



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case No: 309/21

In the matter between:

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS  
PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA  
APPELLANT**

**FIRST APPELLANT**

**SECOND**

and

**BRITISH AMERICAN TOBACCO SOUTH  
AFRICA (PTY) LTD  
RESPONDENT  
JT INTERNATIONAL SOUTH AFRICA  
(PTY) LTD  
RESPONDENT  
MELINDA FERGUSON  
RESPONDENT  
KEOAGILE MOLOBI  
RESPONDENT  
LIMPOPO TOBACCO PROCESSORS**

**FIRST**

**SECOND**

**THIRD**

**FOURTH**

<b>(PTY) LTD</b>	<b>FIFTH</b>
<b>RESPONDENT</b>	
<b>SOUTH AFRICAN TOBACCO</b>	
<b>TRANSFORMATION ALLIANCE NPC</b>	<b>SIXTH</b>
<b>RESPONDENT</b>	
<b>BLACK TOBACCO FARMERS</b>	
<b>ASSOCIATION</b>	<b>SEVENTH</b>
<b>RESPONDENT</b>	
<b>SUIDER AFRIKA AGRI INISIATIEF NPC</b>	<b>EIGHTH</b>
<b>RESPONDENT</b>	
<b>SOUTH AFRICAN INFORMAL TRADERS</b>	
<b>ALLIANCE</b>	<b>NINTH</b>
<b>RESPONDENT</b>	
<b>LA TOSCANA INVESTMENTS CC T/A</b>	
<b>J J CALE TOBACCONISTS</b>	<b>TENTH</b>
<b>RESPONDENT</b>	

**Neutral citation:** *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* (case no 309/21) [2022] ZASCA 89 (14 June 2022).

**Coram:** MAYA P and ZONDI, VAN DER MERWE and SCHIPPERS JJA and MOLEFE AJA

**Heard:** 3 March 2022

**Delivered:** 14 June 2022

**Summary:** Constitutional law – COVID-19 pandemic – regulation made under Disaster Management Act 57 of 2002 (the Act) – prohibiting sale of tobacco and related products – challenged as infringement of fundamental rights – dignity, bodily and psychological integrity, freedom of trade and deprivation of

property – limitation under s 36 of Constitution – to reduce strain on health system – not established – interpretation of ss 27(2)(n) and 27(3) of the Act – tobacco ban unnecessary – appeal dismissed.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Ndita, Steyn and Slingers JJ) sitting as court of first instance:

- 1 The appeal is dismissed with costs, including the costs of two counsel.
- 2 The cross-appeal is upheld with costs, including the costs of two counsel.
- 3 Paragraph 224.2 of the order of the Western Cape Division of the High Court is set aside and replaced with the following order:  
‘The first and second respondents are ordered to pay the applicants’ costs, including the costs of two counsel and the qualifying expenses of the applicants’ expert witnesses.’

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## JUDGMENT

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**Schippers JA (Maya P, Zondi and Van der Merwe JJA and Molefe AJA concurring)**

[1] On 30 January 2020 the World Health Organisation (WHO) declared the outbreak of a novel virus, namely SARS-CoV-2 (COVID-19), a ‘Public Health Emergency of International Concern’. In response to the COVID-19 pandemic the first appellant, the Minister of Co-operative Governance and Traditional Affairs (the Minister), the Cabinet member responsible for the administration of the Disaster Management Act 57 of 2002 (the Act), on 15 March 2020 declared a national state of disaster in terms of s 27(1) of the Act. The Minister made a series of regulations under s 27(2) of the Act to contain the spread of COVID-19. These included a nationwide lockdown, defined as ‘the restriction of movement of persons’, which came into effect on 23 March 2020, and a prohibition on the sale of tobacco products, e-cigarettes and related products.<sup>1</sup>

[2] The term, ‘tobacco product’ is defined in the Tobacco Products Control Act 83 of 1993 (Tobacco Products Control Act) and includes a product containing tobacco intended for human consumption and any device manufactured for use in the consumption of tobacco. Vaping products that do not contain tobacco are not currently regulated in South Africa, but were restricted in the same way as tobacco products during the lockdown. These products include e-cigarettes, designed to deliver an aerosol to users by heating a solution of substances which may or may not contain nicotine.<sup>2</sup>

[3] In some respects, the lockdown in South Africa resembled lockdowns in other countries. However, this was not the case when it came to smoking and vaping. South Africa was the only country in the world to prohibit the sale of tobacco and vaping products to consumers during a national lockdown, save for

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<sup>1</sup> Regulation 27 of the Regulations published under GN R480, GG 43258, 29 April 2020.

<sup>2</sup> The concept, ‘vaping’ refers to the process in terms of which a consumer inhales, exhales, holds or otherwise has control over an electronic delivery system, with or without nicotine.

Botswana and India.<sup>3</sup> Countries such as Italy, France, Switzerland and Spain had expressly classified tobacconists and other retailers that sell tobacco and vaping products as essential shops that could remain open during lockdown.

[4] The respondents are farmers, processors, manufacturers, retailers and consumers, situated at every level of the supply chain for tobacco and vaping products. In June 2020 they launched an urgent application in the court below, for an order declaring that Regulation 45, which provided that ‘[t]he sale of tobacco, tobacco products, e-cigarettes and related products is prohibited, except for export’ (Regulation 45), was unconstitutional and invalid. The prohibition applied during Alert Level 3 of the national state of disaster.<sup>4</sup>

[5] The application was heard by a full court of the Western Cape Division of the High Court, Cape Town (the high court) (Ndita, Steyn and Slingers JJ) on 5 and 6 August 2020. After judgment had been reserved, Regulation 45 was rescinded by the Minister on 17 August 2020, upon the move to Alert Level 2. The high court made an order declaring Regulation 45 inconsistent with the Constitution and invalid, and directed each party to pay its own costs. With the leave of that court, the appellants appeal the order of invalidity, and the respondents, the costs order.

### **The basic facts**

[6] The first respondent, British American Tobacco South Africa (Pty) Ltd (BATSA), after the lockdown had come into effect on 26 March 2020, decided not to challenge the prohibition on the sale of tobacco until it became clear that the Government intended to continue enforcing the ban on cigarette sales. It was

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<sup>3</sup> Botswana banned the import and sale of tobacco and tobacco-related products during a declared six-month state of public emergency – <https://theconversation.com/tobacco-bans-during-lockdown-should-encourage-renewed-anti-smoking-drives-139690>. India imposed a ban on tobacco products and e-cigarettes – <https://www.sciencedirect.com/science/article/pii/S0033350621004418>.

<sup>4</sup> Regulation 45 was published under GN R608, GG 43364, 28 May 2020.

anticipated that the extension of the lockdown would be accompanied by a relaxation of certain restrictions imposed in terms of the regulations, including the sale of tobacco and vaping products. However, that did not happen and the ban remained in force when Alert Level 5 lockdown was extended until 30 April 2020.

[7] In his address to the nation on 23 April 2020, the President said that the sale of cigarettes would be permitted when the country moved to the Alert Level 4 lockdown on 1 May 2020. Pursuant to the President's speech, a draft framework for all five alert levels called 'The Risk Adjusted Strategy' was published on 25 April 2020. It included tables for each of the five alert levels setting out proposed permitted activities and goods that could be sold during each level. In line with the President's announcement, the table applicable to Alert Level 4 included 'tobacco products' as goods that would be permitted to be sold.

[8] The draft Risk Adjusted Strategy called for public comment. BATSA made written representations which included the following. There was insufficient evidence to draw any firm conclusions on the relationship between smoking, vaping and COVID-19. An extension of the ban on the sale of tobacco products would have an adverse impact on the revenue of local suppliers, distributors, retailers, wholesalers and BATSA's sustainability programme for 10 000 informal traders. The ban was likely to result in the closure of operations including farming, processing and local production, and result in the illicit trade completely replacing all legal tobacco and vaping products.

