was to protect human life and health and to reduce the potential strain on the health care system and that the medical material and reports provided the Minister with a firm rational basis to promulgate the regulations outlawing the sale of tobacco products and cigarettes.</p>

<p><i>Khosa & Others v Minister of Defence and Military Defence and Military Veterans & Others (21512/2020)</i></p> <p>Applicants asked the Court to confirm existing rights protection available to citizens during states of disaster and to ensure that the government, and by implication the public, is aware of the requirements.</p>	<p>The court confirmed that all persons present within South Africa are entitled to the following non-derogable even during states of emergency: the right to human dignity, the right to life, the right not to be tortured and the right not to be treated or punished in a cruel, inhuman or degrading way. The court ordered the South African security services to instruct all its members to act in accordance with the Constitution and the law and to develop and publish a code of conduct and operational procedures, regulating the conduct of members of the South African security service in giving effect to the declaration of the State of Disaster.</p>
<p><i>Esau and Others v Minister of COGTA and Others (5807/2020)</i></p> <p>The Applicants challenge the establishment of the National Coronavirus Command Council (NCCC) and want its existence and decisions declared unconstitutional and inconsistent with the Disaster Management Act. The Applicants also challenges the constitutionality of regulations 16(1) to (4), 28(3) and 28(4), read with Part E of Table 1 of 29 April 2020.</p>	<p><i>Challenge to the NCCC</i></p> <p>The Applicants averred that the President and the National Executive usurped Parliament’s powers unlawfully by establishing and granting powers to the NCCC that ought to vest with the National Disaster Management Centre. The applicants alleged that the NCCC ‘has no legal validity and no decision-making powers, yet it has seemingly managed and made decisions affecting all South Africans’ rights.’ The court dismissed the applicants’ case and held that the ‘President’s decision to establish the NCCC is neither a decision made in terms of legislation nor are the decisions of the NCCC capable of having legal consequences because they are subject to acceptance, rejection or modification by Cabinet and where applicable, individual Cabinet members.’ Furthermore, that Cabinet’s consensus building mechanism, (i.e. the NCCC) does not detract from its obligation to consult with the National Centre and that the decision to make the regulations was part of a deliberative and consultative process as they</p>

Esau and Others v Minister of COGTA (611/2020) [2021] ZASCA 9; 2021 (3) SA 593 (SCA) (28 January 2021)

consulted their fellow cabinet members and various role players including the National Centre.

Constitutionality and validity of regulations

The Court held that the section 36(1) test for reasonable and justifiable limitations of rights should have been utilised and rejected the applicant's comparison of the regulations with one another. The Court proceeded to analyse the rationality of the regulations and the means used by the Minister to curbing the spread of the virus and was satisfied that the regulations are justified. The Court accepted that government had itself undertaken a 'proportionality exercise' to determine the justifiability of the regulations. The court was satisfied that not only is the rational link between the measures and its purpose explained in the answering affidavits of the Minister of COGTA and the Department of Trade and Industry as well as the expert affidavit but it is also self-evident from the content of the regulations themselves, properly construed in its context.

This case was taken on appeal.

Appeal Court decision

The Appeal Court largely upheld the High Court's ruling but the following two regulations were declared invalid:

- a) regulation 16(2)(f) of the regulations promulgated in GN 480, Government Gazette 43258 of 29 April 2020 (the level 4 regulations) is invalid to the extent that it limited: the taking of exercise to three means, namely walking, running and cycling; the time during which exercise could be taken to the hours between 06h00 and 09h00; and the

