

Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa

*Martin van Staden**

Head of Legal (Policy and Research), Free Market Foundation
<https://orcid.org/0000-0002-4612-5250>

Summary: *The purpose of the rule of law, entrenched as supreme in section 1(c) of the South African Constitution, is to guard against tyranny. If the rule of law is conceptualised as a meta-legal doctrine that is meant to permeate all law in the promotion of certainty, predictability and accessibility, in the interests of safeguarding constitutional rights, this makes sense. Yet, the COVID-19 pandemic has seen the reach of state power expand at the expense of these rights. South Africa's COVID-19 lockdown, and within at least its first five months carrying the endorsement of the courts, has made a mockery of the rule of law so conceived. This article considers the constitutionality of South Africa's COVID-19 lockdown against the backdrop of the constitutional rights limitation regime within the broader theoretical framework of constitutionalism and the rule of law. This analysis is conducted in the context of some early challenges brought against the lockdown in four High Court cases. The article concludes that the South African government, with the partial endorsement of the courts, has strayed beyond the bounds of the Constitution and engaged in unjustified violations of constitutional rights.*

* LLB LLM (Pretoria); martinvanstaden@fmfsa.org

Keywords: *freedom; constitutionalism; constitutional rights; limitation of rights; rule of law; COVID-19; pandemic; state of disaster*

1 Introduction

It is in the nature of the state to continuously wish to expand its power.¹ The course of South African history since the adoption of the South African Constitution² has been illustrative of this fact.³ It is rare to see areas of state regulation and regimentation being totally repealed and replaced by the void of freedom, where civil society self-regulates.⁴ Instead, where regulatory regimes have been repealed, they have been replaced by a different regime; but the more likely event has been that more regulation has simply been added on top of existing regulation.⁵

The global COVID-19 outbreak has offered a rare opportunity for the state, including South Africa, to substantially expand its power and domain over vast swathes of social and economic affairs.⁶ The COVID-19 lockdown regulations are likely to be repealed when the pandemic has ended.⁷ However, the event still offered governments an opportunity to determine how much resistance would be forthcoming from civil society in response to such a sudden and radical increase in power. Indeed, it is trite that constitutions in themselves are powerless to stop unconstitutional conduct, and require a vigilant citizenry aided by conscientious courts to facilitate constitutional accordance.

1 MN Rothbard *Anatomy of the state* (2009) 47.

2 Constitution of the Republic of South Africa, 1996.

3 For the tyrannical extent of state power during the tenure of the previous regime, see generally EH Brookes & JB MacAulay *Civil liberty in South Africa* (1958).

4 See LJ Wintgens 'Legisprudence as a new theory of legislation' (2006) 19 *Ratio Juris* 11, where Wintgens argues for a theory of legislation that permits state intervention only in those circumstances where it can be shown that such intervention is preferable to social self-regulation.

5 For discussions of an increasingly regulated social world, see J Šima 'From the bosom of Communism to the central control of EU planners' (2002) 16 *Journal of Libertarian Studies* 70; D Boaz *Toward liberty: The idea that is changing the world* (2002) 8; F Bastiat *Economic harmonies* (1850) 164 330.

6 V Geloso 'Disease and the unconstrained state' 22 April 2020, <https://www.aier.org/article/disease-and-the-unconstrained-state/> (accessed 24 July 2020).

7 As of 18 March 2020, the South African government has issued a multitude of regulations pursuant to the Minister of Cooperative Governance and Traditional Affairs having declared a state of national disaster in terms of sec 27(1) of the Disaster Management Act 57 of 2002 on 15 March 2020. These regulations collectively are popularly referred to as the 'COVID-19 lockdown' or simply the 'lockdown', and will be referred to similarly in this article. Throughout this article, 'regulation(s)' will be used as a catch-all term to include directives and other measures, other than Acts of Parliament or superior court judgments, introduced by government that demand compliance.

This article critically analyses the government's COVID-19 lockdown regime against the backdrop of South Africa's constitutional framework, particularly its commitment to freedom and the rule of law as stated in section 1 of the Constitution, and section 36 which regulates the degree to which government may invade the rights and freedoms contained in the Bill of Rights. A thorough consideration of existing constitutional law and of the COVID-19 regulations themselves, as challenged in four of the earliest court challenges to the lockdown,⁸ will precede the critical analysis. The article enquires as to whether government has acted in contravention of the Constitution, despite case law to the contrary, and, if so, recommends certain measures to rectify such conduct for future disaster situations.

2 Constitutional framework

2.1 Section 1 and the law behind the Constitution

It has long been recognised, albeit contentiously, that a constitution's text simply is the point of departure, and that there are a multitude of principles, values and structural implications that, while not explicitly part of the text, certainly are part of that constitution.⁹ Even positivists recognise that there are certain legal implications that may be deduced from the very nature of law, without those implications necessarily being required by the legal text.¹⁰

Section 1 of the Constitution partly brings the law behind the Constitution to the foreground, entrenching various values said to underpin South Africa's constitutional order. While it is trite that the Constitution must be read holistically, Malherbe argues that section 1 (as well as section 74) is the most important provision in the Constitution because of its deeper entrenchment than the remainder of the highest law. Section 1 can only be amended with a 75 per cent affirmative vote of the National Assembly, not the usual two-thirds majority required for other constitutional amendments.¹¹ It

8 At the time of writing the cases discussed were in various stages of appeal, review and settlement. This limitation is surmounted by the fact that the general principles discussed and stated in the judgments, rather than the peculiarities of the cases themselves, are the focus of this article.

9 See M Wiechers 'The fundamental laws behind our Constitution' in E Kahn (ed) *Fiat iustitia: Essays in memory of Oliver Deneys Schreiner* (1983) 389-392 and EFJ Malherbe 'Die wysiging van die Grondwet: Die oorspoel-imperatief van artikel 1' (1999) 2 *Journal of South African Law* 194.

10 JD van der Vyver 'Law and morality' in Kahn (n 9) 356-358.

11 Malherbe (n 9) 191-192. Six out of the nine provinces represented in the National Council of Provinces are required to approve an amendment, whether

would have been senseless for the most important provision in the Constitution to not have any enforceable or consequential effect – it cannot amount to empty words.¹² Other provisions throughout the Constitution that give concrete expression to some of the values in section 1 should be regarded as falling under the protective blanket of section 1, guarding them against a mere two-thirds majority amendment. This is called the ‘spillover effect’ of section 1,¹³ showcasing the importance of background values to the South African constitutional order.

None of the values contained in section 1 are defined in the Constitution itself. Aspects of those values are given expression through other constitutional provisions, but it cannot be argued that those other provisions are exhaustive of the section 1 values. For instance, in *Fedsure v Johannesburg*, Chaskalson P implied *obiter* that the doctrine of the rule of law (section 1(c)) could have a broader content than what is currently known in positive law – chiefly the legality principle.¹⁴ This, it is submitted, means that the scope of the section 1 values could potentially be far-reaching and entail wide-ranging legal implications that go beyond the textual provisions found throughout the remainder of the Constitution.

For present purposes, the two values of importance are, in section 1(a), the ‘advancement of human rights and freedoms’, and in section 1(c), the ‘supremacy of the Constitution and the rule of law’. These values are evidently relevant to the conduct of government, including judicial and legislative, particularly where such conduct interferes with entrenched constitutional rights, such as the response to COVID-19.