[9] Despite the President's statement that the sale of cigarettes would be permitted in Alert Level 4, on 29 April 2020 the Minister announced that the prohibition on the sale of tobacco and vaping products would continue. The

Minister's reasons were twofold. First, consumers in the lower economic bracket tend to share lit cigarettes (manufactured or hand-rolled), thereby increasing the risk of coming into contact with infected saliva. This would increase the transmission of COVID-19. In addition, these consumers do not observe social distancing. Second, the disease allegedly has an adverse impact on the lungs of smokers.

[10] On 24 May 2020 the President announced that the country would move to Alert Level 3 with effect from 1 June 2020, and that the sale of tobacco products would remain prohibited, 'due to the health risks associated with smoking'. Regulation 45 formed part of the regulations published in Government Gazette 43364 dated 28 May 2020.<sup>5</sup>

[11] The continued prohibition on the sale of tobacco products had an adverse effect on some 11 million users of tobacco and vaping products in South Africa. They use these products for pleasure and to manage or relieve stress during their daily lives. Their inability to enjoy the daily pleasures of smoking and vaping had a negative impact on their emotional well-being and personal autonomy.

[12] Regulation 45 resulted in heavy losses to the fiscus because tobacco manufactures, such as BATSA and the second respondent, JT International South Africa (Pty) Ltd, pay substantial excise duties, which the illicit tobacco trade does not pay. BATSA alone usually collects and pays about R214 million weekly in excise revenue to the fiscus, or over R900 million monthly. According to the organisation Tax Justice SA, the ban on the sale of cigarettes during the lockdown resulted in the loss to the national Government of some R35 million per day in excise duties. This means that a total amount of approximately R2.4 billion in taxes was lost during the first eight weeks of the lockdown.

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<sup>5</sup> See fn 4.

[13] There was no unanimity within the Cabinet concerning the ban on cigarette sales. On 30 April 2020 the Minister of Finance publicly stated that he was not in favour of continuing the ban on alcohol and tobacco, because it had cost the country at that stage, some R1.5 billion in lost revenue, but that he had lost that debate.

[14] On 15 May 2020 a research paper entitled, 'LIGHTING UP THE ILLICIT MARKET: SMOKERS' RESPONSES TO THE CIGARETTE SALES BAN IN SOUTH AFRICA', was published by Prof Corné van Walbeek, Samantha Filby and Kirsten van der Zee of the Research Unit on Economics of Excisable Products at the University of Cape Town (the Walbeek Report).

[15] The Walbeek Report is the product of an online survey conducted from 29 April 2020 to 11 May 2020, which commenced during Alert Level 5 that changed to Alert Level 4 on 1 May 2020. The survey targeted people 'who were regular cigarette smokers in the period immediately before the ban on cigarette sales was announced on 25 March 2020'. The aim of the research was to 'explore how cigarette smokers responded to the ban' on the sale of cigarettes and 'assess the implications of a response on the market for cigarettes in South Africa'.

[16] The main findings of the Walbeek Report may be summarised as follows. Of the 10 257 people who continued smoking, 90% continued to buy cigarettes illegally after the lockdown commenced. The range of prices of cigarettes increased dramatically: from R0.50 to R4.00 each before lockdown, to R0.50 to R14.00 each thereafter. The survey results showed that since the lockdown, the price of cigarettes increased by 4.4% per day which suggested that 'cigarettes experienced hyper-inflation in the first two weeks of May 2020'.



Approximately 16% of smokers reported successfully quitting smoking during the lockdown. Smokers who responded to the survey questionnaire expressed anger at the prohibition (5 322) and 1 511 said that it impacted adversely on their emotional well-being.

[17] The Walbeek Report states that according to an estimate of revenues for the 2019/2024 fiscal year, the number of legal cigarettes increased by 11% in 2019/2020, probably due to a decrease in the illicit trade and not an increase in smoking prevalence. The prohibition on cigarette sales as part of South Africa's response to COVID-19, was likely to undo this progress. The ban on tobacco sales fuelled the illicit market for cigarettes. Illicit traders 'gained a foothold in a market where they previously could not compete', by exploiting the ban and the desperation of smokers. When the ban was lifted a price-war would ensue between cigarette producers, resulting in a decrease in cigarette prices and ultimately an increase in cigarette consumption in the country.

[18] The Report concludes that the ban on cigarette sales 'is failing in what it was intended to do'. While it was aimed at supporting public health, people were buying cigarettes illegally in large quantities, despite the lockdown. The ban was feeding the illicit market which would be difficult to eradicate. The Walbeek Report states: 'It was an error to continue with the cigarette sales ban into Level 4 lockdown'.

[19] As stated above, on 1 June 2020 the respondents successfully launched an application in the high court for an order declaring that Regulation 45 was unconstitutional and invalid. The grounds were that Regulation 45 constituted an infringement of the fundamental rights to dignity, privacy, bodily and psychological integrity, freedom of trade, and property.

[20] The high court found that Regulation 45 did not reduce the strain on the health system. Therefore, the appellants had not shown that Regulation 45 was necessary or that it furthered the objectives set out in s 27(2)(n) of the Act.<sup>6</sup> On this basis the court concluded that the jurisdictional facts envisaged in that provision were absent and consequently, Regulation 45 was *ultra vires*.

### **The rights implicated**

[21] The respondents alleged that Regulation 45 limited the right to dignity enshrined in s 10 of the Constitution,<sup>7</sup> for the following reasons. Consumers of tobacco and vaping products were denied the right to exercise their free will: they were prevented from buying these products during the lockdown. This infringement of personal autonomy, ie the ability to regulate one's own affairs, was an unconstitutional limitation of the right to dignity.<sup>8</sup>

[22] It was further alleged that Regulation 45 was a limitation of the right to privacy contained in s 14 of the Constitution.<sup>9</sup> It denied consumers the right to purchase tobacco products for use in the privacy of their homes – conduct in respect of which consumers legitimately harbour an expectation of privacy.<sup>10</sup> This constituted an unjustifiable intrusion by the State into the private sphere,

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<sup>6</sup> 27(2)(n) of the Disaster Management Act 57 of 2002 provides:

**'27 Declaration of national state of disaster**

...

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

...

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

<sup>7</sup> Section 10 of the Constitution reads:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

<sup>8</sup> *Barkhuizen v Napier* [2007] ZACC 5 (CC); 2007 (5) SA 323 (CC) para 57.

<sup>9</sup> Section 14 of the Constitution provides:

'Everyone has the right to privacy, which includes the right not to have–

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.'

<sup>10</sup> *Bernstein and Others v Bester N O and Others* [1996] ZACC 2 (CC); 1996 (2) SA 751 (CC) para 77; *Khumalo and Others v Holomisa* [2002] ZACC 12 (CC); 2002 (5) SA 401 (CC) para 27.

particularly in the context of the lockdown where persons were generally confined to their homes.

[23] Section 12(2)(b) of the Constitution, which forms part of the right to freedom and security of the person, provides that '[e]veryone has the right to bodily and psychological integrity, which includes the right . . . to security in and control over their body'. The respondents alleged that 'control' includes the protection of one's autonomy or bodily self-determination against interference, and that Regulation 45 limited the freedom and autonomy of adults to choose tobacco and vaping products, which they enjoyed and found relaxing when coping with stress, particularly during the lockdown. This was a limitation of the right to bodily and psychological integrity.

[24] Regulation 45, it was also alleged, constituted a limitation of the right to choose and practise a trade or occupation freely, guaranteed under s 22 of the Constitution.<sup>11</sup> Prior to the lockdown, the sale of tobacco and vaping products was lawful. The effect of Regulation 45 was that individual tobacco farmers could not sell, and nobody could buy their tobacco. This was likely to threaten the viability of their farming. These farmers could be faced with a stark choice whether to continue their chosen trade or occupation, or cut their losses and leave the industry. Tobacconists who sold only tobacco and vaping products were unable to trade. Their right to choose their trade was taken away by Regulation 45. Manufacturers, wholesalers and general retailers were denied the right to practise their trade or occupation, which the respondents alleged, was arbitrary and not rationally related to the achievement of a legitimate government purpose.

