CHAPTER 3.2:
LEGAL CHALLENGES, HUMAN RIGHTS VIOLATIONS, AND LAW ENFORCEMENT

ABSTRACT

This chapter discusses the legal challenges to the government's disaster management measures in response to the Covid 19 pandemic. The cases discussed here are selected for their relevance regarding the application and enforcement of the statutory and institutional framework and for their human rights implications. They involve the legal foundations for responding to a disaster and the constitutional validity of the action taken by government, followed by specific human rights challenges under chapter 2 of the Constitution. Abuse of power by law enforcement agencies and procurement corruption by government officials also fall within the scope of the chapter.

There is no denying that the measures government adopted in terms of the DMA mitigated the spread of the Covid-19 pandemic, saved lives, and bought time for medical facilities to prepare to treat infected people. Although these are admirable outcomes, several legal and governance issues emerged from government's disaster management efforts. Government needs to prioritise these to act on the systemic weaknesses exposed by the pandemic. These priorities include, in no specific order: the building of efficient, responsive, and capable state institutions; modernisation and professionalisation of government services; a thorough overhaul of the functioning of the law enforcement agencies; better intergovernmental cooperation; non-selective and demonstrable criminal accountability for corrupt activities and abuse of power; and an appreciation of the potential future importance of a fundamental rights analysis in the adoption of disaster management measures.

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ABBREVIATIONS AND ACRONYMS

CoGTA	[Department of] Cooperative Governance and Traditional Affairs
DMA	Disaster Management Act
IPID	Independent Police Investigative Directorate
MEC	Member of the Executive Council
SANDF	South African National Defence Force
SAPS	South African Police Service
WHO	World Health Organization

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INTRODUCTION

Following the declaration of a national state of disaster on 15 March 2020, the South African government imposed various measures in terms of the Disaster Management Act (DMA) 57 of 2002 to combat the Covid-19 pandemic. This chapter discusses select legal challenges to these measures. It first reviews the statutory and institutional framework of government's response to the pandemic, which sets the context of the legal disputes. It then discusses several of these cases, which were selected because of their role in illustrating the constitutional and human rights issues that emerged from the nature and scope of the measures and their enforcement. Subjects covered in these challenges include the locus of the power to deal with the pandemic, issues around the National Coronavirus Command Council, the constitutionality of the DMA, the constitutionality of the minister's declaration in terms of the Act, the constitutionality of certain regulations, human rights violations during the pandemic, the abuse of power by law enforcement agencies, and corruption. The chapter concludes with recommendations.

THE STATUTORY FRAMEWORK AND LEGAL FOUNDATIONS

Government's response to the Covid-19 pandemic was founded on the powers and functions assigned to it under the DMA. As per Box 3.2.1, this distinguished the response from one in terms of a state of emergency. While the DMA appeared to be the most appropriate legislative measure at the time (as discussed in Chapter 3.1), its interpretation and application remain subject to the Constitution in terms of the supremacy clause in section 2 of the Constitution. Given the nature and impact of the restrictions government imposed in response to the pandemic, a range of constitutionally protected human rights was bound to be affected. This was the crux of several legal cases that sought to challenge government action and conduct during the pandemic.

Box 3.2.1: States of emergencies and states of disaster in South African law

In terms of section 37 of the Constitution, a state of emergency may be declared when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency. Following the *eiusdem generis* ('of the same kind') rule of interpretation, the words 'disorder, natural disaster, or other public emergency' must be given a restrictive meaning to bring them in line with the circumstances that are first mentioned as threats to the life of the nation – war, invasion, and general insurrection – which connote a military-type threat. This has implications for the threshold that must be met when applying section 37 to the other three occurrences. Consequently, section 37, read with the State of Emergency Act 64 of 1997, would have been an ill-chosen and possibly an illegal response to the pandemic.

The DMA itself, in section 2(1)(a), distinguishes between a DMA disaster and a disaster in terms of section 37 of the Constitution by suspending the application of the DMA for disasters dealt with under section 37. This suggests the threshold for determining whether a disaster has occurred in terms of the DMA is different from that for section 37.

However, in section 2(1)(b), the DMA leaves open a third possibility, namely, that government may respond to the disaster in terms of other national legislation. This option would also render the DMA inapplicable to the extent that the disaster could be dealt with effectively through existing legislation.

South Africa's response to Covid-19 was set in motion when the pandemic was declared a national disaster on 15 March 2020 (CoGTA, 2020a) under the DMA. In terms of section 23(1)(b) of the DMA,

the national executive assumed primary responsibility for coordinating and managing government's response to the pandemic (section 26 read with 23(8)). Under section 3, the president designated the Minister of Cooperative Governance and Traditional Affairs (CoGTA), Dr Nkosazana Dlamini-Zuma, as the minister responsible for administering the DMA. The minister declared a national state of disaster (Box 3.2.2) in terms of section 27(1) of the DMA (CoGTA, 2020b) this empowered her to make regulations or issue directions on a wide range of matters to deal with the Covid-19 pandemic.

Box 3.2.2: The Disaster Management Act's definition of a disaster

In section 1, 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;
    (iii) 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.'

The DMA purports to *limit the minister's wide-ranging powers* in section 27(3), which stipulates that the powers assigned to the minister may only be exercised to the extent that they are *necessary* for:

(a) Assisting and protecting the public
(b) Providing relief to the public
(c) Protecting property
(d) Preventing or combating disruption
(e) Dealing with the destructive and other effects of the disaster.

However, none of these 'purposes' is unproblematic as an adequate limit on the minister's power. The general nature and vagueness of these limits were bound to attract legal scrutiny.

Given the potentially significant impact of a disaster, cooperation between different government departments and sectors is essential for an effective response. To this end, section 4 of the DMA enables the president to establish an *Intergovernmental Committee on Disaster Management*, comprising cabinet ministers, the Members of the Executive Council (MECs) of the provinces, and members of local councils. The Committee must give effect to the constitutional principles of cooperative government (section 4(3)(a)) and must adopt a national policy framework to provide for a coherent, transparent, and inclusive policy on disaster management. Section 7(2)(b) sets *prevention* and *mitigation* as the core principles of disaster management. It also requires the envisaged policy to give effect to cooperative governance and to determine the relationship between the sphere of government with primary responsibility for disaster management and those with supportive roles. Such a policy was adopted in 2005 (Ministry for Provincial and Local Government, 2005).

In sections 8(1) and (2), the DMA provides for the establishment of a *National Disaster Management Centre* as an institution within the public service. Organisationally it is to be part of the department

for which the designated minister is responsible (CoGTA, in this case). Its objective is to promote an integrated and coordinated system of disaster management by national, provincial, and municipal organs of state, statutory functionaries, and other relevant role players (section 9). It was the Head of the National Disaster Management Centre who classified Covid-19 as a national disaster on 15 March 2020. The Centre enjoys wide powers (section 15), including monitoring whether organs of state and statutory functionaries comply with the DMA and the national disaster management framework and whether progress is made with post-disaster recovery and rehabilitation (section 15(1)(b)).

Confusion about the location of government's decision-making power arose when the president announced on 15 March that the national executive had established a *National Coronavirus Command Council* 'to coordinate all aspects of our extraordinary emergency response' (de Vos, 2020). When officials later suggested the Command Council could take binding decisions, the impression was created that it was more than simply a coordinating body. This, along with other conflicting statements on the Council's functions, raised issues about its legality and its relationship with the institutions created under the DMA, the national executive, and parliament. Adding another component to the statutory governance structure and failing to explain its function clearly (at least initially) made it all but inevitable that the new structure would give rise to litigation; such cases are discussed below.

LEGAL CHALLENGES TO GOVERNMENT'S RESPONSE TO THE PANDEMIC

THE LOCUS OF POWER

After the Covid-19 pandemic was declared a national disaster in terms of the DMA, it became apparent that government intended to locate the official response to the pandemic within the executive and regulatory powers of the CoGTA minister acting in terms of the DMA. This was to be the mechanism through which the national executive channelled its response to the pandemic. The president confirmed this in his public address of 18 May 2020, stating that the DMA is the 'basis for all the regulations promulgated under the national state of disaster', which together with the initial lockdown and risk regulations constituted 'our national coronavirus response' (The Presidency, 2020). Government's intent to maintain this position was evident every time the national state of disaster was extended in terms of section 27(4) of the DMA.

This state of affairs led to an interesting legal challenge by the Helen Suzman Foundation. In the High Court,[1] the Foundation applied for an order declaring that:

- Parliament failed to comply with its constitutional obligations to consider, initiate, prepare, and pass legislation to regulate the state's response to the pandemic.[2]
- The national executive failed to comply with its constitutional obligations to prepare and initiate legislation in response to the pandemic.[3]

[1] *Helen Suzman Foundation v The Speaker of the National Assembly*, 2020.
[2] Constitution ss 42(3), 44(1), 55(1) and 68.
[3] Constitution s 85(2).

The gist of the *Helen Suzman Foundation* case was that the DMA is a temporary measure government could use to respond to an event that is 'progressive or sudden, widespread or localised' with the consequences listed under section 1; the measure ceases to apply when government enacts national legislation in terms of section 2(1)(b). The applicant argued that parliament has a constitutional duty to reclaim the legislative functions assumed by the CoGTA minister. In allowing government to rely exclusively on the DMA and failing to prepare new legislation to govern the response to the pandemic, both parliament and the executive had abdicated their duties under the Constitution to ensure parliamentary oversight over the plethora of regulations affecting every aspect of life. Locked into these were two issues the court was asked to adjudicate:

- *The constitutional argument:* Is the power to initiate and pass legislation permissive or peremptory?
- *The interpretation argument:* Does the DMA authorise government action for as long as the pandemic persists?

The constitutional basis for the case emanates from sections 55 and 85 of the Constitution, read with section 7(2), which requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. According to section 55(1), parliament *may* pass legislation in exercising its legislative power. In terms of section 85(2)(d), the president exercises executive authority, together with other members of cabinet, by *preparing and initiating legislation*. The applicant argued that even if it is accepted that the exercise of legislative power is permissive and not peremptory in this case, under section 7(2) the state *must* respect, protect, promote, and fulfil the rights in the Bill of Rights; many of these rights have been impaired by the measures taken in terms of the DMA.