2.1.1 *Advancement of human rights and freedoms*

The values in section 1(a) permeate the remainder of the Constitution and, as a result, the whole legal order.¹⁵ Indeed, the guarantee of civil liberty, or freedom under law, is one of the main aims of the rule

it be a sec 74(1), (2) or (3) amendment.

12 Malherbe (n 9) 195. See also M van Staden ‘A comparative analysis of common-law presumptions of statutory interpretation’ (2015) 3 *Stellenbosch Law Review* 564.

13 Malherbe (n 9) 196-197. Malherbe is not arguing that secs 74(2) and (3) are redundant, but that if a constitutional amendment undermines or weakens a provision that is supposed to give effect to a sec 1 value (ie, values that are protected by sec 74(1)), then it would also need to comply with the requirements of sec 74(1).

14 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) para 58.

15 *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 66.

of law and constitutionalism.¹⁶ Were this not the case, constraining government conduct through law would be a pointless exercise.

In the minority judgment of Khampepe J in *AB & Another v Minister of Social Development*, the judge explains freedom as a constitutional value:¹⁷

What animates the value of freedom is the recognition of each person's distinctive aptitude to understand and act on their own desires and beliefs. The value recognises the inherent worth of our capacity to assess our own socially-rooted situations, and make decisions on this basis ... Our Constitution actively seeks to free the potential of each person; a goal which can only be achieved through a deep respect for the choices each of us makes.

Ngcobo J expressed it most concisely in *Barkhuizen v Napier*: 'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'¹⁸

This important identification of freedom *as an inherent part of human dignity* must be borne in mind forthwith. It is clear that the Constitutional Court recognises that freedom is the medium through which individual South Africans realise their own potential and destinies. South Africa is not, or at least no longer is, a society where a person's potential and destiny is determined by government, from cradle to grave, but a society where these decisions rest with the people themselves.

It is trite, however, that under the Constitution freedom and individual rights are not unlimited. The various provisions of the Bill of Rights contain internal limitations on the rights they demarcate, and section 36, discussed below, contains general principles for the limitation of such freedoms. This is understandable, given that an unlimited conception of freedom would involve some negating the freedom of others.

Whatever one's conception of freedom, whether it is more limited or more ample, the language of section 1(a) puts it beyond question that human rights and freedoms must be *advanced*. Thus, human rights and freedoms may not be undermined or undone – outside

16 G Sartori 'Liberty and law' (1976) 5 *Studies in Law Institute for Humane Studies* 14. See also Brookes & MacAulay (n 3) 1.

17 *AB & Another v Minister of Social Development* [2016] ZACC 43 para 56 (citations omitted).

18 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57. See also Langa CJ in *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC) para 53.

of sections 36 and 37 – as it stands to reason that to do so would be unconstitutional.

2.1.2 *Supremacy of the Constitution and the rule of law*

It is trite that law and conduct inconsistent with the Constitution are invalid. This fact, deducible from section 1(c), is further explicitly reinforced by section 2 of the Constitution. However, the significance of the latter portion of section 1(c) – ‘and the rule of law’ – is rarely considered in any detail.¹⁹

The extent of the content of the rule of law has been the subject of widespread debate, but the basic content of the doctrine is relatively, albeit not absolutely, uncontroversial. Fuller’s eight elements that comprise the so-called ‘internal morality of the law’ capture this basic content aptly: The law must be general and of equal application, known and knowable, not be of retroactive effect, must be clear and understandable, not be contradictory or impose contradictory obligations, not require the impossible, must be certain and not change too frequently, and the execution and administration of the law must be consistent with the law itself.²⁰

Mathews argued that the purpose of the rule of law is ‘the legal control of the government in the interests of freedom and justice’.²¹ Without such legal control – constitutionalism – a citizenry with guaranteed civil liberties is impossible.²² Van Schalkwyk mirrors this sentiment by submitting that ‘[t]he task of the rule of law ... is to secure the right to individual liberty against ... tyranny’.²³ The rule of law, then, reinforces the already-existing constitutional commitment to the advancement of human rights and freedoms.

In the South African juridical context, the most comprehensive expression of the content of the rule of law has been the minority judgment of Madala J in *Van der Walt v Metcash*. In this case the judge notes that, as with the advancement of human rights and freedoms,

19 For a comprehensive consideration of this phenomenon, see M van Staden *The Constitution and the rule of law: An introduction* (2019).

20 LL Fuller *The morality of law* (1969) 46, as discussed in Van der Vyver (n 10) 358-359.

21 AS Mathews *Freedom, state security, and the rule of law* (1986) xxix.

22 AS Mathews *Law, order and liberty in South Africa* (1971) 267-268. See also G van der Schyff ‘Die modaliteite van konstitusionele toetsing as ‘n uitwerking van konstitusionalisme: ‘n Kritiese en regsvergelykende beskouing van die Engelse reg in die Verenigde Koninkryk en die Suid-Afrikaanse reg’ (2010) 1 *Journal of South African Law* 86.

23 R van Schalkwyk ‘Babylonian gods, the rule of law and the threat to personal liberty’ 8 June 2017, <https://www.cnbcfrica.com/special-report/2017/06/08/ruleoflaw/> (accessed 7 July 2020).

the supremacy of the Constitution and the rule of law permeates the remainder of the Constitution, and as a consequence the whole of South African law. The rule of law's 'basic tenets' include 'the absence of arbitrary power', meaning that discretionary powers may not be unlimited; legal equality, meaning that everyone is subject to the same law before the ordinary courts; the protection of 'basic human rights'; legal predictability; and reasonableness.²⁴

It should be uncontroversial to summarise the core (although perhaps not the full extent) of the rule of law as comprising the following imperatives, stated generally:

- The law must be clear and understandable.
- The law must be certain and predictable.
- The law must be general and of equal application.
- The law must place limits on the exercises of state power.²⁵
- The law must not apply retroactively.
- The law must not be inconsistent with itself or other laws.
- The law must not require impossible conduct.
- There must be consistency between the law and its enforcement.
- The rights recognised in the Bill of Rights must be adequately protected.
- The separation of powers must be observed.

These mostly procedural limitations on government and parliamentary conduct fundamentally serve the ends of guarding the sphere of free action, over which legal subjects have the final say, from arbitrary interference. At a basic level, these limitations on government make it more burdensome and onerous for government to step into this sphere of free action, and thus act as a disincentive of sorts. These disincentives must be observed and not merely regarded as recommendations, particularly during times of crisis – wherein government power usually expands significantly – such as the COVID-19 pandemic.

Indeed, it is submitted that these imperatives, by virtue of the language of section 1(c), must be understood as being legally supreme alongside the remainder of the Constitution, even though they are not expressly written anywhere in the constitutional text.

²⁴ *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC) paras 65-66.

²⁵ Mathews (n 22) 6 regards limited government and the rule of law as two sides of the same coin.