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<sup>11</sup> Section 22 of the Constitution provides:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

[25] Finally, the respondents asserted that Regulation 45 was a limitation of the right not to be deprived of property, contained in s 25(1) of the Constitution.<sup>12</sup> For the duration of the prohibition on the sale of tobacco, farmers were unable to sell their recently-harvested crops, which could go to waste. They were also unable to use their farms productively, in which they had invested substantial capital. Manufacturers were not able to use their costly factories and equipment to manufacture tobacco and vaping products, or sell what they had produced. Wholesalers and retailers were unable to sell their stock-in-hand of tobacco and vaping products, or utilise their facilities beneficially. All of these industry participants were unable to alienate their property (tobacco and vaping products) and realise the value in that property for commercial gain. Manufacturers and wholesalers were unable to employ their capital assets to turn a profit. This was a significant limitation of the use, enjoyment and exploitation of their property.

### **The rights were limited**

[26] Counsel for the appellants contended that Regulation 45 did not limit the relevant fundamental rights based on two arguments. The first was that Regulation 45 did not prohibit the *use* of tobacco products, but rather their *sale*. But this is a distinction without a difference. The Minister's affidavit makes it plain that the only reason for the prohibition on the sale of tobacco and vaping products, was to make it impossible for people to *consume* those products during the lockdown. In fact, the Minister's case was that the *use* of tobacco products and the behavioural risks associated with that use (the sharing of lit cigarettes), increased the risks of developing a more severe form of COVID-19, and the transmission of the disease.

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<sup>12</sup> Section 25(1) of the Constitution reads:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[27] The second argument was that the primary right implicated by Regulation 45 was the right to freedom of trade, occupation and profession in s 22 of the Constitution, and that even if the regulation had a limiting effect on the right to dignity and privacy, that effect was incidental to its main purpose – to regulate the rights of tobacco farmers and tobacconists to sell their products.

[28] This argument however has no basis in the evidence. The Minister herself stated that Regulation 45 ‘seeks to reduce the incidence of smoking’. This is a direct limitation of the rights to dignity, and the right to bodily and psychological integrity. In these circumstances, it is difficult to see how the effect of Regulation 45 was incidental. Further, the authorities on which the appellants relied, namely *Soobramoney*<sup>13</sup> and *Dawood*,<sup>14</sup> do not support their contention that the limitation exercise must be performed under s 22 of the Constitution, because that is the primary right implicated.

[29] *Soobramoney* concerned the interpretation and application of the rights to housing, health care, food, water and social security in ss 26 and 27 of the Constitution.<sup>15</sup> The Constitutional Court in *Dawood* held that in many cases where the value of human dignity is implicated, the ‘primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour’.<sup>16</sup> It means no more than this: in a case where it is alleged that the right to dignity is infringed, the correct enquiry may involve the breach of some other fundamental right.

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<sup>13</sup> In *Soobramoney v Minister of Health, KwaZulu-Natal* [1998] ZACC 17; 1998 (1) SA 765 (CC).

<sup>14</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC).

<sup>15</sup> *Soobramoney* fn 13 paras 15-16 and 19.

<sup>16</sup> *Dawood* fn 14 para 35.

[30] The reason for the second argument is not far to seek. The Minister preferred to apply the rationality test applicable to s 22, rather than the more stringent proportionality test required by s 36 of the Constitution. The jurisprudence of the Constitutional Court referred to below, however, does not permit the Minister to preclude the s 36 enquiry in this manner.

[31] In any event, the appellants' second argument has already been rejected by this Court in *Esau*,<sup>17</sup> a case in which the constitutionality of the Level 4 Regulations was challenged. Plasket JA said:

'I accept too that regulations 28(1), 28(3) and 28(4) also infringe the fundamental right to human dignity to the extent that they limit the freedom that everyone has to make their own decisions, as consumers, as to what goods they wish to purchase. These regulations also infringe the fundamental right to freedom of trade, occupation and profession – the right to “perform activities by means of which a livelihood is pursued”. This right is infringed in that people may only practise their chosen trade, occupation or profession to the extent permitted by the regulations.’<sup>18</sup>

[32] The contention that Regulation 45 was not a limitation of the relevant fundamental rights was not pressed before us, although we were informed that it had not been abandoned. Rather, the case was argued on the basis that the rights implicated were limited, but that Regulation 45 was reasonable and justifiable under s 36 of the Constitution. It is to that enquiry that I now turn.

### **The s 36 limitation enquiry**

[33] The determination of the constitutionality of Regulation 45 involves a two-stage analysis: the respondents are required to establish that the regulation limits one or more fundamental rights and if they do so, the burden shifts to the appellants to justify the limitation in terms of s 36(1) of the Constitution.<sup>19</sup> If the

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<sup>17</sup> *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; 2021 (3) SA 593 (SCA).

<sup>18</sup> *Esau* fn 17 para 118.

<sup>19</sup> **‘36 Limitation of rights**

limitation is not reasonable and justifiable under s 36(1), Regulation 45 must be declared to be inconsistent with the Constitution and invalid to the extent of that inconsistency.<sup>20</sup>

[34] At the outset, the approach to a justification analysis under s 36 of the Constitution in a time of national crisis such the COVID-19 pandemic, as stated in *Esau*,<sup>21</sup> bears repetition:

‘[T]he executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution . . .

That is not to say that the courts have untrammelled powers to interfere with the measures chosen by the executive to meet the challenge faced by the nation. Judicial power, like all public power, is subject to the rule of law.’<sup>22</sup>

[35] The s 36 limitation enquiry requires a balancing of two sets of interests. On the one hand, there is the right that is limited: its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation. What must be assessed overall, is whether the limitation is proportional (whether it invades the fundamental right as little as possible, balancing the harm caused against the purpose served) and whether it is reasonable (having regard to its purpose and effect).<sup>23</sup>

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(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights’; *Esau* fn 17 para 108.

<sup>20</sup> Section 172(1)(a) of the Constitution.

<sup>21</sup> *Esau* fn 17.

<sup>22</sup> *Esau* fn 17 paras 5 and 6.

<sup>23</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC) para 35.

[36] The principles governing the limitation enquiry are settled. The party seeking to justify an impugned law – usually the organ of state responsible for its administration – must put the factual material or policy considerations justifying it before the court.<sup>24</sup> Although the party relying on the justification must establish the facts on which the justification depends, a legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data.<sup>25</sup> Where the State fails to prove data and there are cogent objective factors pointing in the opposite direction, the State would have failed to establish that the limitation is reasonable and justifiable.<sup>26</sup>

[37] The Minister's case on justification may be summarised as follows. The overarching reasons for prohibiting the sale of tobacco and vaping products for domestic consumption in Alert Level 3 of the lockdown, were to protect human life and health, and reduce the potential strain on the health system, particularly given the then predicted steep rise in the rate of infections following the lifting of the Level 4 restrictions on work and the movement of people necessary to restart the economy. The use of tobacco products increased behavioural risks associated with the transmission of COVID-19, as some smokers share lit cigarettes. The emerging research concerning the relationship between smoking tobacco products and COVID-19 showed that the severity of COVID-19 outcomes is greater in smokers than non-smokers. Smokers have higher intensive care unit (ICU) admission rates, a higher need for ventilators and a higher mortality rate than non-smokers. Smoking thus increases the strain on the country's health care resources, including health workers.

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<sup>24</sup>*Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC) (NICRO).

<sup>25</sup> *NICRO* fn 24 paras 35 and 36.

<sup>26</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2014 (2) SA 168 (CC) para 84.



[38] It is convenient at this point to deal with the ground of justification based on the behavioural risks concerning the sharing of lit cigarettes. Regulation 45 did little to address this concern. As the Walbeek Report shows, some 90% of smokers did not stop smoking during the lockdown and continued to purchase cigarettes illicitly. Thus, smokers would have continued to share illicit cigarettes despite Regulation 45. And there is no evidence of any sharing of vaping products by the users of those products.

[39] Aside from this, any concerns about the sharing of lit cigarettes could have been addressed by measures other than an absolute prohibition on the sale of cigarettes. The founding affidavit states that the Minister could have embarked on a targeted awareness campaign aimed at ensuring that tobacco users do not behave in a manner that might increase the spread of COVID-19. The Government implemented widespread education and awareness campaigns to inform people about social distancing and sanitising measures to reduce the spread of the disease. For example, the Minister advised the public not to share spoons at funerals. Similar measures could have been taken in relation to the use of tobacco and vaping products.