The court accepted that this may be the case but only when the context and circumstances support such a conclusion.[4] The applicant's case failed on this issue because the measures government took in terms of the DMA *aimed to protect rights*. As the court noted, if these measures had limited rights, they should have been challenged under section 36 of the Constitution (which sets out the grounds on which a right might be limited), which this case had not done. Furthermore, the applicant sought to bring a case for an additional duty to legislate for the consequences of the Covid-19 measures adopted by the state, without *identifying the outcome* the legislation had to achieve.[5]

The argument that the DMA was only intended as *a short-term measure* (until specific legislation could be adopted) also failed, as it was not substantiated by the ordinary language used in section 2(1)(b) of the Act. The court interpreted this provision as referring to existing rather than contemplated legislation. To determine whether the DMA applies, the comparison is therefore between the efficacy of other, existing legislation and that of the DMA.[6]

While one could easily concur with the judgment, an underlying issue seemed to have motivated the legal challenge, at least in part, which may be relevant for disaster management in future. This is the

[4] *Helen Suzman Foundation*, 2020: par. 55, 57, 67, 68.
[5] *Helen Suzman Foundation*, 2020: par. 68–76.
[6] *Helen Suzman Foundation*, 2020: par. 93–97.

concern that the extraordinary power given to the executive without the usual parliamentary oversight (especially in view of the far-reaching limitations on human rights and freedoms) may endure for as long as the pandemic does. The fact that this issue has frequently emerged in public comments and court cases underscores its gravity.

The National Coronavirus Command Council

The National Coronavirus Command Council has attracted criticism since its inception, and it was inevitable that its legality, powers, and functions would be challenged in the courts. In the *Esau* case,[7] the applicants inter alia sought an order declaring:

- the establishment and existence of the Council inconsistent with the Constitution and the DMA
- consequently, any decision taken by the Council inconsistent with the Constitution and the DMA.

The applicants invoked the principle of *legality*,[8] which renders any exercise of public power unlawful unless that power has been conferred on government by law. Relying on statements by government officials about the role and function of the Command Council, the applicants argued that the minister and the president had abdicated their responsibilities under the DMA by allowing the Council to assume the power to set the level and substance of the lockdown restrictions. Allowing the Council to coordinate government's response to the pandemic also allowed it to usurp the powers of the National Disaster Management Centre without a legal basis.

Despite the initial (and confusing) public statements on the role and function of the Command Council noted above, in responding to this case government argued that the Council was merely a *consultative forum* (or cabinet committee, or structure of cabinet), with advisory rather than decision-making capacity. It held that the Council had been established to enable government to deal exclusively with the pandemic, separately from other cabinet business. As the Constitution allows cabinet to arrange its own procedures,[9] government argued that it is free to establish a consultative body such as the Council to coordinate the responses of state departments to the pandemic.[10]

On the issue of the *respective coordinating functions* of the DMA centre and cabinet, the court held that the Centre's coordinating function was not an exclusive or even primary function granted by the DMA.[11] To hold otherwise would be inconsistent with section 85(2)(c) of the Constitution, which assigns overall authority to cabinet to coordinate the functions of state departments. This function cannot be delegated, by legislation or otherwise, to the Centre;[12] it remains a collective responsibility of cabinet under section 92(2) of the Constitution. As noted, section 26(1) of the DMA states unequivocally that the national executive is 'primarily responsible for the coordination and

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[7] *Esau v Minister of Co-operative Governance and Traditional Affairs*, 2020.
[8] See for instance *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,* 1998; *Affordable Medicines Trust v Minister of Health,* 2005; *Masetlha v President of the Republic of South Africa,* 2008.
[9] Government relied in this instance on s 85 of the Constitution, which is silent on this matter.
[10] On the coordinating function of cabinet, see s 85(2)(c) of the Constitution.
[11] *Esau*, 2020: par. 69.
[12] *Esau*, 2020: par. 82.

management of national disasters, irrespective of whether a national state of disaster has been declared in terms of section 27'.

The court also interpreted section 85 of the Constitution as not prohibiting the president from obtaining advice before exercising his powers. It held the appointment of a *consultative or advisory body* for that purpose to be within his discretion. Indeed, the establishment of such committees is standard practice in government.[13]

A final issue was the *lack of written authority* authorising the establishment of the National Coronavirus Command Council, a point persistently raised by the applicants in questioning its lawful existence. This issue was dealt with in terms of section 101 of the Constitution, as government argued that the president had established the Council in terms of his powers as head of the national executive. It also argued that internal cabinet processes and practices had been followed. Under section 101(1), the president's decisions need to be in writing only when they are taken in terms of legislation or when they can have legal consequences. Neither condition applied here, as the Council was not established by law. Its decisions did not have legal consequences, because they could be accepted, rejected, or modified by cabinet or individual ministers.[14]

It is doubtful whether the court's reasoning on this issue is satisfactory. The creation of the Command Council and its envisaged role in the pandemic were *not part of the executive's ordinary business*. Instead, the Council was intended to deal with an extraordinary threat with far-reaching implications. In such circumstances, the decision to establish the Council, as well as an explanation of its role and function, should at least have been recorded in the minutes of the relevant cabinet meeting.[15] Yet, government stated in its response that there was no written authority in terms of which the Council had been established.[16] If this means there was no written record of the matter, there is also no basis on which to determine whether the decisions of the Council would have legal consequences or not; this makes the application of section 101 of the Constitution rather problematic. Concerns in this regard are reinforced by the president's own statements that decisions on the lockdown levels, with all the attendant effects on individual rights and freedoms, were made on the advice of the Council.

Furthermore, the practice of *cabinet confidentiality* deserves scrutiny, as does the principle of the collective responsibility of cabinet in section 92(2) of the Constitution, on which the court ostensibly also relied in justifying the non-disclosure by government of a written authority for the establishment of the Command Council.[17] The confidentiality rule is a convention of the Westminster system of government and was transplanted into South Africa's cabinet practice via common law. It is common

[13] *Esau*, 2020: par. 72 et seq.
[14] *Esau*, 2020: par. 96.
[15] It should be noted that records of cabinet and its committees enjoy immunity against disclosure in terms of section 12 of the Promotion of Access to Information Act 2 of 2000 (RSA, 2000). However, this only applies to requests for access to information required for the exercise or protection of the rights in the Bill of Rights and not to information required solely for determining the legality or constitutionality of government conduct.
[16] *Esau*, 2020: par. 88.
[17] *Esau*, 2020 par. 89–94.

cause that this rule strengthens the collective accountability of the executive by preventing individual members from distancing themselves from decisions and policies. This enables coherent and stable government and allows cabinet to present one voice to parliament. It is also the reason why the deliberations, discussions, and individual views preceding cabinet decisions are immune from disclosure to the public (Malan, 2016:117, 119, 128, 129).

Cabinet would be entitled to rely on this convention in refusing to disclose information on these processes. It cannot, however, rely on the confidentiality convention to withhold a cabinet decision or adopted policy when that information is needed for exercising or protecting a right. The convention applies only to the extent that it is indispensable for collective cabinet accountability and coherent government. Once a decision has been taken or a policy adopted, the confidentiality justification falls away, as that decision represents the 'united front of cabinet for which cabinet, as a collective, is accountable' (Malan, 2016:131).

The court failed to make this distinction in dealing with the confidentiality and collective accountability issues. Upholding this distinction is of special significance in cases where decisions or policies have an impact on the general public (Malan, 2016:129). Thus, it seems reasonable to argue that section 32(1)(a) of the Constitution, which guarantees the right of access to information held by the state, applies here. The only way cabinet might justify withholding information would be by relying on the limitations clause in the Constitution, showing that non-compliance is justified by a law of general application and that all the conditions of section 36(1) have been met (Malan, 2016:119).

The Disaster Management Act

The constitutionality of the DMA itself was unsuccessfully challenged in the *Freedom Front Plus* case.[18] The essence of the case was that the DMA was unconstitutional in that it permits the executive to impose a state of disaster without safeguards similar to those that apply to states of emergency under section 37 of the Constitution (Box 3.2.3). The applicant argued that such safeguards are needed in a state of disaster; since the DMA fails to provide for them, it cannot withstand constitutional scrutiny.

Box 3.2.3: Constitutional safeguards in states of emergency

Under section 37 of the Constitution:

- A state of emergency may be imposed for an initial period of no more than 21 days.
- Extensions are subject to parliamentary approval.
- A competent court may review the validity of a declaration of a state of emergency, the extension thereof and any legislation enacted, or other action taken, in consequence of a state of emergency.
- Derogations from the Bill of Rights must be strictly required by the state of emergency and comply with international law.
- Indemnification of the state for unlawful conduct is prohibited.
- Non-derogable rights must still be respected.

[18] *Freedom Front Plus v President of the Republic of South Africa*, 2020.

The relevance of this case is twofold:

- The court's distinction between a DMA disaster and a state of emergency
- Its affirmation that the general powers of judicial scrutiny apply to measures adopted under the DMA.

In a state of emergency, the threat stems from the 'direst of circumstances', which put the 'life of the nation' or 'peace and order' in danger. As noted, this threshold is markedly higher than in a national disaster.[19] Also, under states of emergency certain fundamental rights may lawfully be suspended, hence the need for built-in safeguards.[20] By contrast, restrictive measures such as those imposed under the DMA remain subject to the general limitation provisions of the Constitution, along with the constitutional legality rule in section 1(c). Courts apply these as a matter of course when the constitutionality of legislation or government conduct is challenged. This remedy remains unimpaired by the absence of built-in safeguards in the DMA.[21]

Given the distinction between a national disaster and a state of emergency, another part of the argument also failed – that the DMA is unconstitutional because it does not expressly provide for parliamentary oversight. The court held that section 37 of the Constitution expressly provides for parliamentary oversight because it permits constitutional deviations under states of emergency. Where no such deviations are permitted, the need for an explicit provision for oversight falls away. Whether parliament has duly complied with its obligations in this regard is a separate issue and does not render the DMA unconstitutional.[22]

THE MINISTER'S DECLARATION OF A NATIONAL STATE OF DISASTER

The *De Beer* case challenged the constitutional validity of the minister's declaration under section 27(1) of the DMA that the pandemic constitutes a national state of disaster.[23] It also challenged the constitutionality of certain regulations promulgated by the minister, as discussed in the next section.

The applicants argued that the minister's declaration of the pandemic as a national disaster was not constitutionally valid, because government's response to Covid-19 was irrational and an overreaction. To substantiate this argument, they cited other diseases plaguing the country and the continent, such as tuberculosis and influenza.