2.2 Limitation of rights and section 36 of the Constitution

Section 36(1) of the Constitution sets out the framework within which constitutional rights, provided for in the Bill of Rights and further entrenched in section 1(a), may be limited. It acts as the proviso to the unqualified commitment to human rights and freedoms in section 1(a). To be sure, section 36(1) is not meant to be an invitation to government to limit rights, but because state action almost invariably involves limiting freedom, section 36(1) *limits* the way in which the state may do so. Section 36(1), therefore, is part of the regime of rights protection, not rights infringement.²⁶

The section provides that a right may be limited if it is reasonable and justifiable in an open and democratic society based on freedom, dignity and equality. To determine whether the state has satisfied this standard, the courts must conduct an analysis of the nature, extent and purpose of the right and its limitation, and ascertain the limitation's rationality and proportionality. The courts must also consider whether there were less restrictive means to achieve the purpose of the limitation. The courts must test every alleged infringement of a constitutional right against this formula.²⁷ Section 36(1), it is submitted, is (supposed to be) a strong, not a weak, limitation on exercises of state power, as the unavailability of less restrictive means in particular is a high bar to reach.

Section 36(2) provides that there may be no deviation from the rights enshrined in the Bill of Rights unless it is in terms of section 36(1) or another provision of the Constitution, most likely referring to section 37 which regulates derogation from constitutional rights during a declared state of emergency.

When a right is limited, the essential content of the right must be maintained and not extinguished.²⁸ The limitation must be construed narrowly, or strictly, in favour of the rights bearer.²⁹ The courts in such circumstances will have regard to the substance, not the form, of the limitation.³⁰ The implication of this is that rights limitations will be regarded objectively, with reference to the reality of the matter, rather than the subjective intentions or purposes for which those rights limitations were enacted. This principle must be borne in mind

26 G Erasmus 'Limitation and suspension' in D van Wyk et al (eds) *Rights and constitutionalism: The new South African legal order* (1996) 640.

27 As above.

28 Erasmus (n 26) 650.

29 Erasmus 629.

30 Erasmus 633.

particularly in the discussion on the early judicial challenges to the lockdown below.

Because the unmolested exercise (rather than the limitation) of guaranteed rights is the default position, government must 'restrain itself when regulating' such exercise³¹ – freedom is the general rule, and limitation is the exception.³² Such exceptional limitations must be for valid, constitutional, public purposes, rather than purposes not contemplated by the Constitution. Purposes that are unconstitutional, or simply extra-constitutional, are insufficient to justify rights limitations.³³

Section 36 limitations do not apply to section 1 and the values discussed above. No argument based on section 36 can therefore be made that the imperatives of the rule of law or the necessity of advancing human rights and freedoms have been limited or suspended due to the COVID-19 pandemic. Those values must always be observed, without exception.

3 COVID-19 lockdown

3.1 Disaster Management Act

The COVID-19 lockdown in South Africa was not embarked upon in terms of a state of emergency, but in terms of a national state of disaster as contemplated, declared, and gazetted in terms of section 27(1) of the Disaster Management Act (DMA). Any infringement of constitutional rights during the COVID-19 lockdown by government agents must therefore comply with section 36(1) of the Constitution, and its formula for determining the justifiability of a limitation of (not derogation or suspension of) rights. As a consequence of the declaration of a state of disaster, the power to derogate from rights as contemplated in section 37(4) of the Constitution does not vest in the DMA, but would require compliance with the prescripts of the State of Emergency Act after a state of emergency has been declared.³⁴

Section 27(2) of the DMA enables the Minister of Cooperative Governance and Traditional Affairs to 'make regulations or issue directions or authorise the issue of directions' under the state of

31 Erasmus 640.

32 Erasmus 642.

33 Erasmus 647.

34 State of Emergency Act (64 of 1997).

disaster. These regulations must concern one or more of 15 grounds for regulation listed in sections 27(2)(a)-(o). Section 27(2)(n) is a catch-all provision which allows for regulation 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’.

3.2 Challenging the lockdown: The approach(es) of the superior courts

The National Disaster Management Forum classified the COVID-19 pandemic as a national disaster on 15 March 2020. In the same *Government Gazette*, the Minister of Cooperative Governance and Traditional Affairs (Minister) declared a national state of disaster in terms of section 27(1) of the DMA.³⁵ Three days later, the first set of regulations as contemplated in section 27(2) of the Act were published.³⁶ Over the next months, dozens of regulations, amendments to regulations, repeals of regulations, directives and notices were published by the Department of Cooperative Governance and Traditional Affairs, other cabinet departments, and government agencies.³⁷

The overarching purpose of the regulations is to ‘flatten the curve’ and allow government time to build capacity before a wave of Coronavirus patients arrive at healthcare facilities.³⁸

On 23 April 2020 the President announced the lockdown classification system. From that point onwards the 18 March to 30 April regulations were classified as Level 5 of the lockdown, the most restrictive level. Four other levels were also elaborated.³⁹ As of 21 September, and at the time of writing, South Africa was at Level 1 of the lockdown.⁴⁰

35 Government Notice R313 of 15 March 2020.

36 Government Notice R318 of 18 March 2020 (Level 5 regulations).

37 The Parliamentary Monitoring Group maintains a catalogue of all regulations and directives from 15 April onward. See <https://pmg.org.za/page/COVID-19%20State%20of%20Disaster%20&%20Lockdown%20Regulations:%20A%20summarynew> (accessed 7 July 2020).

38 See *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 para 5.2 (*De Beer*); MC Ramaphosa ‘South Africa’s response to coronavirus COVID-19 pandemic’ 13 May 2020, <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-13-may-2020> (accessed 7 July 2020).

39 MC Ramaphosa ‘South Africa’s response to coronavirus COVID-19 pandemic’ 23 April 2020, <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020> (accessed 7 July 2020).

40 South African Government ‘Coronavirus COVID-19 Alert level 1’, <https://www.gov.za/covid-19/about/coronavirus-covid-19-alert-level-1> (accessed 28 September 2020).

The regulations themselves, found in a scattered body of *Government Gazettes*, are not specifically considered. Instead, four of the earliest lockdown judgments from the divisions of the High Court, dealing with the constitutionality and rationality of the regulations, are analysed. These four cases are divided into categories of those submitted to be the earlier, rights-centric judgments, and those submitted to be the later, executive-minded judgments. Some of these cases are in various stages of appeal and review, and might be overturned. However, they are merely utilised as useful vehicles to discuss general principles of constitutional law during crisis situations, particularly the apparent lacklustre executive and judicial approach to section 36 of the Constitution.

3.2.1 *Khosa and De Beer* cases: A hurrah for rights

The first notable case, *Khosa & Others v Minister of Defence and Military Defence and Military Veterans & Others*, was brought by the family of Collins Khosa. The applicants allege that Khosa ‘was brutalised, tortured and murdered by members of the security forces’ after soldiers – falling under the political responsibility of the Minister of Defence and Military Veterans – enforcing the lockdown accused Khosa of violating the regulations prohibiting the sale of alcohol and beat him severely for protesting their actions. The applicants challenged ‘lockdown brutality’, not the lockdown itself or any particular regulation.⁴¹

The Court per Fabricius J remarked that the lockdown regulations must not infringe on South Africans’ constitutional rights, and if they do, ‘the least restrictive measures must be sought, applied and communicated to the public’.⁴² The Court was asked to confirm existing law, to ensure that government, and by implication the public, are aware of the requirements, particularly of the Constitution and international law.⁴³ The Court order declared, among other things, that anyone present in South Africa is entitled to various constitutional rights, even if a state of emergency is declared, such as the right to life and to not be tortured; and that the security services must comply with the Constitution, domestic and applicable international law.⁴⁴

41 *Khosa & Others v Minister of Defence and Military Defence and Military Veterans & Others* (21512/2020) [2020] ZAGPPHC 147 paras 24 & 34 (Khosa). Reg 8 of the Level 5 regulations regulated the liquor and alcohol trade, but imposed no rules on the consumption or possession of alcohol on private property.