[40] The remaining reasons for promulgating Regulation 45, the Minister said, were supported by a WHO statement and scientific brief dated 11 May 2020 and 26 May 2020, respectively. In the ‘WHO statement: Tobacco use and COVID-19’, the WHO said this. A review of studies by public health experts convened by the WHO on 29 April 2020 found that smokers were more likely to develop severe disease with COVID-19, compared to non-smokers. Available research suggested that smokers were at a higher risk of developing severe disease and death. The WHO recommended that smokers take immediate steps to quit by using proven methods.<sup>27</sup>

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<sup>27</sup> The WHO statement also describes what happens when a smoker quits, as follows:

[41] The WHO's Scientific Brief entitled 'Smoking and COVID-19' concludes as follows:

'At the time of this review, the available evidence suggests that smoking is associated with increased severity of disease and death in hospitalised COVID-19 patients. Although likely related to severity, no evidence to quantify the risk to smokers of hospitalisation with COVID-19 or of infection by SARS-Cov-2 was found in the peer-reviewed literature. Population-based studies are needed to address these questions.'

[42] The WHO statement and Scientific Brief however, do not support the Minister's justification for the prohibition. In neither publication is it suggested that the sale of tobacco or vaping products should be prohibited. The Scientific Brief itself states:

'There are currently no peer reviewed studies that have evaluated the risk of SARS-Cov-2 infection among smokers. This research question requires well-designed population-based studies that control for age and relevant underlying risk factors.'

[43] As to the risk of smokers being hospitalised for COVID-19, the Scientific Brief states:

'There are currently no peer-reviewed studies that directly estimate the risk of hospitalisation with COVID-19 among smokers. However, 27 observational studies found that smokers constituted 1.4-18.5% of hospitalised adults. Two meta-analyses have been published which pooled the prevalence of smokers in hospitalized patients across studies based in China. The meta-analysis by Emami et al. analysed data for 2986 patients and found a pooled prevalence of smoking of 7.6% (3.8% -12.4%) while Farsalinos et al. analysed data of 5960 hospitalized patients and found a pooled prevalence of 6.5% (1.4% - 12.6%).'<sup>28</sup>

[44] More fundamentally, in order to establish the primary justification that smokers have higher ICU admission rates, a higher need for ventilators and a

'Within 20 minutes of quitting, elevated heart rate and blood pressure drop. After 12 hours, the carbon monoxide level in the bloodstream drops to normal. Within 2-12 weeks, circulation improves and lung function increases. After 1-9 months, coughing and shortness of breath decrease.'

<sup>28</sup> According to the Farsalinos paper the pooled prevalence of 6.5% (1.4% - 12.6%) represented one quarter of the population smoking prevalence rate in China of 26%.

higher mortality rate than non-smokers, which would increase the strain on health care resources, the Minister was required to show: (i) that smoking leads to a more severe COVID-19 disease progression; (ii) that a temporary ban on the sale of tobacco products during lockdown will reverse or lessen that disease progression; (iii) that Regulation 45 is effective in materially reducing the number of smokers; and (iv) that the reduction in smoking over the period that the ban was intended to be in place would have led to reduced ICU bed occupancy at a level that would have had a material impact on the ability of the public health system to cope with COVID-19 admissions: in short, that the purpose of Regulation 45 outweighed the limitation of the relevant rights. Each of these requirements is dealt with, in turn.

***Does smoking lead to more severe COVID-19 progression?***

[45] The Minister's statement that 'smokers are more likely to develop severe disease with COVID-19, compared to non-smokers', was not established in the evidence. The WHO Scientific Brief states that there is no peer-reviewed studies to estimate the risk of hospitalisation of smokers who contract COVID-19. This is hardly surprising given that according to the medical literature, the pandemic, an evolving infectious disease, was still under progression and there was limited data with regard to clinical characteristics of patients and their prognostic factors, and smoking was assumed to be possibly associated with an adverse disease prognosis.

[46] What is more, the appellants' expert, Prof London, a Professor of Public Health and Family Medicine at the University of Cape Town (UCT), conceded that the findings in the literature on the risk of infection or hospitalisation for COVID-19 are mixed; and stated that the literature as to whether or not smoking is a risk factor for severe COVID-19 goes both ways. Prof London referred to five studies published in peer-reviewed scientific journals showing

that smoking is a risk factor for severe COVID-19, and the opposite view taken in two peer-reviewed articles relied on by the respondents' expert, Dr Morjaria, a Consultant Physician in Respiratory Medicine. However, the Scientific Brief by the WHO dated 30 June 2020, and the five studies relied on by Prof London, were published after the promulgation of Regulation 45, and thus were not considered by the Minister.

[47] It seems to me that on balance, Dr Morjaria's opinion that the scientific evidence on the question whether smoking increases COVID-19 disease progression is 'mixed and inconclusive', is sound. It follows that the Minister's statement that '[a]t this point in time, the evidence as a whole suggests that smokers are more likely than non-smokers to develop a severe case of COVID-19, requiring a ventilator or admission to ICU', is unsustainable on the evidence.

***The effect of quitting smoking on COVID-19 disease progression***

[48] Even if this Court were to find that an association between smoking and disease progression in relation to COVID-19 is established on the papers, the Minister had to establish that the temporary ban on smoking during the lockdown was likely to reverse or lessen the progression of the disease. The reason is obvious: if smoking is associated with severe COVID-19 but that association would continue even if a person were to stop smoking, then Regulation 45 would be incapable of achieving its stated purpose of reducing the burden on the health system to cope with severe cases of COVID-19.

[49] The point is that the medical evidence on both sides showed that the dangers from cigarette smoking, more specifically its adverse effects on the respiratory system that impairs pulmonary defence mechanisms, result from long-term chronic use. Thus, even if it were assumed that the Minister has

shown that the smoking population is more susceptible to certain COVID-19 risks, that susceptibility would be the result of years or decades of prior smoking. The Minister bore the onus of showing that this susceptibility would be reduced or reversed by a temporary cessation of smoking during the tobacco ban.

[50] The Minister apparently did not appreciate this issue and made no attempt to discharge this onus. The issue is not addressed at all in the WHO literature on which the Minister relied. Neither Prof London nor Dr Nyamande, a Specialist Physician and Pulmonologist and the Minister's expert, addressed the issue in their affidavits. They dealt with the general health benefits resulting from quitting smoking, but did not say that this would assist in relation to COVID-19.

[51] Prof London conceded that there is no scientific data to show that quitting smoking will reduce disease severity in relation to COVID-19. He suggested tentatively that 'quitting smoking may reverse the receptor upregulation that is thought to be the mechanism by which smoking increases the risk for severe COVID-19 disease'. However, Prof London agreed that this would only be the case 'if the link between upregulation of ACE-2 receptors and increased risk for severe COVID-19 is accepted'. Dr Morjaria however showed that this link is 'speculative', because there is no peer-reviewed evidence establishing the clinical significance of upregulation of ACE-2 receptors in relation to COVID-19 risks. He said that the literature cited by Prof London suggests that downregulation of ACE-2 associated with quitting smoking, is not immediate and is observed in smokers who had quit for at least a year.

[52] In short, there was no scientific justification for the continued ban on the sale of tobacco products: there is no evidence that short-term quitting has clinical significance for COVID-19 severity and outcomes.

[53] That left Dr Egbe as the only expert to address the issue on behalf of the Minister. But Dr Egbe is not a medical doctor: she is a Research Psychologist. Moreover, Dr Egbe conceded that ‘there is not yet enough data to assess whether and/or to what extent the chance of infection or disease progression decreases when a person quits smoking’. At most, Dr Egbe suggested that it was ‘logical’ to believe that stopping smoking would ‘give [smokers’] lungs a fighting chance against the disease’.