	<p>location for taking exercise to a radius of five kilometers from a person’s residence; and</p> <p>b) items 1 and 2 of Part E of Table 1, read with reg 28(3), of the level 4 regulations are invalid to the extent that they prohibited the sale of hot cooked food, otherwise than for delivery to a person’s home.’</p>
<p><i>Freedom Front Plus v President of the Republic of South Africa and Others (22939/2020)</i></p> <p>The Applicant’s attacks government’s decision to declare a state of disaster as oppose to a state of emergency. They allege that the state of disaster provisions does not adequately protect citizens against unjust and irrational decisions and regulations made by the government and does not contain the same constitutional safeguards that are in section 37 of the Constitution, which deals with states of emergency.</p>	<p>The Applicants case was dismissed. The Court noted that there is no suggestion on the papers, nor was there in argument by the Applicant, that the life of the nation is under threat from COVID-19, or that peace and security need to be restored. The court noted that a state of emergency has ‘particular jurisdictional requirements limiting the circumstances in which the power may be exercised’ and the circumstances under the coronavirus pandemic did not warrant the enactment of a state of emergency as provided for under the Constitution – being it may only be declared when the ‘life of the nation is under threat’ and it must be necessary to restore ‘peace and order.’</p> <p>Further, the court ruled that the necessary constitutional safeguards are in place under a state of disaster. The court stated that should the state unjustifiably limit fundamental rights by the measures it adopts to deal with the COVID-19 disaster, the courts may step in because courts may review a declaration of a state of disaster, any extension thereof, and any regulations enacted thereunder under the courts ordinary powers to review the exercise of any public power in section 1(c) of the Constitution, and all the provisions of the Bill of Rights,</p>

	<p>The Appeal Court overturned the decision of the High Court. The Court noted that the constitutional challenge made to the regulations was too diffuse and inadequately specified to make out a case for an infringement of the Bill of Rights.</p>
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Annexure B: Regulations & Directions by Minister of COGTA

In terms of Section 27 (2), Disaster Management Act, 2002, if a national disaster has been declared, the Minister of Cooperative Governance and Traditional Affairs may, 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 area.

Annexure C: Lockdown levels and timeline

Level 0 (15 March – 25 March 2020)

On the 15 of March 2020, a state of disaster was officially gazetted because WHO declared COVID-19 a global pandemic.

- Closure of schools and partial care facilities
- The prohibition of gatherings. The assembly of more than 50 persons at premises where liquor is sold and consumed is prohibited.
- Suspension of visits by members of the public to correctional centres, remand detention facilities, holding cells, military detention facilities and department of social development facilities (i.e. child and youth care centres, shelters, one stop centres, and treatment centres)

Level 5 (26 March -30 April 2020)

A strict nation-wide lockdown for a period of 21 days commencing on 26 March 2020 introduced and further extended to 30 April 2020 due to the rapid rise in and concern it would stretch health services.

- Stay at home orders: Movement from residence only allowed to perform an essential/permitted service, buy permitted goods and attend funeral.
- Gatherings prohibited, except at funerals, with attendance limited to 50 people.
- Suspension of visits by members of the public to correctional centres, remand detention facilities, holding cells, military detention facilities and the department of social development facilities, including child and youth care centres, shelters, one stop centres, and treatment centres.
- Limits to perform certain economic activities: Essential service business open.
- Public places and facilities where religious, cultural, sporting, entertainment, recreational, exhibition, organisational or similar activities take place is closed. (i.e. church, mosque, parks, flea markets, clubs, hotels, casinos, museums, etc.)

Level 4: 1 May -31 May 2020

On 23 April 2020 the President acknowledged that a lockdown cannot be sustained indefinitely and relaxes rules.

- A person must wear a cloth face mask when in a public place.
- Stay at home orders: Movement of persons still subject to perform an essential/permitted service. Curfew from 20H00 until 05H00 daily. Outside exercise allowed between 06H00 - 09H00 am within a 5km radius of residence.
- Gatherings prohibited, except for funerals (50 people), at a workplace or buying/obtaining goods and services

- Visits by members of the public to correctional centres, remand detention facilities, police holding cells, military detention facilities, health establishments and facilities, except to receive treatment/medication in line with health protocols; and facilities controlled or managed by the department of social development including child and youth care centres, shelters, one stop centres and treatment centres allowed but subject to the issuing of directions.
- Adjusted schedule on limits to perform certain economic activities.
- Public places and facilities (such as religious, cultural, recreational or similar) remain closed.

Level 3: 1 June – 17 August 2020

The President followed the COVID-19 risk-adjusted approach in making the decision to ease lockdown restrictions.