The court dismissed the challenge.[24] It considered the global spread of Covid-19, the stance of the World Health Organization (WHO) and its plea to governments to take the pandemic seriously, and the absence of an effective vaccine. It also accepted that government needed time to address the shortcomings of an 'ailing and deteriorated public healthcare system' and to increase its state of

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[19] *Freedom Front Plus*, 2020: par. 59–60.
[20] *Freedom Front Plus*, 2020: par. 62–63.
[21] *Freedom Front Plus*, 2020: par. 66–67.
[22] *Freedom Front Plus*, 2020: par. 69.
[23] *De Beer v Minister of Cooperative Governance and Traditional Affairs*, 2020.
[24] *De Beer*, 2020: par. 4.12.

readiness through drastic and urgent measures to slow the rate of infection, all of which could be deemed ‘special circumstances’ under section 27(1).

This issue elicited some remarks from the court. The applicants did not rely on any of these justifications to attack the constitutionality of the minister’s declaration; thus, the court’s remarks, although *obiter dicta* (incidental and not legally binding) for purposes of the judgment, suggest a need to reflect on government’s handling of this and any future matters of this kind. The minister seemingly invoked, inter alia, the section 27(1) justifications – existing legislation and contingency arrangements were not adequate, and special circumstances warranted the declaration of a national state of disaster. However, she failed to elaborate either on the shortcomings of existing legislation or arrangements or on the special circumstances. The court found it ‘somewhat disturbing’ that there was no time delay between the National Disaster Management Centre classifying the pandemic as a national disaster (under section 23(1)(b) of the DMA) and the Minister’s declaration under section 27(1). In fact, they were made on the same day and published in the same Government Gazette. There was therefore *no time for shortcomings in existing legislation to have manifested*.[25] This raises the question whether the minister applied her mind and formed an opinion independently of the Centre’s classification, or whether she made the declaration on the basis and because of the classification.

This issue is important because the grounds for classifying an event as a national disaster in section 23 are substantially different from those in section 27 for declaring a national state of disaster. The latter fall within the purview of the minister and no-one else; thus, her justification for invoking section 27(1), which she chose not to discuss, goes to the heart of the legality of her action. Had the applicants structured their attack in accordance with the section 27(1) requirements in the form of a review application, as opposed to an urgent application, the outcome could have had greater significance for the future interpretation and application of this section. Nevertheless, a responsible government would diligently inform itself of the factual and legal components of its actions in response to this disaster; this would help it prepare to be more accountable in any future disasters.

Regulations adopted in terms of the Disaster Management Act

The regulations around the different lockdown levels caused widespread public discontent. Social media accounts exposing their contradictions demonstrated the public’s frustration. Predictably, the validity of the measures was challenged; some examples of these challenges are discussed here. They illustrate the dilemma of balancing the need to fight the pandemic with the resulting limitations on constitutional rights. In the early cases, the courts applied a rationality analysis, which caused confusion or attracted criticism; in subsequent judgments, a limitation of rights analysis was applied.

Rationality analysis: The low threshold

In the *De Beer* case discussed above, the measures in question were those published in Government Notice 608 of 28 May 2020 (CoGTA, 2020c). They related to alert level 3 regulations, which added a

[25] *De Beer*, 2020: par. 4.10–4.11.

Chapter 4 to the existing alert level 4 regulations, with a view to easing the level 4 restrictions. The applicants argued that the regulations were irrational and unconstitutional, and that all the regulations promulgated by the minister should be declared unconstitutional, unlawful, and invalid.

The court correctly noted that the rationality test requires regulations to be rationally related to the purpose for which they were adopted.[26] This test requires the courts to establish whether the means used to achieve a certain objective (e.g., limiting the spread of the virus and preventing healthcare facilities from being overwhelmed) are, objectively speaking, rationally connected to the objective. If not, they cannot pass constitutional scrutiny.[27] However, in some instances the court seems to blur the distinction between the rationality test and the limitation of rights test in section 36 of the Constitution. The latter is essentially a *proportionality* test to determine whether an infringement of or encroachment on rights is reasonable. In dealing with the limitations that apply to the regulations in general, the court mentioned this test in the same breath as the rationality test.[28] More important, though, was the court's conclusion on the rationality of the lockdown regulations:

> Insofar as the 'lockdown regulations' do not satisfy the 'rationality test', their encroachment on and limitation of rights guaranteed in the Bill of Rights … are not justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in Section 36 of the Constitution.[29]

Apparently to illustrate the irrationality of the regulations, the court alluded to several contradictory outcomes, in which the regulations affect different categories of people unequally.[30] But unfair or unequal treatment is not an element of the rationality test; rather, it is to be dealt with under the Bill of Rights, which involves the reasonableness and proportionality of the rights infringement. This aspect of the judgment was critically reviewed by a number of commentators. Another concern is the indiscriminate finding of invalidity of the regulations as a whole (with a few exceptions), instead of testing each regulation for rationality (Rautenbach, 2020:825; Moosajee & Davis, 2020; Brickhill, 2020:1; Malan & Grobbelaar-Du Plessis, 2020).

A further matter relates to the lack of evidence in the papers filed by the state on whether the responsible minister had properly applied her mind to the impact of the regulations on people's constitutional rights;[31] this should have involved an analysis in terms of section 36 of the Constitution. The court's comments in this regard were rather damning:

> The clear inference I draw from the evidence is that once the Minister had declared a national state of disaster and once the goal was to 'flatten the curve' by way of retarding or limiting the spread of the virus, … little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was

[26] *De Beer*, 2020: par. 6.1.
[27] *De Beer*, 2020: par. 6.2–6.3.
[28] *De Beer*, 2020: par. 6.1.
[29] *De Beer*, 2020: par. 9.4.
[30] *De Beer*, 2020: par. 7.
[31] *De Beer*, 2020: par. 7.16.

> justifiable or not. The starting point was not 'how can we as government limit Constitutional rights in the least possible fashion whilst still protecting the inhabitants of South Africa', but rather 'we will seek to achieve our goal by whatever means, irrespective of the costs and we will determine, albeit incrementally, which Constitutional rights you as the people of South Africa, may exercise'. The affidavit put up on behalf of the Minister confirms that the factual position was the latter. … This paternalistic approach, rather than a Constitutionally justifiable approach, is illustrated further by the following statement by the Director-General: 'The powers exercised under lockdown regulations are for public good. Therefore, the standard is not breached.'[32]

Government's subsequent application for leave to appeal was unsuccessful, except in one aspect – the alleged blanket declaration of invalidity beyond the individually identified regulations above.[33] Government contended that the relief ordered in the initial judgment was vague and constituted a ground for appeal. The court had ordered the minister to undertake an evaluation to determine whether the measures encroach on individual rights and whether such encroachment is justifiable. She was also ordered to review, amend, and republish the regulations in question to address their deficiencies. In her application for leave to appeal, the minister argued that she is not told what is required of her to comply with the orders. In dismissing this ground for appeal, the court had the following to say about the evaluative exercise issue:

> It therefore follows that in every instance where the exercise of executive power impacts on or infringes on those rights of people enshrined in Chapter 2 of the Constitution, an evaluative exercise must be undertaken to determine the extent of the infringement and the social justice impact thereof. The evaluative exercise involves both a consideration of the justification of the impact and the determination of appropriate steps to mitigate such impact. This is not new law or a novel concept, it is an obligation imposed by section 36 of the Constitution. It follows on the onus imposed on the executive who curtails constitutional rights, to be able to justify such curtailment. … Again, this is an exercise that the Minister must undertake and for this court to have prescribed how exactly the regulations must be amended, would have improperly crossed the boundaries of the separation of powers.[34]

A remaining matter is the *state's compliance with court orders during the pandemic*; this cannot be divorced from government's accountability in general. Given that circumstances were fluid during the pandemic, government's response also had to change over time. Thus, regulations were frequently reviewed and amended as circumstances changed. This also happened before, during, and after the litigation in the *De Beer* case. As the court pointed out in the initial judgment and in the application for leave to appeal, there was no way of telling whether the regulations had been amended in compliance with the court order or in response to the changing pandemic, unless government provided clarity in this regard. The minister gave no such indication in this case and did not indicate

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[32] *De Beer*, 2020: par. 7.17–7.18.
[33] *Minister of Cooperative Governance and Traditional Affairs v De Beer*, 2020: 6.3–6.4 and 12. At the time of finalising this chapter, this case was still on appeal before the Supreme Court of Appeal.
[34] *Minister of Cooperative Governance v De Beer*, 2020: par. 7.7–7.8.

whether the evaluative exercise required by section 36 of the Constitution had been undertaken in response to the court's order.[35] Was government applying obscurantism (i.e., deliberately preventing the full details from becoming known) to sidestep court orders and let them become irrelevant as circumstances changed? This question will probably never be answered, but the concerns it raises about government's responsibility in a constitutional democracy should not be dismissed easily. The measures imposed on the public have far-reaching consequences for individual rights and freedoms.

Proof of this is the *Esau* case discussed above, which was decided barely two weeks after judgment had been handed down in the *De Beer* case. In *Esau*, the regulations in question were those in force during alert level 4. Some remained in force under alert level 3, subject to the necessary amendments. These regulations restricted movement (regulation 16) and the consumption and purchase of certain goods (regulation 28). They were challenged on the basis of being unconstitutional, unlawful, and invalid. Here too, the applicants invoked the contradictory and arbitrary nature of the regulations.[36]

However, the applicants' legal justifications of the claims of unconstitutionality and unlawfulness (illegality) were rather confusing. At one point, they argued that human dignity had been infringed by regulation 28 (consumption and purchasing choices) and freedom of movement by regulation 16 (a curfew and limitations on the place and duration of physical exercise), both of which are fundamental rights.[37] At another, they claimed unlawfulness because the regulations were not necessary to curb the spread of the pandemic. Like the human rights infringements, such a challenge would as a matter of course trigger the application of section 36 of the Constitution. Yet, the applicants invoked section 27(3) of the DMA,[38] which lists the requirements for determining whether the minister's regulations are necessary for responding to a national disaster. They argued that the regulations went beyond what is allowed under section 27(3),[39] asserting that less restrictive means could have been used to curb the spread of the pandemic.[40] However, the 'less restrictive means' requirement is a factor that must be considered under section 36 of the Constitution in determining whether a limitation of a fundamental right is justifiable. Therefore, it is not relevant for determining whether the minister acted within the confines of section 27(3) of the DMA.