[54] In the light of what is stated above, Dr Morjaria’s conclusion that there is no consensus that current smoking is a risk factor for infection or COVID-19 disease progression, in my view, is consistent with the medical evidence, and makes good sense. He said:

‘[B]ased on currently available data in the evolving literature there is an emerging consensus that risk factors for severe COVID-19 include: older age, male gender, medical comorbidities including cardiovascular diseases, diabetes, hypertension, increased body mass index (BMI), chronic kidney disease, solid organ transplants and chronic pulmonary diseases. . . [T]here is no consensus in relation to current smoking being a risk factor for infection or COVID-19 disease progression. While some of these generally accepted risk factors for COVID-19 severity can be caused by smoking . . . the impact of smoking in relation to these diseases occurs over a long period of time, often many years (not weeks or months).’

[55] If quitting smoking does not confer a benefit in relation to the chance of infection or COVID-19 disease progression (as opposed to general improvements in health), it means that the objectives of Regulation 45 would not have been achieved. Accordingly, the Minister did not show that the temporary ban on smoking would have lessened or reversed COVID-19 disease progression.

***Regulation 45 did not materially reduce the number of smokers***

[56] The respondents relied on the Walbeek Report to show that Regulation 45 was ineffective in reducing the number of smokers. According to the Report, 90% of survey respondents who did not quit smoking indicated that they had purchased cigarettes during the lockdown. This means that of the total survey respondents, 16% had quit smoking and only 8.4%, ie 10% of 84% had not purchased cigarettes during the lockdown. Differently stated, 75.6% of survey respondents had purchased cigarettes during the lockdown. Even the report by Genesis Analytics (Genesis), a firm of economists engaged by the Minister to provide an economic assessment of the respondents' arguments, states that '76% would be a high proportion'.

[57] The Minister claimed that Regulation 45 was effective in reducing the number of smokers, based on a study by the Human Sciences Research Council (HSRC), a report by Genesis, a survey by M4Jam (Pty) Ltd (M4Jam), the evidence of Mr Richard Murgatroyd, an economist and partner at RBB Economics (RBB), and expert evidence by Dr Ross, the Deputy Director of the Research Unit on the Economics of Excisable Products at UCT.

[58] The HSRC study was conducted between 27 March 2020 and 24 April 2020, during Alert Level 5 over the first four weeks of the lockdown. The statement in the HSRC study that 11.8% of smokers were able to buy cigarettes during this period has little probative value because, as stated in the Genesis Report, smokers would have stockpiled cigarettes when the lockdown was first announced. In any event, the RBB Report offers several reasons for being sceptical of the results of the HSRC study. For example, the RBB Report states: '[I]t is inherently far more plausible that smokers were able to continue consuming tobacco products without having to make purchases during the period covered by the HSRC study, by consuming stockpiles accumulated before the ban, than during the period covered [by] the van Walbeek study. Consistent with this, the van Walbeek study finds that most respondents (90% of smokers) had stocked up on cigarettes before the start of the lockdown.'

[59] The survey by M4Jam also has little probative value because M4Jam is not a market research company, but a crowd-sourcing data platform. The author of the survey herself describes it as ‘an informal and non-scientific survey’ and cautions that ‘the information contained therein is not intended as a substitute for any formal research conducted by any third party’. The Genesis Report states that a ‘non-trivial’ proportion of smokers had stopped smoking. Genesis did not, however, perform any independent research to compute what that proportion is.

[60] Dr Ross dealt with this issue most fully on behalf of the Minister. According to Dr Ross, Regulation 45 would have reduced smoking prevalence (the percentage of adults who smoke) and smoking intensity (the number of cigarettes consumed by a smoker per day), because smokers would have been unable to afford the full price of cigarettes that are sold unlawfully during lockdown. In fact, she said that this price would consist of ‘both monetary value (money paid to the seller) and the effort expended to purchase cigarettes (e.g. time, travel expenses, risk of prosecution). The ban on cigarette sales increased both components of the price’.

[61] Dr Ross performed a price elasticity exercise regarding smoking prevalence and said that there would be a ‘10% to 15% quit rate’, and pointed out that this was close to the number of 16% in the Walbeek Report. Since there are 8 million smokers in South Africa, Dr Ross concluded that ‘if 10% to 15% of them quit smoking due to the ban, this represents 0.8 to 1.2 million quitters’.

[62] The evidence of Dr Ross on behalf of the Minister is entirely destructive of the Minister’s case concerning the effectiveness of Regulation 45 – its foundation is illegality. It means that any reduction in smoking would have occurred because smokers would not have been able to afford the prices of



cigarettes on the black market. The Minister's claim that Regulation 45 was effective because most smokers would have contravened the law, but a small minority of them would not have been able to afford the prices of illicit cigarettes, is constitutionally perverse – it relies on unlawful conduct (the sale of illegal cigarettes at a premium) in order to achieve the intended outcome (a reduction in smoking).

[63] This perversity is exacerbated by the fact that the State could have achieved the same outcome by imposing a temporary increase in excise duty on cigarettes, so that the price of cigarettes sold lawfully would be the same as the price of cigarettes sold unlawfully during the lockdown. The difference, as the full court pointed out, is that the fiscus would then have collected the tax revenue lost when cigarettes were sold unlawfully while Regulation 45 was in force. In other words, there was an option that was less restrictive than limiting the respondents' constitutional rights. That option would have had the additional advantage of generating funds to expand the number of ICU beds beyond the number that might have been saved by the tobacco ban.

[64] What all of this shows is that on the Minister's own evidence, Regulation 45 did not achieve its stated purpose: 'to reduce the incidence of smoking'. This, because only 10% to 15% of smokers would have stopped smoking, and then only for the reason that they would not have been able to afford the price of illegal cigarettes. Although the appellants submitted that number of quitters referred to in the Walbeek report (16%) is significant, the fact remains: some 90% of smokers continued to smoke while Regulation 45 was in force.

***The purpose of Regulation 45 did not outweigh the limitation of the rights***

[65] The Minister was obliged to show that the benefits of Regulation 45 exceeded the harm it caused, failing which the limitation of constitutional rights would not be reasonable and justifiable. Section 36(1) of the Constitution requires the court to ‘weigh the extent of the limitation of the right against the purpose for which the legislation was enacted’.<sup>29</sup>

[66] According to the Minister, Regulation 45 would have made available more ICU beds and ventilators by preventing smokers from contracting a more serious form of COVID-19. The Minister contended that if 1% of the 8 million smokers in South Africa had to contract COVID-19, and 5% of that number needed ICU beds, about 4 000 smokers would require ICU beds and ventilators. There are approximately 3 300 ICU beds in South Africa.

[67] Counsel for the appellants submitted that the 1% number was ‘illustrative’. This means that the Minister did not put up any evidence to support the contention that admitting 4 000 smokers to ICUs would place undue strain on the health system. For this reason, I do not think that the respondents’ calculation that there would have been about 16 fewer patients in the ICU than would have been the case had there been no prohibition on the sale of tobacco products, and that this did not show that the health system would not have been able to cope, takes the matter any further.

[68] As is demonstrated above, the Minister did not discharge the onus of showing that the infringement of the fundamental rights in issue was justified. On the contrary, the evidence shows that the purpose sought to be achieved by Regulation 45 did not outweigh the limitation of those rights. There can be no question that Regulation 45 was an unjustifiable limitation of the rights to dignity, and bodily and psychological integrity.

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<sup>29</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N O and Others* 2001 (1) SA 545 (CC); *National Coalition for Gay and Lesbian Equality* fn 23 para 37.

[69] The third respondent stated that she was involved in a life-threatening car accident as a result of which she developed post-traumatic stress disorder (PTSD). She smokes organic tobacco in order to cope with PTSD, which she finds pleasurable and relaxing, and which has helped her overcome her addiction to hard drugs, which included heroin and crack cocaine. She has been clean for 20 years. When she ran out of tobacco on 1 May 2020, in desperation she resorted to smoking Rooibos tea and herbal teas, and bought tobacco on the black market at three times the normal price. After this purchase she suffered a panic attack and heart palpitations. This evidence shows that Regulation 45 unjustifiably limited the autonomy and freedom of persons to regulate their own affairs, to choose which products to buy to cope with stress, and to exercise control over their bodily and psychological well-being.