42 *Khosa* (n 41) para 7.

43 *Khosa* (n 41) paras 24 & 142.

44 *Khosa* para 146. ‘Security services’ is understood to encompass the police service, the national defence force and municipal police departments.

The Court's brief remarks about the economic consequences of certain lockdown regulations bear mentioning.

One of the cornerstones of the higher lockdown levels was the distinction between so-called 'essential' goods and services, on the one hand, and non-essential goods and services, on the other. All else being equal, those businesses that provide the former were allowed to continue operating while those that provide the latter were not.⁴⁵ These regulations, alongside others that undermined the sustainability and ability of businesses to operate efficiently, led to economic ruin.⁴⁶ Fabricius J *obiter* summarised the position as follows:⁴⁷

The present lock-down measures will result in massive unemployment with all its consequences relating to the inability to provide each particular family with sustenance and an income. It is clear that thousands of small businesses have been adversely affected and many of them will probably never be re-established. Unemployment will become worse and many families, in fact most likely millions, will think about the future with a great deal of insecurity and despair. Added to that is that both the Commissioner of South African Revenue Services and the Minister of Finance have told the public about the billions of rand that are lost every month, unrecoverable in my view, as a result of the lock-down regulations, and the fact that thousands of businesses have ground to a halt.

In the second notable case, *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs*,⁴⁸ the applicants – civil society organisations – in an urgent application sought, among others, to have the declaration of the national state of disaster, and the lockdown regulations promulgated as a consequence thereof – both emanating from the Department of Cooperative Governance and Traditional Affairs – set aside.⁴⁹ Briefly, the applicants argued that the declaration of the national state of disaster was an 'irrational reaction to the Coronavirus itself and the number of deaths caused thereby',⁵⁰ and that the lockdown regulations themselves were also irrational.⁵¹

45 See regs 11A and 11B of Government Notice R398 of 25 March 2020 (amended Level 5 regulations). Businesses that provided both were only allowed to continue providing essential goods and services. Other businesses in the manufacturing and production supply chain of essential goods and services were also allowed to continue operating.

46 See also, eg, regs 4 and 5 of Government Notice R350 of 19 March 2020 which activated provisions in the Competition Act 89 of 1998 and Consumer Protection Act 68 of 2008 prohibiting the charging of 'excessive' and 'unconscionable, unfair, unreasonable and unjust prices'.

47 *Khosa* (n 41) para 19.

48 *De Beer* (n 38).

49 *De Beer* (n 38) paras 1 & 3.

50 *De Beer* para 4.12.

51 *De Beer* para 6.4.

The Court per Davis J noted various inconsistencies and nonsensicalities in the regulations at the time, leading it to conclude that the regulations were ‘not only distressing but irrational’.⁵²

Some of the regulations the Court considered were the following:

- the prohibition of persons to be around their family, even when a family member is terminally ill, as compared to the allowance of persons to attend funerals in groups of 50;⁵³
- the prohibition on various forms of commerce where traders and workers come into little contact with others, again as compared to the allowance of persons to attend funerals, or be seated in minibuses, in large groups;⁵⁴ and
- the alleged burden imposed on those who care for children to ensure that the latter’s interests are taken care of.⁵⁵

However, the Court also made it clear that not all the lockdown regulations were irrational,⁵⁶ and that the national state of disaster itself was rational.⁵⁷ The Court further explained that irrational measures would inherently be impermissible in terms of section 36 of the Constitution as a limitation of a constitutional right.⁵⁸

It was all but admitted by counsel for the respondents that section 36(1) was not considered when the regulations at issue were formulated.⁵⁹ This the Court referred to as a ‘paternalistic approach, rather than a constitutionally justifiable approach’.⁶⁰

52 *De Beer* paras 7.1-7.2. This refers to reg 35(2) of Government Notice R608 of 28 May 2020 (Level 3 regulations), prohibiting more than 50 persons from congregating at a funeral, read with the general prohibition on movement in reg 33 and the ‘specific economic exclusions’ in Table 2 of the Level 3 regulations. Further examples follow in the judgment.

53 Reg 33 of the Level 3 regulations prohibiting movement generally, read with reg 35 which allows funerals under certain conditions.

54 The Court did not name a specific regulation, but this evidently refers to reg 33 of the Level 3 regulations, the general prohibition on movement, and reg 39, which closed many commercial premises to the public.

55 Reg 34 of the Level 3 regulations regulated the movement of children in particular. A child could not be moved between municipalities or provinces without a permit, and a permit may only be issued by a magistrate *inter alia* if a birth certificate and written reasons why the movement was necessary were provided.

56 *De Beer* (n 38) paras 7.14-7.15. The Court specifically points to regs 36 (prohibition of evictions); 38 (prohibition of initiation practices); 39(2)(d)-(e) (forced closure of night clubs and casinos); and 41 (closure of borders).

57 *De Beer* (n 38) para 9.1.

58 *De Beer* para 6.6.

59 *De Beer* paras 7.16-7.17.

60 *De Beer* para 7.18.

The Court directed that the Minister undertake 'remedial action, amendment or review of the regulations',⁶¹ which the Court 'declared unconstitutional and invalid'.⁶²

While *De Beer* has been criticised for its lack of specificity as to which particular regulations were irrational or noncompliant with section 36(1),⁶³ there has also been qualified praise.⁶⁴

3.2.2 *Esau and FITA: A cheer for executive power*

In *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* the applicants, being private citizens, sought to have the existence of the so-called National Coronavirus Command Council (Council) declared unconstitutional and inconsistent with the DMA, and that the Council's decisions as a consequence be declared invalid.⁶⁵ As in the case of *De Beer*, the applicants also argued that the lockdown regulations,⁶⁶ specifically 'regulations 16(1) to (4); 28(3) and 28(4), read with Part E of Table 1' of 29 April,⁶⁷ were unconstitutional and should be declared such. This argument was based on legality and rationality.⁶⁸

The Court remarked *obiter* that 'the restriction on the movement of goods and services' amounts to 'a limitation on human dignity'.⁶⁹ This confirms the sentiment expressed in *Barkhuizen*, as quoted above, that freedom and human dignity are inextricably linked.

The Court, however, rejected the argument that the Council's existence was unlawful, as '[n]either the DMA nor the regulations

61 *De Beer* para 10.3.

62 *De Beer* para 11.3.

63 See eg *De Beer* (n 38) paras 9.2-9.5; J Brickhill 'The striking down of the lockdown regulations', <https://juta.co.za/press-room/2020/06/07/constitutional-implications-covid-19-striking-down-lockdown-regulations-issue-14/> (accessed 23 July 2020).

64 K Malan & I Grobbelaar-Du Plessis 'Regter Norman Davis se dapper uitspraak', <https://www.litnet.co.za/regter-norman-davis-se-dapper-uitspraak/> (accessed 24 July 2020).

65 *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* (5807/2020) [2020] ZAWCHC 56 paras 1.1-1.2 (*Esau*).

66 *Esau* (n 65) para 1.3. The applicants also sought other relief which is irrelevant for purposes of this article.

67 *Esau* (n 65) para 182.