- A person must wear a cloth face mask when in a public place.
- Stay at home orders: Movement from residence of persons restricted to amongst others, perform an essential or permitted service, buy permitted goods and obtain services, a place of worship in the same province and attend a school or learning institution. Outside exercise limited to 06H00am to 18H00pm.
- Gatherings prohibited, except a gathering at a faith-based institution, which is limited to 50 persons or less; a funeral (50-person limit); a workplace; an agricultural auction and a professional non -contact sports match.
- Visits by members of the public to correctional centres, remand detention facilities, police holding cells, military detention facilities, health establishments and facilities, except to receive treatment/medication in line with health protocols and older persons' residential facilities, are prohibited, except as directed in Directions.
- Adjusted schedule on limits to perform certain economic activities.
- Faith based institutions allowed to open and other cultural/recreational public places/facilities remains closed.

Level 2: 18 August -20 September 2020

The decision to ease the lockdown restrictions to level two was due to declining number of COVID-19 infections.

- A criminal offense not to wear a mask in public.
- Stay at home orders: Movement from residence and between provinces, metropolitan areas and districts subject to curfew from 20H00pm until 04H00am daily except for – essential or permitted service workers, attending to a security or medical emergency.
- Gatherings at places such as faith-based institution, cinemas, workplace, conference, funerals, theatres, casinos, sporting activities, weddings, restaurants and hotels subject to 50-person limit.
- Adjusted schedule on limits to perform certain economic activities.

- Controlled visits by members of the public to all places of detention including health establishments and facilities, except to receive treatment or medication, subject to strict adherence to health protocols; and older persons' residential facilities, are prohibited except as directed by the relevant Cabinet member.
- Public places and recreational facilities to open and subject to a 50-person limit. Night clubs remain closed.

Level 1: 21 September to 28 December 2020.

The Cabinet decided to move the country to Level one following advice of scientists and engagements with stakeholders.

- Wearing a mask is not necessary if involved in vigorous exercise in a public place.
- Stay at home orders: curfew adjusted to between 23H00 until 04H00 daily.
- Gatherings allowed and adjusted up to a 100-person limit in case of an indoor gathering (subject to venue size) and 250 persons or less in case of an outdoor
- Funeral attendance adjusted to 100 persons max, subject to venue size. No night vigils/after service gatherings.
- Adjusted schedule on limits to perform certain economic activities.
- Controlled visits by members of the public to all places of detention including health establishments and facilities, except to receive treatment or medication, subject to strict adherence to health protocols; and older persons' residential facilities, are prohibited except to the extent directed by the relevant Cabinet member.

Adjusted Alert Level 3: 29 December 2020 – 31 January 2021

The President announces shift due to the resurgence in COVID-19 cases, a new COVID-19 variant.

- Stay at home orders curfew reduced to between 21H00 until 06H00 daily.
- The duration of a funeral is restricted to 2 hours and attendance of a funeral is limited to a maximum of 50 persons or 50 percent of the venue capacity if the venue is too small. No night vigils/after service gatherings.
- Social gatherings, political gatherings, traditional council meetings, faith -based gatherings, gatherings at sports grounds and fields are prohibited for two weeks. Gatherings at cinemas, casinos, museums, galleries, libraries subject to 50-person limit or 50 percent venue capacity limit if the venue is too small.
- Places and premises closed to the public: Night clubs, swimming pools except for - (i) the training of professional athletes: and (ii) swimming contests, bars, taverns and shebeens, public parks - including recreational facilities at such places where there are no access control measures and entry limitations already in place. All beaches, dams, lakes and rivers inclusive of all recreational facilities at these places, are closed to the public in all the areas declared as hotspots. (except Northern Cape)
- Adjusted schedule on limits to perform certain economic activities.

- All visits by members of the public to detention facilities such as correctional centres, remand detention, police cells, military detention; health establishments and facilities - except to receive treatment or medication and older persons' residential facilities, are prohibited except in the manner directed by the relevant Cabinet member.

Alert Level 3: 1 February 2021

The President announced the easing of a number of restrictions of advice from experts.

- Stay at home orders curfew adjusted and increased to 23H00 until 04H00 daily.
- Gatherings: social, sport and political events; traditional council meetings gatherings prohibited except religious gatherings and funerals (50 people) and other limited exceptions such as restaurants, museums and gyms.
- Faith-based gatherings will be permitted. Such gatherings may not exceed 50 people for indoor venues and 100 persons for outdoor venues or no more than 50 % of the capacity of the venue may be used for smaller venues.
- Adjusted schedule on limits to perform certain economic activities.