[70] The high court's finding that the right to privacy was infringed, however, is inconsistent with the reach and operation of that right. In *Bernstein* the Constitutional Court said:

'The truism that no right is to be considered absolute implies that from the outset of interpretation its right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. . . . Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'

The Court went on to say:

'A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the

individual's activities then acquire a social dimension and a right of privacy in this context becomes subject to limitation.'<sup>30</sup>

[71] Applied to the present case, Regulation 45 did not impact on any particular person or his or her private life. Neither did it limit the intimate personal sphere of life of any individual. Instead, Regulation 45 prohibited the sale of tobacco and vaping products, which involved an individual's outside relations with others. Therefore, the right to privacy was neither implicated nor infringed.

[72] Regulation 45 threatened the stability of the entire tobacco value chain. Tobacconists who sold only tobacco and vaping products were unable to trade at all. They were the only retailers of goods that were prevented from opening their doors under Alert Level 3. Many informal traders were forced to close their shops or stalls.

[73] Regulation 45 meant that tobacco farmers had no buyers for their tobacco and were likely to go out of business. Although the Minister said that exports were permitted, it was not feasible, in a very short period of time, for local tobacco farmers to find external purchasers to purchase the volumes of tobacco that BATSA would have purchased. Thus, tobacco farmers were unable to sell harvested tobacco crops and forced to continue operations without any income or cash flow from the rest of the tobacco value chain.

[74] When the application was launched there were more than 200 commercial farmers and over 150 emerging farmers producing tobacco in South Africa. They provided about 8 000 jobs for employees, responsible for more than 30,000 dependants, mainly in rural areas of the country where employment opportunities are scarce. The inability of tobacco farmers to sell their crops

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<sup>30</sup> *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) paras 67 and 77. (Footnotes omitted.)

undermined their ability to continue paying their workers and jeopardised their financial ability. This was aggravated by the fact that tobacco farmers were excluded from the R1.2 billion disaster relief fund intervention made available to assist South African farmers with the impact of COVID-19.

[75] As a result of Regulation 45, BATSA lost revenue of approximately R322 million per week. Its total loss of revenue exceeded R2 billion in the nine-week period since the lockdown commenced.

[76] Regulation 45 unjustifiably limited the right to freedom of trade. As was held in *South African Diamond Producers*, a law ‘providing that certain persons may no longer continue to practise [a] trade, would limit the choice element of section 22; in these cases there is a legal barrier to choice’.<sup>31</sup> The Minister contended that Regulation 45 was temporary. However, it was not clear at the time when the prohibition would end – the Minister herself contemplated that the prohibition could continue for a year. Regulation 45 was rescinded in August 2020. Before that however, tobacconists and tobacco farmers did not know for how long they would be prevented from practising their trade.

[77] Regulation 45 was also an unjustified limitation of the right to property. It substantially interfered with the right to use or exploit property, as described in paragraph 25 above. The Minister’s contention that this limitation also was temporary, is untenable for the reasons advanced above. Had the prohibition continued in force for a year as envisaged by the Minister, very few businesses would have been able to survive. Given the substantial limitation on the right to property, the Minister was required to show a rational connection between the

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<sup>31</sup> *South African Diamond Producers Organisation v Minister of Minerals and Energy N O and Others* [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC) para 68.

deprivation and the end sought to be achieved (the purpose of Regulation 45), which had to be proportionate.<sup>32</sup> This was not shown.

[78] In conclusion on the justification analysis: The extent to which Regulation 45 limited the rights in issue, particularly given the lack of factual and scientific evidence to support its promulgation, was disproportionate to the nature and importance of the rights infringed, which are foundational to a democracy. As the Constitutional Court recently held:

‘. . . [T]he rights in the Bill of Rights are an embodiment of the very character or cornerstone of our constitutional democracy. Both the nature and importance of the right must necessarily be taken into account. And the State has no inherent “right” to limit these rights. But it is constitutionally obliged to respect, protect, promote and fulfil them.’<sup>33</sup>

[79] In sum, as stated in the Walbeek Report, ‘the disadvantages of the ban outweigh the advantages’. For all of the above reasons, and on the facts, the Minister failed to justify the limitation of constitutional rights in terms of s 36 of the Constitution. The high court was thus correct in coming to this conclusion.

### **The application to review Regulation 45**

[80] The respondents contended that Regulation 45 was unlawful and fell to be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality, on the following grounds. The Minister abdicated her power to the National Coronavirus Command Council (NCCC). The Minister had no power under the Act to prohibit the sale of

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<sup>32</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC) para 100; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) para 48; *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) para 80.

<sup>33</sup> *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25; 2021 (2) BCLR 118 (CC); 2021 (2) SA 1 (CC); 2021 (1) SACR 387 (CC) para 35. (Footnotes omitted.)

tobacco and vaping products. Regulation 45 was unnecessary and unreasonable. The Minister did not follow a fair procedure in making the regulations.

[81] The high court found that the review grounds based on abdication of power and that the Act does not authorise the making of a regulation prohibiting the sale of tobacco products, had no merit. It held that the threshold for valid regulation in terms of s 27(2)(n) of the Act was that the regulation must be ‘strictly necessary to achieve and/or further the objectives set out in section 27(2)(n)’; and that unless it was shown Regulation 45 served to reduce the strain on the health system, it would be *ultra vires*. The appellants say that the latter findings are incorrect.

[82] Before us, counsel for the respondents, rightly, did not press the argument that the Minister had abandoned her power to the NCCC. It was however submitted that Regulation 45 was unlawful for the following reasons. Section 27(2)(i) of the Act expressly empowers the making of regulations that suspend or limit only the sale of alcohol, therefore s 27(2)(n) of the Act must be interpreted so as to exclude regulations that suspend or limit the sale of any other products. Section 27(2) does not grant the Minister the power to make regulations that prohibit the sale of tobacco products in a manner inconsistent with the Tobacco Products Control Act. Regulation 45 was not necessary as contemplated in s 27(2)(n) of the Act. Regulation 45 was vitiated by procedural irrationality, alternatively, procedural unfairness.

[83] The review was brought in terms of both the PAJA and the principle of legality. It would make no difference to the outcome if the provisions of the PAJA are not applied. On this basis, the respondents’ review grounds are considered under the principle of legality.

***The interpretation of s 27(2)(n) of the Act***

[84] This Court in *Capitec*<sup>34</sup> has explained that the triad of text, context and purpose in statutory interpretation should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the statute as a whole, which constitutes the unitary exercise of interpretation.

[85] The starting point is the purposes of the Act. According to its long title, it was passed to provide for:

‘an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters, and post-disaster recovery and rehabilitation; the establishment and functioning of national, provincial, and municipal disaster management centres. . . .’

[86] Section 1 defines a ‘disaster’ as:

‘. . . a progressive or sudden, widespread or localised natural or human-caused occurrence which

- (a) causes or threatens to cause-
  - (i) death injury or disease;
  - (ii) damage to property, infrastructure or the environment; or
  - (iii) significant disruption of the life of the 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.’

[87] Consistent with the purposes of the Act, s 23(1) provides that the National Disaster Management Centre must determine whether a disastrous event or the threat of such event should be regarded as a disaster under the Act and if so, the National Centre must assess the magnitude and severity or

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<sup>34</sup> *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.



potential magnitude and severity of the disaster and classify the disaster as a local, provincial or national disaster.

[88] Section 27(1) of the Act empowers the Minister to declare a national state of disaster if ‘existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster’, or ‘other special circumstances warrant the declaration of a national state of disaster’. Section 27(2)(a)-(m) lists the matters in respect of which the Minister is empowered to make regulations. Subsection 2(n) specifically authorises the Minister to make regulations or issue directions concerning ‘other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster’, ie in relation to matters other than those stated in s 27(2)(a)-(m).

[89] These provisions of the Act make it clear that if it is necessary to suspend or limit the sale of a commodity other than alcohol, in order to prevent an escalation of a disaster, or to alleviate, contain and minimise its effects, and if doing so is necessary for one or more of the purposes set out in s 27(3), then the Minister is empowered to make regulations suspending or limiting the sale of that commodity in terms of s 27(2)(n). This construction accords with the plain language of ss 27(2) and 27(3), the immediate context of s 27(2)(n), and the purposes of the Act.