68 *Esau* para 222. Regs 16(1)-(4) of Government Notice R480 of 29 April 2020 (Level 4 regulations) confined people to their residences and only allowed them to leave under a limited number of defined circumstances between 20h00 and 05h00. Movement across provincial and municipal borders was also strictly regulated. Regs 28(3)-(4) prohibited stores from selling any goods other than those listed in Table 1, and required those who performed essential or permitted services to carry with them a written designation (found in Form 2 of Annexure A) as an essential or permitted worker.

69 *Esau* (n 65) para 45.

infringe on the accountability duty of the Minister of CoGTA and DTIC have to Parliament' and that the Council simply is a committee of cabinet.⁷⁰ The Court held that the President need not reduce the establishment of a cabinet committee to writing.⁷¹ Section 12(a) of the Promotion of Access to Information Act⁷² also protects the confidentiality of discussions held in cabinet committees.⁷³ Regarding this contention Allie J held:⁷⁴

In casu, the President established the NCCC which according to the Minister of CoGTA, comprised some Cabinet members and later all the Cabinet members were added. When the Minister asserts that minutes of Cabinet meetings as well as those of its committees including the NCCC are confidential, there is nothing sinister or un-transparent about it.

Cabinet, accountable to Parliament, has the lawful authority to accept, reject or modify decisions of the Council.⁷⁵ The Court held that '[t]he ultimate decision as to the formulation of disaster management regulations were made by the minister concerned, alone'.⁷⁶

The Court rejected the applicants' comparison of the regulations with one another. Instead, the section 36(1) test for reasonable and justifiable limitations of rights should have been utilised.⁷⁷ Rather than itself undertaking a section 36(1) analysis, however, the Court only tested for rationality.⁷⁸ Without further ado and contrary to *De Beer*, the Court implied that government had itself undertaken a 'proportionality exercise' to determine the justifiability of the regulations.⁷⁹

After satisfying itself that the regulations were rational and that the regulation-making power in the DMA must be construed broadly instead of narrowly, the Court held that the Minister's power to make regulations 'was lawful and in compliance with the Constitution' as the Minister 'correctly interpreted the purpose of the regulations as granting her the power to use necessary means to manage the national disaster'. A narrow interpretation would have been unacceptable as it would have operated 'to limit government's ability to' contain COVID-19.⁸⁰

⁷⁰ *Esau* paras 81, 85-86.

⁷¹ *Esau* para 88.

⁷² Promotion of Access to Information Act 2 of 2000.

⁷³ *Esau* (n 65) para 90.

⁷⁴ *Esau* paras 92-93.

⁷⁵ *Esau* para 96.

⁷⁶ *Esau* para 98.

⁷⁷ *Esau* paras 230-231.

⁷⁸ *Esau* paras 236-244.

⁷⁹ *Esau* para 254.

⁸⁰ *Esau* para 253.

Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another (FITA) was another mainly rationality-based challenge of certain lockdown regulations, particularly those prohibiting the sale of tobacco-related products.⁸¹

Since the amended Level 5 regulations became operative on 25 March, tobacco and tobacco-related products were not on the list of so-called 'essential' goods. This persisted under the Level 4 regulations, which now explicitly excluded tobacco and tobacco-related products in regulation 27, and the Level 3 regulations, which prohibited the sale of such goods, except in cases of export, in regulation 45.⁸²

The applicants, representing a portion of the tobacco industry, in the course of their rationality argument also attempted to argue that there were less restrictive means that government could have employed to achieve the same sought-after objectives of preventing the overwhelming of healthcare facilities.⁸³

The Court per Mlambo JP rejected this argument because the application was based on rationality, 'not whether better, or less restrictive means' were available.⁸⁴ The Court thus did not undertake a section 36(1) analysis that would involve an inquiry into whether there were less restrictive means available to government rather than infringing on the constitutional rights of South Africans, despite the fact that the applicants, perhaps errantly by subsuming it into a rational argument, put it to the Court. The Court, however, was satisfied that 'the Minister considered all the relevant medical literature' despite the Minister's admission that 'she discounted [the] reports' that the applicant submits were 'empirical medical literature that concludes that there is no evidence of a link between smoking and COVID-19'.⁸⁵

81 *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another* (21688/2020) [2020] ZAGPPHC 246 para 13 (*FITA*).

82 *FITA* (n 81) paras 3-12.

83 The less restrictive means inquiry is an aspect of the sec 36(1) analysis for whether a limitation of a constitutional right is justified.

84 *FITA* (n 81) para 50.

85 *FITA* paras 51-53.

4 A critical analysis of South Africa's lockdown jurisprudence

4.1 Limitation of rights during a crisis situation

With the COVID-19 lockdown proceeding in terms of the legislative framework of the DMA – and, consequently, within the framework of section 36 of the Constitution – it follows that all infringements of constitutional rights must be justified in terms of section 36. Such infringements cannot otherwise be lawful, even if they are rational in the legal-technical sense of the term.⁸⁶ Indeed, in *Khosa* the Court noted that South Africans remained entitled to have their rights recognised and respected despite the circumstances. The Court further noted that certain rights – including the rights to equality, human dignity, life, freedom and security, and the rights of arrested, detained, and accused persons – ‘may not be derogated from even in a state of emergency’.⁸⁷ It has also been expressed by the Constitutional Court, and restated in *Esau*, that freedom is an inherent aspect of dignity.⁸⁸ This context is relevant to the following discussion.

4.2 Section 36, where art thou?

In an arguably correct criticism of *De Beer*, Brickhill writes that the COVID-19 pandemic does not ‘automatically [justify] the web of new regulations’ as against the standards of section 36(1). ‘Ultimately’, Brickhill continues, ‘every strand in the web must satisfy s 36’. In *De Beer* the converse happened, where the applicants appeared to challenge the regulatory regime as whole, which Brickhill argues is not permissible. The Court in that case did not undertake a section 36(1) analysis – despite it concluding in part on the strength of that provision that the regulations were unconstitutional – nor did the government undertake a section 36(1) justification.⁸⁹

In *Esau*, despite the Court having specifically corrected the applicants for not relying on section 36(1), the judgment included no section 36(1) analysis. In *FITA*, too, the Court paid no heed to section 36(1), despite the fact that the applicant – errantly, perhaps – put it before the Court subsumed into a rationality argument.⁹⁰

86 Sec 36(2) of the Constitution.

87 *Khosa* (n 41) para 19.

88 See nn 18 & 69.

89 Brickhill (n 63).

90 *FITA* (n 81) para 50.

It is most disturbing that in none of these three cases a section 36(1) analysis was conducted. Section 36(1) analyses appear to have been sacrificed in every instance at the altar of rationality analyses. It might be that none of the applicants argued expressly on the basis of section 36(1), but there is no rule of law that proscribes a court from *mero motu* giving effect to constitutional provisions even though those were not placed expressly before that court. In fact, the opposite is the case. In *CUSA v Tao Ying Metal Industries* the Constitutional Court held:⁹¹

Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.