The applicants' submissions, at least as recorded in the judgment, did not refer to the relevant constitutional provisions on the infringement of fundamental rights. Rather, they specifically relied on the DMA, in particular sections 27(2) and (3). The court confined itself to section 27(3) for considering the rationality and, hence, the legality of the regulations.[41] It opted for an extensive interpretation of this section by relying on section 59(1) of the DMA, which allows the minister to make regulations that are (a) not inconsistent with the Act, and (b) necessary to achieve its objectives. The court held that

[35] *Minister of Cooperative Governance v De Beer*, 2020: par. 10.
[36] *Esau*, 2020: par. 182 et seq.
[37] *Esau*, 2020: par. 183.4–183.5.
[38] *Esau*, 2020: par. 183.14.
[39] *Esau*, 2020: par. 183.6.
[40] *Esau*, 2020: par. 183.10 read with par. 183.12.
[41] *Esau*, 2020: par. 202.

ancillary objectives, not expressly stated but necessary for an effective response to the pandemic, could also be regulated.[42] It was, therefore, satisfied that government's measures were rationally connected to their objectives and, hence, lawful and constitutional.[43]

The court relied on the lowest of thresholds – the rationality test. It was entitled[44] to have undertaken, on its own volition, an analysis in terms of section 36(1) of the Constitution to determine whether the rights infringements were justifiable. That it did not do this was correctly criticised (see, for example, van Staden, 2020). The court was not unaware of the human rights implications of government's measures; the applicants' submissions even alluded to certain infringements. The court also at one point countered the applicants' position that the regulations were contradictory and arbitrary by stating that this was not the test it had to apply under section 36(1); instead, it had to assess whether the measures were reasonable and justifiable in an open and democratic society.[45]

However, the court did not apply this analysis to the regulations in question, which would have clarified the application of constitutional safeguards in the context of disaster management. Rather, it opted for the rationality threshold and lowered this threshold even further by applying an extensive interpretation of the minister's invasive powers under the DMA. If such choices are motivated by deference to the executive, there is much to be learnt from the comment by Rautenbach (2020:836):

> Giving effect to the bill of rights cannot be diluted by applying different levels of judicial control of the limitation of rights on the basis of the identity of the alleged perpetrators (the executive, administrative organs, legislatures, or private persons) or the kind of action which they perform (legislative, executive, administrative or private action). There is no indication in the constitution that executive or administrative action that limits rights may be reviewed only or preferably on the basis of a weak rationality standard.

Limitation of rights analysis: The high threshold

The above concerns with the High Court's approach were remedied when the matter went to the Supreme Court of Appeal.[46] In approaching the question of the lawfulness of the regulations from a limitation of rights perspective, the court applied the well-established two-stage process:

- The applicants must first show that the regulations infringe on one or more fundamental rights.
- If they succeed, the burden shifts to the respondents to justify the infringement in terms of section 36(1) of the Constitution.[47]

The court had no difficulty in concluding that certain regulations infringed the right to freedom of movement[48] (section 21(1)), the right to dignity[49] (10), and the right to practise one's trade and

[42] *Esau*, 2020: par. 246–247.
[43] *Esau*, 2020: par. 251 et seq.
[44] See *CUSA v Tao Ying Metal Industries*, 2008: par. 67.
[45] *Esau*, 2020: par. 231.
[46] *Esau*, 2021.
[47] *Esau*, 2021: par. 108.
[48] *Esau*, 2021: par. 117.
[49] *Esau*, 2021: par. 118.

profession[50] (22). Equally unproblematic was the section 36(1)(b) requirement – the importance of the purpose of the limitation. The court was satisfied that regulations 16 and 28 were intended to keep the pandemic under control, to save lives, and to relax some of the restrictions on social and economic activity.[51] In respect of the nature and extent of the limitations, which the court must consider under section 36(1)(c) of the Constitution, it was satisfied that the regulations qualified and reduced the impact of the infringements by providing for certain exceptions and exemptions to the alert level 3 regulations.[52] On the basis of this analysis, the court concluded:[53]

> For the most part, I am satisfied that the means chosen – and the limitation of rights that those choices brought about – were objectively rational. They were also proportional in the sense that, in the circumstances, those means were necessary to deal with the exigencies faced by the country, struck appropriate balances between the adverse and beneficial effects of the response to the pandemic and were suitable for their intended purpose.

However, parts of the respondents' case met with the court's disapproval under the last two factors in sections 36(1)(d) and (e). Respectively, they require a rational connection between the limitations and their purpose and the consideration of less restrictive means to achieve that purpose. As the court noted, these factors relate to the reasonableness of the infringements and constitute the 'heart of the limitation enquiry'.[54] As such they were destructive of the limitations in two regulations:

- Regulation 16(2)(f) permitted only limited forms of exercise during a defined period and within a specific locality. The court found these restrictions to be neither rational nor proportional. They undermined the objective of the movement regulations, as they concentrated people in specified times and localities. Equally irrationally, only three forms of exercise were allowed.[55]
- Regulation 28(3) prohibited the selling of hot, cooked food over the counter to in-store customers. The court found this to be arbitrary and not proportional to what it sought to avoid – people congregating at a counter – as they were still allowed to obtain other food from these counters.[56]

The issue of applying different levels of judicial control over measures that violate individual rights also emerged from cases on the tobacco sales ban. In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa,*[57] the applicants challenged regulations prohibiting the sale of tobacco and tobacco products except for export and sought an order invalidating them (see also Chapter 6.5). The applicants appeared to base their challenge on the rationality principle,[58] although

[50] *Esau*, 2021: par. 121.
[51] *Esau*, 2021: par. 130–132.
[52] *Esau*, 2021: par. 133–138.
[53] *Esau*, 2021: par. 142.
[54] *Esau*, 2021: par. 139.
[55] *Esau*, 2021: par. 144–147.
[56] *Esau*, 2021: par. 152.
[57] *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa, 2020.*
[58] *Fair-Trade*, 2020: par. 13, 15.

they also mentioned that proportionality had not been considered.[59] This speaks to the lawfulness of a rights limitation under section 36(1) of the Constitution.

However, the court itself removed any doubt about the correct basis of the challenge by affirming that the challenge against the tobacco sales ban 'is founded on the legality principle in that banning the sale of cigarettes and tobacco products bears no rational relationship to curbing the spread of the COVID-19 virus'.[60] The court applied the legality principle under the rule of law[61] in determining whether the sales ban helped achieve government's aim to save lives, promote health, and reduce the burden on the healthcare system. This placed the analysis outside the Bill of Rights framework. Thus, the court had to determine 'whether a rational connection between a legitimate governmental purpose (i.e., containing the spread of the virus and saving lives) and the means chosen (i.e., banning the sale of all tobacco products) exists'.[62] This then turned on the question whether smokers were at a higher risk of contracting the virus and whether their impaired lung capacity (and other ailments) would make them more likely to need hospital care and take up beds and limited resources. Inconclusive evidence on this did not prevent the court from dismissing the applicants' case by concluding as follows:[63]

> In our view, the medical material and other reports, inclusive from the WHO, considered by the Minister, though still developing and not conclusive regarding a higher COVID-19 virus progression amongst smokers compared to non-smokers, provided the Minister with a firm rational basis to promulgate regulations 27 and 45, outlawing the sale of tobacco products and cigarettes. This in our view is a properly considered rational decision intended to assist the State in complying with its responsibilities of protecting lives and thus curbing the spread of the COVID-19 virus and preventing a strain on the country's healthcare facilities.

This illustrates how easily government could comply with the rationality test as a requirement for lawful conduct, even in cases where the measures clearly encroach on fundamental rights. A different scenario unfolds under a fundamental rights-based analysis, as happened in *British American Tobacco South Africa (Pty) Ltd and Others v The Minister of Co-operative Government and Traditional Affairs*.[64] As in the *Fair-Trade* case, the applicants in *American Tobacco* challenged regulation 45 (promulgated on 28 May 2020 and amended on 12 July 2020), which prohibited the sale of tobacco, tobacco products, e-cigarettes, and related products to members of the public. However, they challenged the constitutionality of the regulation by invoking fundamental rights violations – sections 22 (freedom of trade), 25 (arbitrary deprivation of property rights), 10 (dignity), 14 (privacy), and 12(2) (bodily and psychological integrity).[65]

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[59] *Fair-Trade*, 2020: par. 14.
[60] *Fair-Trade*, 2020: par. 15.
[61] See also *Fair-Trade*, 2020: par. 19.
[62] *Fair-Trade*, 2020: par. 28.
[63] *Fair-Trade*, 2020: par. 43.
[64] *British American Tobacco South Africa (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs,* 2020.
[65] *BATSA*, 2020: par. 136.

Having found that regulation 45 violated these fundamental rights,[66] the court focused on the justification of the violation. As noted, in terms of section 36(1) of the Constitution, the onus falls on government to establish a factual basis showing that the benefits of the regulation exceed the harm it causes.[67] The proportionality test is relevant here; it entails a balancing of interests, which as the court noted, is a much more stringent test than the rationality test applied in *Fair-Trade*.[68] Government failed to meet this threshold. It could not convincingly show that the use of tobacco increased the risk of developing a more severe form of the disease and so increased the strain on the public health system. Moreover, the sales ban also failed in its objective of curbing the number of smokers, as it stimulated extensive illicit trade in tobacco products.[69]

SPECIFIC HUMAN RIGHTS CHALLENGES

Several cases challenged aspects of government's response to the pandemic on the grounds that these contravened various provisions of the Bill of Rights. Some of these cases are discussed below.

ACCESS TO SOCIAL ASSISTANCE

On 21 April 2020, the president announced that a new social relief grant would be available for 'South African citizens, permanent residents and refugees' who were negatively affected by government's response to the pandemic. According to the Minister of Social Development, the grant sought to mitigate the deepening of poverty, the increase of hunger, and the catastrophic human and social effects of the pandemic. But the list of beneficiaries in the announcement meant that special permit holders and asylum seekers who had valid permits and visas, and who were lawfully in South Africa, were excluded from the scheme.

At the time, the Scalabrini Centre in Cape Town experienced an influx of asylum seekers and permit holders requesting assistance. Many of them had been self-employed or ran informal businesses before the lockdown. Most had no savings, and as they could not earn any income, they could not sustain themselves and their families, and their children could no longer benefit from school feeding schemes. Having been unable to engage government about the exclusion of asylum seekers from the social grant, the Scalabrini Centre successfully lodged an urgent application in the North Gauteng High Court[70] to declare the exclusion unconstitutional.