[90] The respondents’ reliance on the maxim *inclusio unius est exclusio alterius* for the submission that the power to make regulations under s 27(2)(n) must be interpreted to exclude the making of regulations that suspend or limit the sale of any products other than alcohol, because s 27(2)(i) expressly empowers the making of regulations that suspend or limit the sale of only alcohol, is misplaced. It ignores the catch-all power conferred by s 27(2)(n), in

terms of which regulations may be made concerning other steps that may be necessary to contain the disaster. Such steps would include a hard lockdown in order to prevent the spread of COVID-19. While it is correct that the maxim is one of common sense, it is not a rule of interpretation and must always be applied with great caution.<sup>35</sup>

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

[92] Moreover, the above interpretation is sensible.<sup>36</sup> The original lockdown regulations (Alert Level 5) confined people to their homes and suspended the sale of many goods. The purpose of those regulations was to prevent non-essential movement of and contact between people, in order to slow the spread of COVID-19, and to enable the health system to implement measures to cope with an anticipated surge in the numbers of gravely ill people. On the respondents’ *inclusio unius* argument, in order to achieve these objectives, the Minister was empowered to suspend only the sale of alcohol, and not any other commodity. The argument is untenable. It ignores the purposes of the Act and s 27(2)(n).

### ***Regulation 45 is consistent with the Tobacco Products Control Act***

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<sup>35</sup> *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* [2020] ZACC 14; 2021 (3) SA 1 (CC) para 50.

<sup>36</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[93] The respondents argued that Regulation 45 was invalid because it is inconsistent with the Tobacco Products Control Act, since it purported to prohibit the sale of tobacco products in all circumstances – including instances where the sale of tobacco products is permitted under the Tobacco Products Control Act. Section 27(2) of the Act should be interpreted in a way that the Minister is not empowered to make regulations which are inconsistent with an Act of Parliament. Unless s 27(2) is construed in this manner, so it was submitted, Regulation 45 is *ultra vires*.

[94] The submission is unsound. Section 27(2), properly interpreted, indeed permits the Minister to suspend or limit rights conferred in terms of other Acts of Parliament. That much is clear from the matters in respect of which the Minister is empowered to make regulations or issue directions in s 27(2)(a)-(m). Most of these matters are regulated by legislation, such as resources of the national Government including stores, equipment, vehicles and facilities;<sup>37</sup> personnel who render emergency services;<sup>38</sup> the regulation of traffic;<sup>39</sup> the provision, control or use of temporary accommodation;<sup>40</sup> the sale of alcohol;<sup>41</sup> and the installation and maintenance of lines of communication.<sup>42</sup>

[95] The point may be illustrated by reference to s 27(2)(i) of the Act. If the sale of alcohol is suspended or limited during a national state of disaster in terms of s 27(2)(i), the provisions of the Liquor Act 59 of 2003 and provincial liquor laws would remain extant, but their enforcement is temporarily suspended or limited, whilst the regulation under s 27(2)(i) of the Act is operative. This is specifically authorised in terms of s 27(2), and is a consequence of the declaration of a national state of disaster. For these reasons,

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<sup>37</sup> Section 27(2)(a).

<sup>38</sup> Section 27(2)(b).

<sup>39</sup> Section 27(2)(e).

<sup>40</sup> Section 27(2)(h).

<sup>41</sup> Section 27(2)(i).

<sup>42</sup> Section 27(2)(j).

the respondents' argument that the power to regulate does not include the power to prohibit, is unsustainable.

[96] Further, the power to make regulations under s 27(2) of the Act is not rendered 'subject to' any Act of Parliament. On the contrary, s 27(1) empowers the Minister to declare a national state of disaster by notice in the Gazette if 'existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster',<sup>43</sup> or if there are other special circumstances that warrant such declaration.<sup>44</sup> That this was the position when the state of disaster was declared in March 2020 as a result of the COVID-19 pandemic, is an understatement. As was stated in *Esau*,<sup>45</sup> the pandemic 'posed, and continues to pose, the biggest threat to this country since the Spanish influenza pandemic of the immediate post-World War I years a century ago'. And contrary to the respondents' assertion, nothing turns on the fact that the Minister declared a national state of disaster in terms of s 27(1)(b) rather than s 27(1)(a).

[97] The respondents' reliance on *Smit*<sup>46</sup> for the proposition that s 27(2) 'would . . . be unconstitutional if it purported to confer on the Minister the power to make regulations that have the effect of amending an Act of Parliament', is inapposite. Sections 27(2) and 27(3) do not assign to the Minister plenary legislative power: it does not grant the Minister the power to pass, amend or repeal an Act of Parliament.<sup>47</sup> What is more, ss 27(2) and 27(3) provide a 'clear and binding framework for the exercise of the powers'.<sup>48</sup>

### **Regulation 45 was unnecessary**

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<sup>43</sup> Section 27(1)(a).

<sup>44</sup> Section 27(2)(b).

<sup>45</sup> *Esau* fn 17 para 140.

<sup>46</sup> *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (3) BCLR 219 (CC).

<sup>47</sup> *Smit* fn 46 para 31.

<sup>48</sup> *Smit* fn 46 para 36.

[98] The jurisdictional facts for the exercise of the power conferred by s 27(2) (n) of the Act, have been stated above. Section 27(3) requires that the powers referred to in s 27(2) be exercised only to the extent that it is necessary, in this case, ‘for the purpose of assisting and protecting the public’ (s 27(3)(a)), or ‘dealing with the destructive and other effects of the disaster’ (s 27(3)(e)).

[99] Neither power in s 27(2) nor s 27(3) is expressly said to be exercisable on the basis of the Minister’s subjective belief, and as stated, whether the exercise of the powers in s 27(3) is necessary, involves an objective enquiry. In other words, it is for a court to determine whether Regulation 45 was necessary. It is not for the Minister to say that she believed that Regulation 45 was necessary to protect the public or to deal with the destructive effects of COVID-19.

[100] The appellants, in reliance on *Fair Trade Independent Tobacco Association*,<sup>49</sup> contended that ‘necessary’ in this context means ‘rational and reasonably necessary’. It was submitted that the high court, on the authority of *Pheko*,<sup>50</sup> erred in concluding that the term ‘necessary’ should be narrowly interpreted; and that *Pheko* essentially dealt with the concept ‘evacuation’.

[101] *Pheko* concerned the interpretation of s 55(2)(d) of the Act, in relation to a local disaster declared in terms of s 55(1) of the Act. Section 55(2)(d) authorises the making of regulations concerning ‘the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life’.<sup>51</sup> Section 55(2)(d) is the local disaster equivalent of s 27(2)(d). Nkabinde J held that s 55(2)(d) must be ‘interpreted narrowly’ and that ‘the Municipality’s powers following upon

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<sup>49</sup> *Fair Trade Independent Tobacco Association v President of the Republic of South Africa and Another* 2021 (1) BCLR 68 (GP) para 87.

<sup>50</sup> *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC) para 52.

<sup>51</sup> Section 27(2)(d) of the Act is in identical terms but applies where a national state of disaster has been declared.

the declaration of a local state of disaster must be exercised only to the extent that it is strictly necessary for the purposes set out in s 55(3).<sup>52</sup>

[102] In *Minister of Finance v Afribusiness NPC*,<sup>53</sup> the interpretation of s 5(1) of the Preferential Procurement Policy Framework Act 5 of 2000 was in issue. It provides that the relevant Minister ‘may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act’.<sup>54</sup> Madlanga J, writing for the majority, held that the word necessary in that context means something ‘needing to be done’ or ‘that must be done’.

[103] Applied to the present case, the word ‘necessary’ in s 27(3) must be narrowly construed, to mean ‘strictly necessary’ or ‘essential’, to assist and protect the public or to deal with the destructive effects of COVID-19. I say this for the following reasons. First, if the legislative intent was that the power in 27(3) should be exercised to the extent *reasonably* necessary, the lawgiver would have said so. Second, it is a settled rule of interpretation that words in a statute bear the same meaning throughout the statute, unless such interpretation would result in injustice, incongruity or absurdity.<sup>55</sup> Consequently, the term ‘necessary’ cannot mean one thing in s 55(3) of the Act, and another in s 27(3). Third, and contrary to the appellants’ submission, the meaning of ‘necessary’ cannot depend on the nature of the matter in s 27(2) in respect of which regulations are made. Fourth, the power conferred on the Minister by s 27(2) cuts across and effectively and temporarily suspends various statutes dealing with the matters listed in s 27(2)(a)-(m). It stands to reason that such a power must be exercised only if it is strictly necessary. Finally, this construction is

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<sup>52</sup> *Pheko* fn 50 para 42.