Section 165(2) of the Constitution provides that the judiciary is 'subject only to the Constitution and the law, which [the courts] must apply impartially without fear, favour of prejudice'. This must be read with sections 7(1) to (2) of the Constitution, which provide that the Bill of Rights 'is a cornerstone of democracy in South Africa' and that the state – of which the judiciary is a branch – 'must respect, protect, promote and fulfil the rights in the Bill of Rights'. More technically, the courts are the expounders and interpreters of law, particularly of the constitutional law that constituted them. Therefore, it cannot be averred that the relevance of section 36 to each of these cases was not apparent to the courts, and indeed in *Esau* the Court specifically made reference to the fact that the applicants ought to have made use of section 36(1).⁹²

In one way or another each of these cases challenged lockdown regulations that infringed on constitutional rights. Particularly during a crisis situation such as COVID-19, when citizens and their constitutional rights are at their most vulnerable, there was no good reason for the courts to ignore section 36(1) and wait for it to be expressly placed before them at some future stage.⁹³

91 *CUSA v Tao Ying Metal Industries & Others* 2009 (2) SA 204 (CC) para 67 (citations omitted). See also n 93 below on the general rule that courts may not stray from what is put before them.

92 *Esau* (n 65) para 231.

93 The general rule that the courts may not stray from the arguments put before them in an adversarial system is not disputed. It has been demonstrated that sec 36 in the aforementioned cases was put before the Court but inappropriately applied (*De Beer*); not put before the Court, recognised by the Court but then ignored (*Esau*); and incompetently put before the Court – by being subsumed into a rationality argument – but disregarded (*FITA*).

4.3 *Esau's* generous construction of the Disaster Management Act

The courts' missteps, it is submitted, went beyond the mere non-enforcement of section 36(1).

In *Esau* the Court undermined the legal protection of rights by framing enabling provisions that allow the limitation of rights generously rather than strictly. The applicants in that case correctly noted that '[t]he regulations ought to be narrowly construed in the terms set out in section 27(3) of [the DMA], namely, to (i) assist, protect and relieve the public; (ii) protect property and prevent disruption; or (iii) deal with the disaster's effects'.⁹⁴

The Court, however, proceeded to effectively disregard section 27(3) by looking to section 59(1)(a)(ii), which allows the Minister to make regulations necessary for the effective implementation and enforcement generally of the Act's provisions. To the Court, this meant that government was authorised to take ancillary measures 'not expressly stated in the Act but which are necessary to achieve the implementation of [the] objects' of the Act.⁹⁵

Provisions such as section 59(1)(a)(ii) are effectively standard form in Acts of Parliament.⁹⁶ It is rare to find an Act that does not contain such a regulation-making provision. It seems untoward that the Court would take such a general provision and use it to effectively override a specific provision, when the applicable legal principle of *lex specialis* is that the specific norm must be preferred over the general norm.⁹⁷ Indeed, the listing of permissible objectives in section 27(3) – which provides that disaster management regulations may be enacted 'only to the extent that [it] is necessary for the purpose of' the objectives listed in sections 27(3)(a)-(e) – could not have been intended to be redundant filler text that may be summarily disregarded in favour of a different, general provision in the Act.⁹⁸ Furthermore, interpretations that do not yield inequitable results must be preferred over those that do, unless legislative intention to the contrary is clear.⁹⁹ The wording of section 27(3) makes it clear that those objectives

94 *Esau* (n 65) para 245.

95 *Esau* paras 246-247.

96 See C Botha *Statutory interpretation: An introduction for students* (2012) 39, where Botha includes the regulations provision as an ordinary feature of the legislative structure.

97 Only where the specific is not applicable ought the general be applied. See L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013) 32-144.

98 See Van Staden (n 12) 564.

99 Van Staden (n 12) 573.

represent a ceiling beyond which disaster management regulations cannot be made. Further, given that in this case the Court was dealing quite directly with regulations that deprive South Africans of their constitutionally-guaranteed rights, it seems obvious that the Court should have insisted on strict compliance with section 27(3) and construed the regulations narrowly to those objectives, rather than going on a fishing expedition in the remainder of the Act for a general provision that might be broad enough to empower government to limit rights generally. The latter course of action both renders section 27(3) redundant by applying a general provision at the direct expense of a specific one, and brings about inequitable results when a more appropriate interpretation was both possible and reasonable. This is even more problematic, as discussed above, given that the Court did not analyse the restrictions on rights against section 36(1) of the Constitution. Indeed, after a rationality analysis, the Court merely concluded that it is 'satisfied that the regulations are justified'.¹⁰⁰

4.4 *FITA's* weakening of the standard of necessity

In *FITA* the Court went a step further, by expressly rejecting the argument that infringements of constitutional rights in regulations could only be justified if they were *strictly* necessary. Rather, the Court adopted the view that mere *reasonable* necessity was sufficient.¹⁰¹ In so doing, the Court departed not only from precedent, but also from the implicit structure of the Constitution, both departures of which are discussed in the next paragraphs.

In the first respect, the Constitutional Court held in the case of *Phoko v Ekurhuleni Metropolitan Municipality* that section 55(2)(d) of the DMA, which provides that local government is authorised to direct the removal of persons to temporary shelters 'if such action is necessary for the preservation of life', had to be construed narrowly, because a generous 'construction may adversely affect rights', particularly the section 26 right to housing in that case.¹⁰² In *FITA* the Court attempted to distinguish the case before it from *Phoko* on the basis that *Phoko* concerned a local affair (with the word 'necessary' appearing under section 55 of the Act) and *FITA* a national affair (with the word 'necessary' appearing under section 27 of the Act).

¹⁰⁰ *Esau* (n 65) para 251.

¹⁰¹ *FITA* (n 81) paras 84-85.

¹⁰² *Phoko & Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) paras 36-37.

This submission by the Court is unconvincing. The Bill of Rights has national application, and as such it makes little sense to argue that when a right is limited locally and concerns a local affair, the limiting regulations must be construed strictly, but when a right is limited nationally concerning a national affair, the limiting regulations must be construed generously. The *Pheko* principle is not *if a local disaster management regulation may adversely affect rights, the provision must be construed narrowly*, but rather, *if any disaster management regulation may adversely affect rights, the provision must be construed narrowly*. Finally, the Constitutional Court has separately noted that where the same word is used more than once in a legislative text, it is rebuttably presumed to carry the same meaning throughout.¹⁰³ With 'necessary' meaning strict necessity in section 55, it must be presumed that 'necessary' also means strict necessity in section 27.

In the second respect, as discussed above, it is evident that section 1 of the Constitution envisages the advancement of human rights and freedoms as a constitutional imperative, and that departures from the rights and freedoms guaranteed in the Bill of Rights can occur only when it is strictly justified by an internal limitation in the right itself, the general limitation of section 36(1), or in terms of a declared state of emergency under sections 37(1) and (4). Finally, it would be nonsensical for infringements of rights to be strictly necessary during a state of emergency as contemplated in section 37(4)(a) of the Constitution, but only reasonably necessary during a state of disaster. States of emergency, as the Court observed in *Freedom Front Plus v President of the Republic of South Africa*, are for more severe public crises.¹⁰⁴ It stands to reason that government has a lesser reason to more severely affect rights adversely during a less severe crisis, whereas it has a greater reason to do so during a state of emergency. It therefore is submitted that strict necessity is the contemplated standard, as the Constitutional Court correctly deduced in *Pheko*.¹⁰⁵

The Court's adoption of the lower threshold of reasonable necessity in *FITA* thus not only goes against established precedent but also undermines the very enterprise of setting out the circumstances under which entrenched rights may be limited. Indeed, one wonders what the use is of sections 1, 36, and 37 of the Constitution if rights

¹⁰³ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* 2010 (6) SA 182 (CC) para 52. See also Van Staden (n 12) 580-581.