The finding for the applicants turned on three provisions in the Bill of Rights: sections 27 (right to healthcare, food, water, and social security), 9 (right to equal treatment) and 10 (human dignity). This is one of those obvious cases that should have been settled internally by the relevant government

[66] *BATSA*, 2020: par. 140 et seq.
[67] *BATSA*, 2020: par. 156–163.
[68] *BATSA*, 2020: par. 156–157.
[69] *BATSA*, 2020: par. 164 et seq. and 174 et seq. See also Chapter 6.5.
[70] *Scalabrini Centre of Cape Town and Another v Minister of Social Development*, 2020.

departments when the social grant was first considered; alternatively, it should have been settled out of court. The reasons are as follows:

- The legal position is and was clear at the time. Section 27(1) of the Constitution guarantees 'everyone' the right of access to, inter alia, sufficient food and water, along with social security, which includes appropriate social assistance if they 'are unable to support themselves and their dependents'. Moreover, the Constitutional Court's 2004 judgment on the application of section 27 in the *Khosa* case[71] makes it clear that given the purpose served by social security, the impact of an exclusion on the affected people, and the wording of section 27(1), the exclusions *in casu* ('in the case') would be unconstitutional.
- The exclusions could not be justified under the regulations in terms of the Social Assistance Act 13 of 2004. Regulation 9(1)(b) provides that a person in need of immediate temporary assistance qualifies for certain social relief of distress if that person is a *South African citizen, permanent resident, or refugee*. However, this is subject to regulation 9(5): 'Notwithstanding the provisions of sub-regulation 9(1), in the event of a declared or undeclared disaster: (i) a person may qualify for social relief … if that household has been affected by a disaster as defined in the DMA …'. As the court in *Scalabrini* concluded, the announcement's reliance on regulation 9(1) while ignoring regulation 9(5) was a 'clear misdirection', as regulation 9(5) 'widens the eligibility requirements for access to social relief of distress during a national disaster'.[72]

This raises questions about the minister's reasons for allowing this matter to go to court and the nature of the legal advice she received. Moreover, she filed a notice to defend the urgent application on 25 May 2020, only to withdraw it on 11 June and replace it with a notice to abide. Despite this notice, the minister was represented by senior counsel when the matter served before the court and after agreement on an out-of-court settlement could not be reached.[73] Is the state's conduct in this matter that of a responsible government that is constitutionally bound to promote the efficient, economic, and effective use of resources?

RACE-BASED ACCESS TO FINANCIAL AID

To mitigate the consequences of the lockdown measures, government provided various relief funds and packages (see also Chapters 5.3 and 6.1). The legal authority for this action was sections 27(2) and (3) of the DMA, which empower government to release available resources to provide relief to the public. Some of these schemes were controversial because they used race-based criteria for the disbursement of the funds.

In the *Solidarity* case,[74] the dispute stemmed from the Minister of Tourism's statement that (a) the disbursement of financial relief from the Tourism Fund would be guided by the Tourism Broad-Based

[71] *Khosa v Minister of Social Development*, 2004.
[72] *Scalabrini,* 2020: par. 38.
[73] *Scalabrini,* 2020: par. 1–5.
[74] *Solidarity obo Members v Minister of Small Business Development,* 2020.

Black Economic Empowerment Codes of Good Practice, and (b) the Fund would be administered in line with the objectives of economic transformation. The result was a system for scoring applications that awarded more points to black-owned companies than to white-owned ones.

The applicants requested the court to set aside the minister's decision to use race-based criteria for disbursing the Fund. They argued that the DMA does not empower the minister to consider economic transformation and black economic empowerment objectives in dealing with the pandemic. This argument failed. The court adopted a contextual interpretation of sections 27(2) and (3) of the DMA, holding that the minister could consider the relevant empowerment codes and that, to the extent that the disaster led to the closure of black-owned businesses, it would undermine government's economic transformation policies and the advancement of equality in terms of section 9(2) of the Constitution.[75] In concluding that a race-neutral response could deepen the fault lines in society, the court highlighted that the pandemic

> made it evident that more often than not the poor and the disadvantaged face the major brunt of the crisis. The response to the crisis must therefore recognise this uneven playing field and therefore calibrating such a response to deal with the impact of the crisis as well as the effect of historical disadvantage is not only permissible at the level of principle but warranted and necessary.[76]

Of importance for a related case, dealt with below, is the court's assessment of government's scoring criteria for the funds. As for the race categories, the court found that the scoring mechanism provided adequate flexibility in dealing with race.[77] Moreover, as race-related criteria accounted for only 20% of the score, race did not give black-owned business an insurmountable advantage over white ones.[78]

Less than two months later, these issues were the subject of litigation in the *Democratic Alliance* case.[79] The Minister of Small Business Development had established two funds to support small, medium, and microenterprises:

- The *Debt Finance Scheme:* Debt and repayment relief during the national state of disaster.
- The *Business Growth Resilience Fund:* Assistance to manufacturing businesses to take advantage of opportunities resulting from the pandemic or shortages in the local market.

The funds attracted attention because of the criteria for their allocation; the matter stemmed in no small measure from contradicting ministerial statements. At a press briefing on 24 March 2020, the minister stated emphatically that all small and medium-size enterprises would be supported, and no race requirements for funding would apply. On 30 April 2020, however, the minister said the opposite, making it clear that black economic empowerment would be a 'fundamental requirement'. She added that gender, geographic location, age, and disability would also be taken into consideration.

[75] *Solidarity*, 2020: par. 24, 25, 27, 28.
[76] *Solidarity*, 2020: par. 36.
[77] *Solidarity*, 2020: par. 39.
[78] *Solidarity*, 2020: par. 41–43.
[79] *Democratic Alliance v President of the Republic of South Africa*, 2020.

Against this backdrop, the Democratic Alliance, the official parliamentary opposition, instituted proceedings in the High Court seeking an order interdicting government from using these criteria.[80] Essentially, it argued that the criteria mentioned by the minister constituted an unpredictable system – the minister failed to explain how each factor would be weighted (i.e., how important they were relative to each other or to other factors).[81] This meant the allocation system would be vague, because applicants would not know in advance how their applications would be assessed. Such vagueness could lead to arbitrary decision-making.[82]

The court went along with the scoring criteria and judgment in the *Solidarity* case[83] and *in casu* granted the request for review and setting aside government's decision because of the vagueness of the criteria. The minister was required to redraft the regulations and reconsider the role of race, gender, youth, and disability to provide clear guidelines for disbursing the funds.[84] The court reasoned:

> It is for the Minister to make sure that the criteria to be employed for the disbursement of public funds are not left to a simple laundry list of hygiene and procedural characteristics buttressed by one vague statement that 'priority would be given' to women, the youth and the disabled. Such a broad phrase without any guidance as to what weight is to be given to these criteria simply cannot pass muster in our constitutional democracy. The ostensible criteria fall foul of basic principles of the rule of law such that the requirement that the exercise of a public power must be certain, even, as is obviously the case in these circumstances, the discretion to allocate funds is permissible.[85]

The remaining issue in the applicant's case, namely, whether the minister was at all entitled to use the criteria mentioned, turned on the interpretation and application of the DMA. As in the *Solidarity* case, the applicant argued that the factors the minister used are not themselves mentioned in the DMA and could not be applied in response to the disaster. In using these criteria, government sought to pursue economic transformation objectives unrelated to the DMA's disaster management objectives.[86] As this argument failed for the same reasons as in the *Solidarity* case, it is not discussed further here.

Brutality during the lockdown

Few cases speak so loudly of government intransigence and ineffectiveness as the *Khosa* matter.[87] On 25 March 2020 the president, in terms of section 201(2) of the Constitution, issued President's Minute 78 of 2020, authorising the South African National Defence Force (SANDF) to support other state departments in ensuring law and order and compliance with the lockdown regulations.

[80] *Democratic Alliance*, 2020.
[81] *Democratic Alliance*, 2020: par. 15.
[82] *Democratic Alliance*, 2020: par. 18.
[83] *Democratic Alliance*, 2020: par. 26, 27, 31.
[84] *Democratic Alliance*, 2020: par. 53–55.
[85] *Democratic Alliance*, 2020: par. 31.
[86] *Democratic Alliance*, 2020: par. 35–39.
[87] *Khosa v Minister of Defence and Military Veterans*, 2020.

On 10 April 2020, during a joint operation to enforce restrictions on civilian movement and activities, members of the SANDF entered the home of a Mr Collins Khosa in Alexandra township. They accused him and another inhabitant, without credible evidence, of violating the lockdown regulations. In the course of events, witnessed by bystanders, Mr Khosa was allegedly forcefully pulled out of his home and taken outside, where he was violently assaulted. He died shortly afterwards; the medical report recorded blunt force trauma to his head and torso as the cause of death. According to bystanders, the cell phone videos they took of the incident were deleted by the SANDF members.

In High Court proceedings, the applicants sought, and the court granted, relief on multiple issues:

- It declared that fundamental rights and freedoms must be upheld even under a state of disaster.
- The security services remain bound by domestic law to use only minimum force that is reasonable in the circumstances.
- The members involved must be placed under precautionary suspension pending the outcome of disciplinary proceedings.
- A code of conduct for and guidelines on the enforcement of lockdown regulations must be developed.
- Internal investigations into the incident must be completed and reports furnished to the court.[88]

Several issues that emerged from the court record suggested a dismissive attitude in government to the potential for abuses in the enforcement of lockdown regulations. These included:

- Public statements before and after the incident by the ministers of Police and Defence *failed to unequivocally condemn the unnecessary use of force* by security officials. Instead, it was implied that the public provoked the security forces into forceful reaction, and they were warned to refrain from such behaviour.[89] Also, when questioned in parliament about alleged brutality during the lockdown, the Defence Force Chief of Staff, Lieutenant-General Lindile Yam, was dismissive: 'You [the parliamentarians] are not our clients, we are not the Police Force. We take our instructions from the Commander-in-Chief [the President]'.[90] As the court observed, the Chief of Staff 'seems to have forgotten that we live in a constitutional democracy where parliament … is the legislative authority'.[91]
- Regulation 11E provided that *no person would be entitled to compensation* for any loss or damage arising from an act or omission by an enforcement officer acting under the DMA regulations. The court held that this 'seems to offer a wholesale indemnity for law enforcement officials and adds to the already lacklustre response by the commanding officers to the increasing spate of lockdown brutality'.[92]
- In engaging with the Minister of Defence to seek clarity on the investigation into Mr Khosa's death, the applicants seemingly had to contend with a dismissive attitude, a denial of any wrongdoing,

[88] *Khosa,* 2020: par. 23, 146.
[89] *Khosa,* 2020: par. 35–46 et seq.
[90] *Khosa,* 2020: par. 47.
[91] *Khosa,* 2020.
[92] *Khosa*, 2020: par. 43.

and a failure to provide the requested information.[93] Indeed, the court pointed out that no proper investigation was in progress at the time of the hearing and none of the applicants or witnesses had been medically examined or interviewed until after the hearing. 'This alone', the court concluded, 'shows that the existing bodies are either not competent or not committed …'.[94]

When it finally completed the investigation, the SANDF exonerated the soldiers from all wrongdoing. It was widely criticised for its poor investigation and flawed conclusions. The SANDF investigation had apparently not been taken seriously (Unchain Our Children, 2020; Ngoepe & Wa Afrika, 2020; Nicolson, 2020).