<sup>53</sup> *Minister of Finance v Afribusiness NPC* [2022] ZACC 4.

<sup>54</sup> *Minister of Finance* fn 53 para 114.

<sup>55</sup> *Liesching and Others v S and Another* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) para 33.

reinforced by the purposes of the Act and the fact that a declared national state of disaster is of a short duration – three months.<sup>56</sup>

[104] The objectives sought to be achieved by Regulation 45 have been outlined in the Minister's reasons, stated above. The Minister accepted that the reasons for the prohibition on the sale of tobacco products were confined to the health risks it posed during the pandemic. The Minister referred to scientific literature dealing with the pandemic and contended that the use of tobacco products increased the risk of developing a more severe form of the disease. However, the Minister conceded that the scientific knowledge on this issue was 'still evolving', and that the medical literature was not 'absolutely conclusive', but said that it provided a sufficient basis for her to 'rationally conclude that smoking presents heightened COVID-19 risks'.

[105] But that is not the test. Section 27(2)(n) and s 27(3) posit an objective enquiry as to whether Regulation 45 was necessary to assist and protect the public, and deal with the destructive effects of the pandemic. The scientific evidence shows that it was not. And as stated above, assuming that there is a causal link between smoking and the risk of contracting a more severe form of COVID-19, the Minister would have had to show that stopping smoking during the tobacco ban would have reversed or reduced the risk of contracting a severe form of COVID-19. This too, has not been established in evidence.

[106] To be valid, the making of Regulation 45 had to comply with the constitutional principle of legality, which applies to all exercises of public power and requires that the relevant functionary act *intra vires* the empowering provision.<sup>57</sup> For these reasons, the high court correctly held that inasmuch as

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<sup>56</sup> Section 27(5) of the Act states that national state of disaster that has been declared lapses three months after it has been declared, and may be extended by the Minister for one month at a time before it lapses.

<sup>57</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (CC) paras 57-59.

Regulation 45 was not necessary to achieve any of the purposes listed in ss 27(2) and 27(3) of the Act, it was *ultra vires*.

[107] It follows that the decision in *Fair Trade Independent Tobacco Association*,<sup>58</sup> in which an application to review and set aside Regulation 45 was dismissed, is incorrect. It must be regarded as overruled.

### ***Procedural irrationality***

[108] Procedural irrationality entails looking at the process leading to the exercise of public power as a whole and determining whether the steps in that process are rationally related to the end sought to be achieved; and if not, whether the absence of a particular step (part of the means) or the absence of a connection between a particular step in the end, taints the whole process with irrationality.<sup>59</sup> Procedural rationality does not mean that the decision-maker must always afford a hearing to an affected party.<sup>60</sup>

[109] On 25 April 2020 the Minister briefed the media regarding a draft framework for each of the five Alert Levels to be implemented from 1 May 2020. The draft framework proposed that the manufacturing and sale of tobacco products would be permitted in Alert Levels 4, 3, 2 and 1. Pursuant to this media briefing, a draft Risk Adjusted Strategy to ease the lockdown restrictions, was published for public comment by 27 April 2020.

[110] On 27 April 2020 the government received 816 sector submissions and 70 014 emails from members of the public. There were submissions in favour of lifting the prohibition on tobacco sales, including one from BATSA, referred to above. A large number of submissions were also made on the other side, in

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<sup>58</sup> *Fair Trade Independent Tobacco Association* fn 49 paras 2, 13 and 99.

<sup>59</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 2 93 (CC) 49-51; *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) para 39; *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 paras 61-65.

<sup>60</sup> *Democratic Alliance* fn 59 para 65.



which it was argued that the prohibition on the sale of tobacco products under Alert Level 4, should continue.

[111] Before making Regulation 45, the Minister considered the main issues relevant to the continuation of the prohibition on the sale of tobacco, tobacco products, e-cigarettes and related products during the Alert Level 3 period. These were the public health-related reasons pointing towards continuing the prohibition. The submissions in favour of lifting the prohibition were also considered, such as those made by BATSA during the public participation process which preceded the making of the COVID-19 regulations for the Alert Level 4 period, and those mentioned by BATSA in a subsequent media statement on 6 May 2020.

[112] Both sides of the issue were discussed and debated in the NCCC and the Cabinet. Ultimately, it was decided that the prohibition should be continued. Given these facts, I do not think it can be said that the decision to continue the prohibition on the sale of tobacco and vaping products, was procedurally irrational.

### **The cross-appeal on costs**

[113] There can be no doubt that the respondents had achieved substantial success in the high court. The full court however ordered the parties to pay their own costs on the following grounds. The Minister was ‘under both a constitutional and moral obligation to act swiftly at a time when very little was known about the COVID-19 pandemic and the scientific knowledge thereof was [scant] and constantly developing’. The prohibition on the sale of tobacco products had been lifted shortly after the matter had been argued.

[114] The respondents had raised constitutional issues and had been substantially successful before the full court. The *Biowatch* principle was therefore applicable,<sup>61</sup> namely that in constitutional litigation between a private party and the State, the general rule is that the private party should have its costs paid by the State, and if unsuccessful, each party should pay its own costs. The Constitutional Court said that ‘particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieved substantial success in proceedings brought against it’.<sup>62</sup>

[115] The appellants accept that the *Biowatch* principle would apply if their appeal were to succeed and that there should then be no costs order against the respondents in this Court or in the high court. But they say that if the appeal fails, the principle does not apply and the respondents are not entitled to their costs. The contention is untenable.

[116] It is trite that in awarding costs, a court exercises a discretion. An appellate court will interfere with such discretion only if the court below ‘did not act judicially in exercising its discretion, or based the exercise of that discretion on wrong principles of law, or misdirection on the material facts’.<sup>63</sup>

[117] This is such a case. The full court did not consider the *Biowatch* principle. The fact that the prohibition on the sale of tobacco products had been lifted shortly after the matter was argued, did not mean that the respondents were not justified in approaching the high court to set it aside on an urgent basis. The respondents had requested the Minister to lift the prohibition before the application was launched, but the Minister declined to do so.

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<sup>61</sup> *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) para 43.

<sup>62</sup> *Biowatch* fn 61 para 24.

<sup>63</sup> *Biowatch* fn 61 para 31.

[118] That the Minister was compelled to act swiftly in response to the COVID-19 pandemic, did not alter the fact that the Minister acted unconstitutionally.<sup>64</sup> The respondents were compelled to go to court to vindicate their constitutional rights. The Minister filed voluminous answering papers, including expert evidence running into hundreds of pages. It is unfair that the respondents should pay these costs, occasioned by the manner in which the Minister chose to litigate.

[119] It follows that the cross-appeal must be upheld with costs, including the qualifying expenses of the respondents' expert witnesses.

### **The order**

[120] In the result, the following order is issued:

- 1 The appeal is dismissed with costs, including the costs of two counsel.
- 2 The cross-appeal is upheld with costs, including the costs of two counsel.
- 3 Paragraph 224.2 of the order of the Western Cape Division of the High Court is set aside and replaced with the following order:

‘The first and second respondents are ordered to pay the applicants’ costs, including the costs of two counsel and the qualifying expenses of the applicants’ expert witnesses.’

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A SCHIPPERS  
JUDGE OF APPEAL

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<sup>64</sup> *Pheko* fn 50 para 52.

Appearances:

For appellants: M T K Moerane SC (with him A Breitenbach SC,  
K Pillay and S Kazee)

Instructed by: The State Attorney, Cape Town  
The State Attorney, Bloemfontein

For respondents: A Cockrell SC (with him A Toefy)

Instructed by: Webber Wentzel, Cape Town  
Webbers Attorneys, Bloemfontein