¹⁰⁴ *Freedom Front Plus v President of the Republic of South Africa & Others* (22939/2020) [2020] ZAGPPHC 266 para 62. The Court also noted that had the Minister declared a state of emergency, it would likely have been unlawful, as the prerequisites for such a declaration had not been met (paras 75-77).

¹⁰⁵ *Pheko* (n 102) para 37.

may be summarily set aside by regulations that simply satisfy the low threshold of rationality and to the average person appear reasonable.

4.5 *FITA's* weak standard of rationality

The Court's adoption of a particularly weak rationality analysis in *FITA* raises questions as to whether such a threshold could ever be sufficient for safeguarding the rule of law.

The Court held that despite the fact that the prohibition on tobacco-related products had not led to widespread cessation of smoking, and even that increased smoking of hazardous, black market-sourced cigarettes now was more prevalent, it is still rational because the prohibition was theoretically capable of achieving that end result.¹⁰⁶ In other words, the prohibition has had a contrary effect to that which it was intended to achieve. Rather than reducing smoking and thus sparing South Africa's healthcare facilities, it has contributed to even more smoking-related unhealthy behaviour, potentially straining healthcare facilities even more. This is the reality, the substance, of the situation.¹⁰⁷ However, because, in theory, the prohibition *could* have reduced smoking, it was allowed to stand, despite the facts. In other words, the Court adopted a form-over-substance analysis, rather than the arguably constitutionally superior substance-over-form method discussed below.

The Court also argued that the reality of the situation 'does not negate the overwhelming view that smoking affects the respiratory system and renders smokers more susceptible than non-smokers' to COVID-19.¹⁰⁸ However, this line of reasoning begs the question: It was the applicant's submission that the regulations have not had the effect of reducing smoking, and at worst have led to the smoking of even more harmful cigarettes.¹⁰⁹ The Court's satisfaction with the Minister's weak argument in this regard – with the Court also having heard that the Minister did not consider the evidence produced by the applicant – is regrettable.

It is submitted that it is a spurious conception of rationality that not the facts, but the theory, is relevant. It cannot be said that, *in fact*, there is a link between the means employed and the objective

¹⁰⁶ *FITA* (n 81) paras 50 & 69.

¹⁰⁷ M van der Merwe 'Cigarette market "in disarray", price war looms, and more people share smokes – Study' 21 July 2020, <https://www.news24.com/fin24/economy/south-africa/cigarette-market-in-disarray-price-war-looms-and-more-people-share-smokes-study-20200721> (accessed 24 July 2020).

¹⁰⁸ *FITA* (n 81) para 69.

¹⁰⁹ See Van der Merwe (n 107).

that was to be attained, when the introduction or enforcement of a measure has the opposite effect of that intended objective.

According to the positivist tradition, form takes precedence over substance, the latter of which can only be called upon within the framework of the formal.¹¹⁰ Langa condemned formalist reasoning, as it 'prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society'. Purely formal reasoning undermines the constitutional 'commitment to substantive reasoning'.¹¹¹

4.6 Imperatives of the rule of law fall by the wayside

Giving ministers or government agents the discretion to determine the extent of freedom is the antithesis of freedom under law. The law itself, not a delegated discretion, must set out the limitations on constitutional rights.¹¹² This is why laws of general application are not only required by the nature of the rule of law (as enshrined in section 1(c)), but also explicitly by section 36 of the Constitution. It is regrettable, therefore, that the DMA, in practice if not textually, has allowed ministers to shoot from the hip, as it were, in deciding when and how to deprive South Africans of their constitutional freedoms. This, it is submitted, is more akin to the rule of man, as opposed to the rule of law.¹¹³ The Court's endorsement of this state of affairs in *Esau* as discussed above is even more regrettable.

It is arguable that it is appropriate for the DMA, because it makes provision for crisis situations, to bestow such wide discretion. This might have been acceptable had the DMA's discretion provisions not been examples of the default position in South African statutory law. In other words, the DMA's provisions are the rule, not the exception,¹¹⁴ and as a result it would be incorrect to regard the DMA's grant of discretion in crisis situations as exceptional. Furthermore, even if the DMA's grant of discretion were exceptional, in any exercise of discretion that intrudes upon the constitutional rights of South Africans, ministers or government agents would have to bear

110 Eg, inherent in the words of a statute. See MI Niemi 'Form and substance in legal reasoning: Two conceptions' (2010) 23 *Ratio Juris* 483-484.

111 P Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 357.

112 Brookes & MacAulay (n 3) 13.

113 See also DV Cowen *The foundations of freedom, with special reference to Southern Africa* (1961) 197.

114 See generally ch 4 in Van Staden (n 19).

the section 36 requirements foremost in mind, even during crisis situations, for that conduct to pass constitutional muster.

Reading and understanding the lockdown regulations themselves also leads to perplexion. Indeed, the regulations are spread over a messy, tangled web of *Government Gazettes*. If jurists such as the present author have struggled to make heads or tails of this concoction, it is fairly evident that lay South Africans have to rely exclusively on accurate press reporting to ensure that they are compliant with the state's order of the day. The regulations were changed multiple times in a short period. As regards the regulations and facts before the Court in *Minister of Cooperative Governance and Traditional Affairs, Davis J* expressed the fluidity of the regulations as follows: 'Amendments were effected prior to the delivery of the application for leave to appeal, again prior to the hearing thereof and yet again since the hearing of the application and during the few days that the judgment had been reserved.'¹¹⁵

It should be uncontroversial to regard this as a wholesale undermining of the rule of law imperative that the law must be certain, predictable, and accessible to those who are expected to comply with it. Absolute certainty, it is conceded, is impossible,¹¹⁶ but on the continuum from absolute certainty to total chaos, the South African government has strayed unacceptably close to the latter.

The rule of law standard ensconced in section 1(c), as previously observed, is not subject to limitation or derogation, as it is outside of the Bill of Rights and is declared, explicitly, to be supreme. It is regrettable that this supremacy has not been observed.

4.7 Locking down the ease with which government may invade rights

A section 36(1) analysis by the superior courts would have been useful for the purposes of this article. In its absence, however, it is still submitted that the lockdown regulations go beyond what is contemplated as a limitation of rights in section 36(1) of the Constitution, and enter the realm of derogation from rights as contemplated in section 37(4). It appears evident that at least during the initial weeks under lockdown, on Level 5 and perhaps

¹¹⁵ *Minister of Cooperative Governance and Traditional Affairs v De Beer & Others* (21542/2020) [2020] ZAGPPHC 280 para 10.

¹¹⁶ See *Affordable Medicines Trust & Others v Minister of Health* 2006(3) SA 297 (CC) paras 108-109.

Level 4, South Africa found itself in the midst of a *de facto*, that is, undeclared, state of emergency. The appropriate legal course of action government should have taken, as a result, was to declare a state of emergency in terms of section 1(1) of the State of Emergency Act.