These observations on the lack of urgent and proper investigations form part of the court's treatment of the *standards set by international law* and the inadequacy of domestic investigative mechanisms.[95] As noted, the applicants sought, inter alia, a declaration that enforcement officials must observe fundamental freedoms even during a national disaster. This includes the freedom not to be tortured or treated or punished in a cruel, degrading, or inhuman way (sections 12(1)(d) and (e) of the Constitution). Apparently, there was also evidence of other incidents in which civilians had been maltreated in the enforcement of the lockdown regulations; some even died as a result.[96] This prompted the court to invoke the Prevention and Combating of Torture of Persons Act 13 of 2013 (RSA, 2013), coupled with South Africa's obligations under the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the country ratified in 1998 (OHCHR, 1984).

By the time the *Khosa* case was heard, South Africa had been repeatedly criticised by international bodies for *deficient investigations* into allegations of torture and mistreatment by law enforcement agencies, for weaknesses in investigative mechanisms, and for the failure to prosecute any officials (CAT, 2006: par. 20; CAT, 2019). In *Khosa*, the court noted that these reports were borne out by the facts of the case.[97] This brought under scrutiny the only two bodies tasked with investigating complaints against the South African Police Service (SAPS) and the SANDF[98] – the Independent Police Investigative Directorate (IPID)[99] and the Office of the Military Ombud.[100]

- *IPID* suffered, even by its own assessment, from a lack of sufficient resources, did not have a permanent executive director, and was impeded in its functions by a constitutionally defective Act that government had failed to remedy within 24 months, as ordered by the court in *McBride v Minister of Police,* 2016.

[93] *Khosa*, 2020: par. 50–51.
[94] *Khosa*, 2020: par. 137.
[95] *Khosa*, 2020: par. 131 et seq.
[96] *Khosa*, 2020: par. 24, point 4.
[97] *Khosa*, 2020: par. 137.
[98] *Khosa*, 2020: par. 138 – 141.
[99] Established in terms of the Independent Police Investigative Directorate Act 1 of 2011 (RSA, 2011).
[100] Established in terms of the Military Ombud Act 4 of 2012 (RSA, 2012).

- In *Khosa*, the court found *the Office of the Military Ombud* equally incapable of investigating complaints effectively and independently. For instance, it lacks institutional independence, in that the Ombud is required to have at least 10 years military experience, there is no procedural safeguard against the removal of the Ombud by the president, its budget is determined by the Minister of Defence, it is accountable to the minister and not to parliament, and the method and conduct of its investigations are prescribed by ministerial regulations.[101] Like IPID it also lacks sufficient resources and capacity to deal with its case load.[102] However, to its credit, in August 2020 the Ombud found that the soldiers implicated in the death of Mr Collins Khosa had acted improperly, irregularly, and in contravention of their code of conduct (Makinana, 2020). However, at the time of writing the conclusion of the criminal investigation into the murder of Mr Khosa by the SAPS was still outstanding. Even after several months, a request to a high-ranking police official for information on progress with the police investigation is as yet unanswered.

When reading the above parts of the *Khosa* judgment, the reason for the court's introductory comments on the issue of trust between government and citizens becomes clear. Speaking from the 'context of the present state of affairs and the application as a whole', the court expressed the need for the populace to be

> able to trust government to abide by the rule of law and to make rational Regulations to promote their stated purpose. … In return the Government can justifiably expect the citizens to cooperate for the common goal, take responsibility to ensure their own safety and that of others. … The social contract that I have briefly referred to will then take its rightful constitutional place for the benefit of the nation and the State.[103]

Concluding its views on this matter, the court makes the following disquieting assessment:

> As I have mentioned in my introductory paragraphs, an important factor arose during argument and that is also contained in all the affidavits when read together, is that I and counsel were ad idem that at present there is a large measure of distrust between the South African populace and the government. This distrust relates primarily to the functions of the respondents and how they treat the persons throughout South Africa in the context of the regulations made under the Disaster Management Act.[104]

Seemingly, the Khosa incident is not an isolated case. On 23 March 2021 the media reported that on 29 March 2020, uniformed members of the SANDF, the SAPS, and the Johannesburg Metro Police Department allegedly stormed the home of the Buthelezi family in Soweto and assaulted everyone, alleging that alcohol was consumed on the premises in violation of the lockdown regulations. The reason for the media reporting on the matter a year later was that nothing had happened since the family laid a complaint of assault following the incident. Speaking on behalf of the family, Mr Sakhile

[101] *Khosa*, 2020: par. 139.
[102] *Khosa*, 2020: par. 140.
[103] *Khosa*, 2020: par. 7.
[104] *Khosa*, 2020: par. 19.

Buthelezi, who ironically happened to work for the VIP protection unit of the SAPS, said: 'Nothing has happened to our case so far. No one has been arrested. No one has been held accountable. When we make enquiries, we are told that the SANDF is not cooperating' (Mbatha, 2021).

Police misconduct during the lockdown

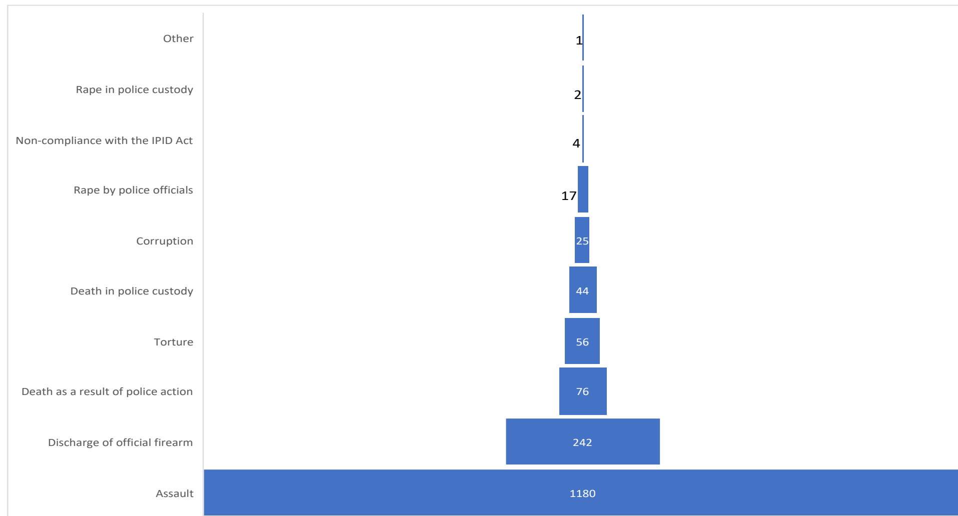
According to a presentation made by IPID to the relevant parliamentary portfolio committees on 29 April 2020, it received 403 cases between 26 March to 17 April. Of these, 199 related to the policing of Covid-19 measures, including death as a result of police action (5), assault (152), and corruption (5) (Parliament, 2020). In a follow-up meeting on 8 May 2020 (Shaikh & Joemat-Pettersson, 2020), IPID reported receiving 828 complaints between 26 March and 5 May 2020. Of these, 376 related to Covid-19 operations, including 10 cases of deaths as a result of police action and 280 of alleged assault. IPID expressed concern about the number of complaints, the excessive use of force, and physical abuse by the police.

A telling aspect of the comments at this session was the dissatisfaction expressed by committee members at the lack of information on the number of cases investigated, the number of cases finalised, and the outcome of finalised cases. It was agreed that IPID would provide written responses to questions raised by the members.

The committee's comments bring to mind the 2019 *Viewfinder* report (Knoetze, 2019; see also ISS, 2019), which details how underfunding, state capture, and statistical manipulation by IPID officials (to inflate performance for parliamentary consumption) have undermined trust in the organisation's ability to comply with its statutory mandate to investigate police misconduct. Interestingly, this report came up in the session of 29 April 2020. No clear answer emerged at the time about the steps taken, if any, to investigate cases prematurely and fraudulently closed by IPID investigators as part of the data manipulation exercise (Parliament, 2020:7).

The concerns raised by the committee members at the May meeting seemed to be addressed by an IPID presentation on 10 July 2020. In IPID's PowerPoint presentation to the relevant committees (Joemat-Pettersson, 2020), slide 7 contains the figures for 'total cases intake' from 26 March to 30 June 2020. It reports 1645 cases, as per Figure 3.2.1. Slide 8 shows the total number of 'completed cases (backlog and current)' for this period as 249. It is not clear, however, what is meant by 'completed cases'. Equally confusing is slide 9, which lists 645 cases 'received' during the lockdown. Slide 10 gives a total of 47 completed cases, presumably of the 645 'received cases'. The difference between 'cases taken in' and 'cases received' is not clear. Be that as it may, these numbers confirm the serious crisis in law enforcement, which government has failed to remedy for far too long (Neala, 2019; Saunderson-Meyer, 2019; Ardé, 2020).

Figure 3.2.1: IPID case intake, 26 March to 30 June 2020



Source: Joemat-Pettersson, 2020

Such enforcement and policing issues should not come as a surprise. After all, the kind of police conduct that occasioned widespread disapproval by the public, commentators, courts, and some politicians in the lockdown is merely a context-specific manifestation of a long-standing institutional and accountability deficit. As such, it is first and foremost a governance deficit.

That many of the issues persist is also clear from IPID's 2019/20 annual report, which was discussed in November 2020 during the budget review of the Portfolio Committee on Police. Of serious concern for the committee was IPID's low completion rate of cases. For instance, it reported that only 2269 cases of an intake of 5640 (i.e., 40%) had been completed. When the backlog and current cases are considered, the picture is even bleaker. Out of a total workload of 13 225 cases, IPID could report only 3889 decision-ready cases – a 29% success rate.

A related issue was how many times the National Prosecuting Authority had decided not to prosecute cases referred to it by IPID because of the poor quality of the investigations. The committee noted that IPID was underperforming and underfunded, and that the rising number of cases against police members was indicative of police impunity and the inability of IPID to hold such members to account. It is, therefore, not surprising to read in media reports on the budget review that members of the committee expressed their 'utter disappointment' with the state of affairs in the police service and that recommendations parliament approved in 2012 for improving police performance have still not been implemented (*Beeld*, 2020:1).

Corruption

Corruption is endemic in South Africa, and its proportions are staggering. Predictably, the new tender arrangements for pandemic-related products and government aid provided appealing possibilities for those already well-connected within existing corruption networks, including members of the political elite. As the Southern Africa Human Rights Roundup argues, 'Covid-19 has shown that countries with pre-existing governance deficits and prone to corruption are turning out to be looters' paradises'

(Tsunga, et al., 2020; see also *Mail & Guardian*, 2020). South Africa falls in this category. In a November 2020 statement, the African Commission on Human and Peoples' Rights and the African Union Advisory Board on Corruption expressed concern and alarm at the increasing incidence of corruption on the continent in the context of fighting the pandemic. The statement specifically mentioned public officials abusing the emergency situation to plunder public resources for personal gain, which the two bodies described as the 'most unforgivable breach of public trust … [that] should be prosecuted and punished' (ACHPR, 2020).

The 'feeding frenzy' during this time of crisis is highlighted by media reports that pandemic-related graft involves 'overpricing, substandard products and giving tenders to government and the ruling party' (DW.com, 2020). This is borne out in the Auditor-General's reports (AGSA, 2020) into government procurement (see also Chapter 6.1). The Special Investigating Unit also investigated corruption involving the R500 billion Covid-19 relief fund (Daniel, 2020).

On 5 February 2021, the Special Investigation Unit released its report on completed investigations (Mothibi, 2021). Of the R30,7 billion spent by government institutions on the procurement of personal protective equipment, R13,3 billion (2556 contracts) was in question. Some of the findings included:

- Persons in authority believed that as procurement took place under emergency conditions, the normal requirements for public sector procurement did not apply.
- Various officials merely rubber-stamped decisions taken by their seniors, accepted and gave effect to 'unlawful' instructions from their seniors, or acted under political pressure.

There is also the rather bizarre case of the SANDF – no stranger to corruption (Mahlangu, 2020) – secretly procuring the interferon Covid-19 drug from Cuba for an alleged amount of R260 million. Media reports suggest this occurred without either the drug being preapproved by the South African Health Products Regulatory Authority, or the inter-ministerial committee appointed by the president to investigate Covid-related corruption being informed (Skiti, 2021). Seemingly, the SANDF's chief financial officer was also unaware of the deal (Felix, 2021; see also Phakathi, 2021). In justifying their non-compliance with procurement processes, the SANDF explained to Parliament's Portfolio Committee on Defence, rather incredibly, that they believed they were facing chemical and biological warfare and needed to protect their soldiers (Bramdeo, 2021). What happened to military intelligence, one may ask. A subsequent media report noted the establishment of an SANDF task team to investigate corruption, including the Cuban drug deal. However, it also quoted defence force members calling the task team a cover-up to conceal the involvement of senior officials (Wa Afrika, 2021).

Such incidents explain the public outcry and calls for accountability that President Cyril Ramaphosa, in a hard-hitting letter to the ruling party, called 'justifiable'. He reminded members of their promises to address the scourge of corruption in South Africa and accused them of being 'deeply implicated in [South Africa's] corruption problem' (Ramaphosa, 2020).

At the dawn of democracy in South Africa, scholars and commentators wrote passionately about the principle of accountability in the Constitution as a cure for arbitrary and unjustified conduct and

decision-making. One of the great ironies is that the principle is nowadays mostly mentioned in the breach. The lesson here is that constitutional values require a supporting, deep-rooted, and mature political culture if they are to thrive.

Dysfunctional government institutions increase the opportunity for official misconduct and rebuilding them is urgently needed. But such initiatives face significant obstacles, such as the dismantling of patronage networks. The president directly implicated this phenomenon in the strategic undermining of state institutions for personal gain (Ramaphosa, 2020). These networks have been instrumental in bringing to power the current political elite and sustaining their rule; dismantling them could exact a steep political price. Moreover, the patrons of these networks and their clients will not readily part with their positions at strategic localities and the rewards they stand to gain. While the efforts to fight corruption may be serious and well-intended, questions remain about the capacity of the law enforcement agencies and the political determination to effectively dismantle, or even just disrupt, such patron-client networks.

Conclusion

There is no denying that the measures government adopted in terms of the DMA mitigated the spread of the Covid-19 pandemic, saved lives, and bought time for medical facilities to prepare to treat infected people. These are admirable outcomes, and they will certainly be 'spun' for political gain and popular consumption in the time to come. However, to allow the elation of the moment to obscure the legal and governance issues that emerged from government's disaster management efforts would be irresponsible and insensitive to the public's concerns and grievances.

Instead of political aggrandisement, therefore, introspection is needed, along with a determined effort to deliberate and act on the systemic weaknesses exposed by the pandemic. Several aspects emerged from the discussion in this chapter that government needs to prioritise. This is especially important as the country had already been in dire economic and political straits even before the pandemic – the state had been failing across the spectrum of its functions after years of corruption, mismanagement, and the tendency to put party before state. These priorities include, in no specific order:

- The building of efficient, responsive, and capable state institutions
- Modernisation and professionalisation of government services
- A thorough overhaul of the functioning of the law enforcement agencies
- Better intergovernmental cooperation
- Non-selective and demonstrable criminal accountability for corrupt activities and abuse of power
- An appreciation of the potential future importance of a fundamental rights analysis (rather than a rationality analysis) in the adoption of disaster management measures.

REFERENCES

ACHPR (African Commission on Human and Peoples' Rights), 2020. Statement of the African Commission on Human and Peoples’ Rights and the African Union Advisory Board on corruption and COVID-19. 2 November. https://www.achpr.org/pressrelease/detail?id=544 (Accessed 17 May 2021).

Affordable Medicines Trust and Others v Minister of Health and Another, CCT27/04, [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005). https://collections.concourt.org.za/handle/20.500.12144/2227

AGSA (Auditor-General of South Africa), 2020. First special report on the financial management of government’s COVID-19 initiatives. 2 September. https://www.agsa.co.za/Reporting/SpecialAuditReports/COVID-19AuditReport.aspx

Ardé, G., 2020. War Party: How the ANC’s political killings are breaking South Africa. Tafelberg, Cape Town.

Beeld, 2020. Polisie kan misdaad nie beveg. 25 November.

Bramdeo, A., 2021. SANDF believed they were exempt from normal pharmaceutical processes when procuring Heberon. SABC News, 17 February. https://www.sabcnews.com/sabcnews/sandf-believed-they-were-exempt-from-normal-pharmaceutical-processes-when-procuring-heberon/ (Accessed 10 March 2021).

Brickhill, J., 2020. Constitutional implications of Covid-19: The striking down of the lockdown regulations. Juta and Company (Pty) Ltd., 7 June. https://juta.co.za/press-room/2020/06/07/constitutional-implications-covid-19-striking-down-lockdown-regulations-issue-14/

British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others, 6118/2020, [2020] ZAWCHC 180 (11 December 2020). http://www.saflii.org/za/cases/ZAWCHC/2020/180.html

CAT (Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), 2006. Consideration of reports submitted by states parties under Article 19 of the Convention: South Africa – UN Doc CAT/C/ZAF/CO/1. 7 December. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/403/24/PDF/G0740324.pdf?OpenElement

——2019. Concluding observations on the second periodic report of South Africa – UN Doc CAT/C/ZAF/CO/2. 7 June. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/154/07/PDF/G1915407.pdf?OpenElement

CoGTA (Department of Cooperative Governance and Traditional Affairs), 2020a. No. 312 – Disaster Management Act, 2002 (Act No. 57 of 2002): Classification of a national disaster. Government Gazette No. 43096, 15 March. http://www.gpwonline.co.za/Gazettes/Gazettes/43096_15-3_CoOperativeGovTradAff.pdf

——2020b. No. 313 – Disaster Management Act, 2002 (Act No. 57 of 2002): Classification of a national disaster. Government Gazette No. 43096, 15 March. https://www.gov.za/sites/default/files/gcis_document/202003/43096gon313.pdf

——2020c. No. 608 – Disaster Management Act, 2002: (Act No. 57 of 2002): Determination of alert levels and hotspots. Government Gazette No. 43364, 28 May. https://www.gov.za/sites/default/files/gcis_document/202005/43364gon608-translations.pdf

CUSA v Toa Ying Metal Industries and Others, CCT40/07, [2008] ZACC 15; 2009 (2) SA 204 (CC), (2008) 29 ILJ 2461 (CC); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC) (18 September 2008). https://collections.concourt.org.za/handle/20.500.12144/3387

Daniel, L., 2020. Investigations into R500 billion COVID-19 relief fund corruption underway. MSN News, 7 July. https://www.msn.com/en-za/news/other/investigations-into-r500-billion-covid-19-relief-fund-corruption-underway/ar-BB16qjvU (Accessed 9 November 2020).

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). http://www.saflii.org/za/cases/ZAGPPHC/2020/184.html

Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening), 21424/2020, [2020] ZAGPCH 237; [2020] 3 All SA 747 (GP) (19 June 2020). http://www.saflii.org/za/cases/ZAGPPHC/2020/237.html

De Vos, P., 2020. The National Coronavirus Command Council riddle and the contradictory statements about its powers and functions. Daily Maverick, 14 May. https://www.dailymaverick.co.za/opinionista/2020-05-14-the-national-coronavirus-command-council-riddle-and-the-contradictory-statements-about-its-powers-and-functions/

DW.com, 2020. South Africa's double blow: Corruption and the coronavirus. https://www.dw.com/en/south-africas-double-blow-corruption-and-the-coronavirus/a-54423065 (Accessed 9 November 2020).

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). http://www.saflii.org/za/cases/ZAWCHC/2020/56.html

Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others, 611/2020, [2021] ZASCA 9 (28 January 2021). http://www.saflii.org/za/cases/ZASCA/2021/9.html

Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another, 21688/2020, [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR (68) GP (26 June). http://www.saflii.org/za/cases/ZAGPPHC/2020/246.html

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others, CCT7/98, [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (14 October 1998). https://collections.concourt.org.za/handle/20.500.12144/2056

Felix, J., 2021. Defence CFO unaware of SANDF's R200m deal to import unregistered Covid-19 drugs. News24, 18 February. https://www.news24.com/news24/southafrica/news/defence-cfo-unaware-of-sandfs-r200m-deal-to-import-unregistered-covid-19-drugs-20210218 (Accessed 10 March 2021).