This conclusion is reached because the various constitutional principles underlying the limitation, on the one hand, and the derogation, on the other, of rights have not been observed to any significant extent. As discussed above, when a right is limited, the core content of that right must persist; the limitation must be strictly necessary for a constitutional purpose; the substance (not form) of limitations must be given the lion's share of consideration; and the unrestrained exercise of rights is the point of departure, and limitation is the exception.¹¹⁷ It is submitted that the core of various impinged rights, specifically the right to freedom of movement as contemplated in *De Beer* and *Esau*, had been effectively extinguished. A principle of 'what is not allowed is prohibited', which upends the notion of freedom under law,¹¹⁸ was established. The strict necessity of some lockdown regulations was not shown, as illustrated in *De Beer*. Thus, even if a state of emergency had been declared, in the absence of proving strict necessity, the legality of the lockdown regime remains doubtful.

The apparent severity of the COVID-19 pandemic – and the fears associated therewith – has seemingly led the courts down the path of undue deference, where the rights protections guaranteed in the Constitution have amounted to empty promises. Allan argues that where legislation bestows a discretion upon government, the exercise of that discretion must 'be construed consistently with legal principles and individual rights'. Only strictly necessary invasions of rights must be allowed.¹¹⁹ This ought to have been observed during the interpretation and construction of the DMA in *Esau* and *FITA*.

The rights to freedom of movement and human dignity, in particular, but also by implication the rights to privacy, property, association, freedom and security have arguably been ignored, without requisite section 36(1) analyses being conducted to determine whether those 'limitations' (but, it is submitted, in fact derogations) were justified. The barest of reasons provided by government for its actions have been accepted by the courts, with the apparently final conclusion

¹¹⁷ As discussed in part 2.2.

¹¹⁸ Brookes & MacAulay (n 3) 13.

¹¹⁹ TRS Allan 'Deference, defiance, and doctrine: Defining the limits of judicial review' (2010) 60 *University of Toronto Law Journal* 55 (citations omitted).

essentially being that the Bill of Rights does not, *de facto*, exist during a pandemic.¹²⁰

5 Conclusion and recommendations

Allowing grave situations to be employed as justification for the upending of constitutional devices, outside of the provisions that allow for the temporary limitation of or derogation from certain rights, undermines the supremacy of the Constitution and the rule of law. When a statute, and it is submitted particularly a supreme constitution, is interpreted, it cannot be 'averred that the particularity of circumstances requires that the generally applicable provisions should not be applied'.¹²¹ The Constitution, indeed, with its general provisions, provides for *all eventualities*, meaning that whatever might happen, the Constitution's provisions and requirements must be complied with, letter and spirit.¹²² For instance, even if an invasion from the planet Mars by an alien species were to take place – something the negotiators and drafters of the Constitution could never have anticipated – the military would still be required to comply with the prescripts of sections 200 to 202 of the Constitution and government would still be required to follow the state of national defence provisions in section 203. Indeed, it must be obvious that if the Constitution is to have any meta-objective, that would be to control the exercise of state power *particularly* in those situations where government's actions are perceived as necessary as a result of heightened public fear. The Constitution controls for the worst of times, so that we may more regularly enjoy the best of times.¹²³

Neither Parliament nor the executive appeared cognisant of their obligations under the rule of law doctrine during the COVID-19 lockdown. Regulations were promulgated and withdrawn on a ministerial whim, and Parliament, primarily responsible for executive accountability,¹²⁴ appeared to stand by idly. It thus is recommended that Parliament adopt national legislation that specifically regulates the exercise of official discretion and regulation-making powers. Such legislation would ideally prohibit the too regular changing of regulations, and set out the *substantive* criteria with which executive functionaries must comply in order to amend or replace regulations.

120 See TRS Allan 'Human rights and judicial review: A critique of "due deference"' (2006) 65 *Cambridge Law Journal* 675-677.

121 Van Staden (n 12) 558.

122 Secs 1(c) and 2 of the Constitution.

123 See M Bagaric 'Originalism: Why some things should never change – or at least not too quickly' (2000) 19 *University of Tasmania Law Review* 187-186.

124 Sec 42(3) of the Constitution.

The changing of regulations cannot be prohibited outright, but a balance (according to standards set in the recommended legislation) must be struck between legal certainty and responding immediately to changing circumstances. Furthermore, the requirement of strict necessity for the promulgation of disaster management regulations should be restated, reinforced, and emphasised.

While it might be jurisprudentially superficial to recommend in the space of a single article a reconsideration of approaches to legal interpretation, these words by Allan bear mentioning:¹²⁵

Deference properly accorded to legislation is a function of its true meaning, which in a liberal-democratic legal order is generally presumed to be compatible with constitutional rights. The greater the danger of unjustifiable injury to such rights, the more urgent is the task of interpretation or even reconstruction: the legislature should not readily be demeaned as the author of rights violations.

In other words, applied to the COVID-19 lockdown, the courts ought to have interpreted the DMA narrowly, because they must have presumed that Parliament's intention could never have been to sanction such incredible invasions of constitutional rights as were evident in the lockdown regulations. In South Africa's historical – and evidently present – context, it ought to be uncontroversial to recommend, and to hope, that the courts, going forward, adopt a less executive-minded and more rights-centric approach to statutory and regulatory interpretation.¹²⁶

It might be argued that the exigencies of the COVID-19 pandemic justified a drastic expansion of state power, and that this article fails to address the important aspect of a justified versus a nakedly tyrannical increase in state power. However, no unconstitutional or authoritarian state institution, practice or intervention of the last century has been without justification. The Holocaust, the Holodomor, apartheid, the Great Leap Forward, are all phenomena for which the intellectual apologists of those regimes could write theses-long jurisprudential, political, economic and social justifications. The concern in this article has been to show, regardless of justifications provided, that when measured against the requirements of the Constitution and of constitutionalism, the lockdown regulations and certain High Court judgments fail to pass muster. The safeguards put in place to protect the fundamental dignity and liberty of the civilian population against

¹²⁵ Allan (n 120) 96.

¹²⁶ See MG Cowling 'Judges and the protection of human rights in South Africa: Articulating the inarticulate premiss' (1987) 3 *South African Journal on Human Rights* 192; J Hlophe 'The role of judges in a transformed South Africa: Problems, challenges and prospects' (1995) 112 *South African Law Journal* 25.

the heteronomous nature of the state have been ignored, too easily, and constitutional democracy might suffer for it in the future. As Fabricius J noted *obiter* in *Khosa*:¹²⁷

It should not be the choice of either the public health or the state of the economy. It is a necessity to safeguard both ... what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and overall, the maintenance of the rule of law[?] The answer in my view is: there is no point.

The judiciary came out strongly in favour of the rights-centric approach to the lockdown with *Khosa* and *De Beer*, but from thereon appeared to revert to executive-mindedness, particularly in *Esau* and *FITA*.¹²⁸ The critiques of superior court judgments in this article are intended as constructive criticism. Courts can and do make mistakes, and it is thus that they are allowed to depart from their own previous decisions if those decisions were clearly wrong.¹²⁹ The conscientious legal community thus has an obligation to assist the courts in rectifying these mistakes through appeal, review, or even reversal. This arguably activist challenge cannot merely proceed in courtrooms – it ultimately falls to constitutionalists, in general, and South African constitutionalists, in particular, whether inside or outside the legal profession, to insist on government compliance with the Constitution.

127 *Khosa* (n 41) para 6.

128 As noted above, these judgments might still be overturned on appeal or review, given the quick pace of events in the midst of the lockdown.

129 See the remarks of Brand AJ in *Camps Bay Ratepayers and Residents Association & Another v Harrison & Another* 2011 (4) SA 42 (CC) para 28.