Freedom Front Plus v President of the Republic of South Africa and Others, 22939/2020, [2020 ZAGPPHC 266; [2020] 3 All SA 762 (GP) (6 July 2020). http://www.saflii.org/za/cases/ZAGPPHC/2020/266.html

Helen Suzman Foundation v The Speaker of the National Assembly and Others, 32858/2020, [2020] ZAGPPHC 574 (5 October 2020). http://www.saflii.org/za/cases/ZAGPPHC/2020/574.html

ISS (Institute for Security Studies), 2019. External investigations into IPID are crucial for police-public relations. 11 October. https://issafrica.org/about-us/press-releases/external-investigations-into-ipid-are-crucial-for-police-public-relations. (Accessed 5 November 2020).

Joemat-Pettersson, T., 2020, 10 July. SAPS, IPID & CSPS special adjustments budget; with Minister & Deputy Minister [Conference proceedings]. SAPS (South African Police Service). https://pmg.org.za/committee-meeting/30636 (Accessed 6 November 2020).

Khosa and Others v Minister of Defence and Military Veterans and Others, 21512/2020, [2020] ZACPPHC 147; 2020 (7) BCLR 816 (GP); [2020] All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (%) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020). http://www.saflii.org/za/cases/ZAGPPHC/2020/147.html

Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004). http://www.saflii.org/za/cases/ZACC/2004/11.html

Knoetze, D., 2019. Kill the files: IPID's cover-up of police brutality in SA. View Finder, 7 October. https://viewfinder.org.za/kill-the-files/ (Accessed 4 November 2020).

Mahlangu, S., 2021. More corruption unearthed at Department of Defence's Intelligence unit. IOL, 11 February. https://www.iol.co.za/the-star/news/more-corruption-unearthed-at-department-of-defences-intelligence-unit-52398a14-cc99-4d06-9dbe-43f95972efae

Mail & Guardian, 2020. Covid Corruption: Putting a mask on it. 17 August.

Makinana, A., 2020. Collins Khosa murder: Military ombud finds that soldiers acted improperly. Sunday Times, 19 August. https://www.timeslive.co.za/politics/2020-08-19-collins-khosa-murder-military-ombud-finds-that-soldiers-acted-improperly/ (Accessed 4 November 2020).

Malan, K., 2016. To what extent should the convention of cabinet secrecy still be recognised in South African constitutional law? De Jure Law Journal, 49(1): 117–133. doi: http://dx.doi.org/10.17159/2225-7160/2016/v49n1a8

Malan, K. & Grobbelaar-Du Plessis, I., 2020. Regter Norman Davis se dapper uitspraak. Litnet, 11 June. https://www.litnet.co.za/regter-norman-davis-se-dapper-uitspraak/

Masetlha v President of the Republic of South Africa and Another, CCT01/07, [2007] ZACC 20; 2008 (1) SA 566; 2008 (1) BCLR 1 (3 October 2007). http://www.saflii.org/za/cases/ZACC/2007/20.html

Mbatha, N., 2021. All we want is justice, says Soweto family accusing cops of assault during early days of lockdown. IOL, 23 March. https://www.iol.co.za/the-star/news/all-we-want-is-justice-says-soweto-family-accusing-cops-of-assault-during-early-days-of-lockdown-38cc3e0d-55eb-494a-bca7-86c495387e29

McBride v Minister of Police and Another, CCT255/15, [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016). http://www.saflii.org/za/cases/ZACC/2016/30.html

Minister of Cooperative Governance and Traditional Affairs v De Beer and Others, 21542/2020, [2020] ZAGPPHC 280 (30 June 2020). http://www.saflii.org/za/cases/ZAGPPHC/2020/280.html

Ministry for Provincial and Local Government, 2005. No. 645 – Minister for Provincial and Local Government – Disaster Management Act, 2002 (No. 57 of 2002). Government Gazette No. 27534, 29 April. https://www.gov.za/sites/default/files/gcis_document/201409/275340.pdf

Moosajee, A. & Davis, J., 2020. Commentary on Pretoria High Court judgment declaring the lock-down regulations invalid. ENSight, 12 July. https://www.ensafrica.com/news/detail/2830/south-africa-commentary-on-pretoria-high-cour/ (Accessed 18 February 2021).

Mothibi, A., 2021. Special Investigating Unit on release of a Report of finalised investigations and outcomes of investigations into allegations on the PPE procurement by state institutions. South African Government, 5 February. https://www.gov.za/speeches/special-investigating-unit-release-report-finalised-investigations-and-outcomes# (Accessed 8 March 2021).

Neala, M., 2019. Corruption in uniform: When cops become criminals. Corruption Watch. https://www.corruptionwatch.org.za/wp-content/uploads/2019/06/Police-sectoral-report-June2019.pdf

Ngoepe, K. & Wa Afrika, M., 2020. SANDF report on the death of Collins Khosa 'a sham'. IOL, 7 June. https://www.iol.co.za/sundayindependent/news/sandf-report-on-the-death-of-collins-khosa-a-sham-49083492#:~:text=Johannesburg%20-%20The%20internal%20SANDF%20report%20exonerating%20soldiers,will%20be%20taken%20on%20review%20by%20the%20family (Accessed 4 November 2020).

Nicolson, G., 2020. Eight witnesses saw soldiers assault Collins Khosa. Daily Maverick, 10 June. https://www.dailymaverick.co.za/article/2020-06-10-eight-witnesses-saw-soldiers-assault-collins-khosa-ipid-report/ (Accessed 4 November 2020).

OHCHR (United Nations Human Rights Office of the High Commissioner), 1984. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 10 December. https://www.ohchr.org/en/professionalinterest/pages/cat.aspx

Parliament, 2020. IPID investigations of public complaints of police misconduct during the lockdown period. 27 April. https://static.pmg.org.za/200429IPID_Investigations_during_Lockdown.pdf (Accessed 5 November 2020).

Phakathi, B., 2021. Defence minister claims not knowing unregistered Cuban drug could not be imported. Business Day, 17 February. https://www.businesslive.co.za/bd/national/2021-02-17-defence-minister-claims-not-knowing-unregistered-cuban-drug-could-not-be-imported/ (Accessed 10 March 2021).

Ramaphosa, C., 2020. Read in full: President Cyril Ramaphosa's letter to ANC members about corruption. Financial Mail, 24 August. https://www.businesslive.co.za/fm/opinion/2020-08-24-read-in-full-president-cyril-ramaphosas-letter-to-anc-members-about-corruption/ (Accessed 9 November 2020).

Rautenbach, I., 2020. Unruly rationality: Two high court judgments on the validity of the Covid-19 lock-down regulations. Journal of South African Law, 2020(4): 825. doi: https://hdl.handle.net/10520/EJC-20284a2e5a

RSA (Republic of South Africa), 2000. Act No. 2 – Promotion of Access to Information, 2000. Government Gazette No. 20852, 3 February. https://www.gov.za/sites/default/files/gcis_document/201409/a2-000.pdf

——2003. Act No. 57 – Disaster Management Act, 2002. Government Gazette No. 24252, 15 January. https://www.ifrc.org/docs/idrl/662EN.pdf

——2011. Act No. 1 – Independent Police Investigative Directorate, 2011. Government Gazette No. 34298, 16 May. https://www.gov.za/sites/default/files/gcis_document/201409/a12011.pdf

——2012. Act No. 4 – Military Ombud Act, 2012. Government Gazette No. 35309, 3 May. https://www.gov.za/sites/default/files/gcis_document/201409/a42012.pdf

——2013. Act No. 13 – Prevention and Combating of Torture of Persons Act, 2013. Government Gazette No. 36716, 29 July. https://www.gov.za/sites/default/files/gcis_document/201409/36716act13of2013.pdf

Saunderson-Meyer, W., 2019. South African police are criminally incompetent. IOL, 16 November. https://www.iol.co.za/news/opinion/south-africas-police-are-criminally-incompetent-37310224 (Accessed 6 November 2020).

Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others, 22808/2020, [2020] ZAGPPHC 308; 2021 (1) SA 553 (GP) (18 June 2020). http://www.saflii.org/za/cases/ZAGPPHC/2020/308.html

Shaikh, S. & Joemat-Pettersson, T., 2020, 8 May. Follow-up meeting on police management & misconduct during COVID-19 lockdown; with Minister & IPID [Conference proceedings]. SAPS (South African Police Service). https://pmg.org.za/page/Followupmeetingonpolicemanagement&misconductduringCOVID19lockdownwithMinister&IPID (Accessed 5 November 2020).

Skiti, S., 2020. SANDF hid R200m expenditure on 'Covid' drug it can't use. Mail & Guardian, 22 October. https://mg.co.za/coronavirus-essentials/2020-10-22-sandf-hid-r200m-expenditure-on-covid-drug-it-cant-use/ (Accessed 10 March 2021).

Solidarity obo Members v Minister of Small Business Development and Others; Afriforum v Minister of Tourism and Others, 21314/20;21399/2020, [2020] ZAGPPHC 133 (20 April 2020). http://www1.saflii.org/za/cases/ZAGPPHC/2020/133.html

The Presidency, 2020. President Cyril Ramaphosa: 73rd session of the World Health Assembly. South African Government, 18 May. https://www.gov.za/speeches/president-cyril-ramaphosa-73rd-session-world-health-assembly-18-may-2020-0000

Tsunga, A., Mazarura, T. & Heywood, M., 2020. Covid-19 and the epidemic of corrupt governments: 'A heart-wrenching, unscrupulous and filthy feeding frenzy'. Maverick Citizen, 2 August. https://www.dailymaverick.co.za/article/2020-08-02-covid-19-and-the-epidemic-of-corrupt-governments-a-heart-wrenching-unscrupulous-and-filthy-feeding-frenzy/ (Accessed 9 November 2020).

Unchain Our Children, 2020. Update: Collins Khosa Murder – SANDF inquiry clears soldiers of the death of Collins Khosa. https://unchainourchildren.org.za/update-collins-khosa-murder-sandf-inquiry-clears-soldiers-of-the-death-of-collins-khosa/ (Accessed 4 November 2020)

Van Staden, M., 2020. Constitutional rights and their limitations: A critical appraisal of the Covid-19 lockdown in South Africa. African Human Rights Law Journal, 20(2020): 484–511. doi: http://dx.doi.org/10.17159/1996-2096/2020/v20n2a6

Wa Afrika, M., 2021. SANDF probe into Cuban drug 'just a cover-up for corruption'. IOL, 7 March. https://www.iol.co.za/sundayindependent/news/sandf-probe-into-cuban-drug-just-a-cover-up-for-corruption-cb1b1bbf-138d-4ce4-b3a6-012466659b06