

## The rationality test in lockdown litigation in South Africa

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**Summary:** *The COVID-19 pandemic that commenced in 2020 confronted South African courts with questions regarding the rationality of decision making during exigent times. South African administrative law has seen continuous development since the negotiated adoption of South Africa's constitutional dispensation. This article examines the effect of the COVID-19 pandemic on the interpretation and application of the test for rationality by examining three particular 'lockdown' cases and how the test was subsequently applied, in all three cases under expedited circumstances and with truncated times in terms of procedure. The three cases discussed dealt with the rationality of decisions made through executive action aimed at protecting the public against the spread of COVID-19 through restrictive measures that limited an array of constitutional rights. The article concludes that the consistent application of the rationality test and, more importantly, the supremacy of the Constitution and its guaranteed rights, do not change with the onset of a pandemic. Moreover, the scrutiny applied over governmental decision making should not waiver.*

**Key words:** *rationality test; administrative law; COVID-19; pandemic; lockdown litigation; Disaster Management Act; PAJA; just administrative action; review*

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## 1 Introduction

After the first case of COVID-19 was identified in Wuhan, China, in December 2019, the virus has caused challenging and exigent times due to the rapid spread of the then novel virus. In response to the rapid spread of the virus the South Africa government, as most governments across the globe, enacted a series of regulations aimed at combating the spread of the virus. These regulations were enacted and promulgated in terms of section 27 of the Disaster Management Act 57 of 2002 (DMA). Section 27 of the Act provides that the responsible member of cabinet, in this case and at the time the Minister of Cooperative Governance and Traditional Affairs, may in the event of a national disaster declare a national state of disaster if, first, existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster, or, second, other special circumstances warrant the declaration of a national state of disaster.<sup>1</sup> These regulations are to be found in numerous *Government Gazettes* that were published from time to time as the South African government adjusted its response to the COVID-19 pandemic. The disjointed body of regulations are not considered in this article, although they are likely to warrant further analysis, as they have fundamentally shaped the way in which the entire South Africa was governed during the pandemic.

These regulations that encompass the national government's response to the pandemic as well as the polycentric nature of the pandemic have resulted in a litany of litigation. The South African judiciary was frequently approached by various litigants regarding the South African national government's response and implementation of regulations to combat the spread of COVID-19. The resultant litigation that we have seen has accelerated the further development of South African administrative law. It must be pointed out that the development of South African administrative law has, broadly speaking, been vibrant and active throughout South Africa's democratic constitutional dispensation, both through the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as the constitutional principle of legality, which have both been well developed by our perceptive judiciary.

During the course of 2020, while our courts were functioning on a limited basis without its usual overburdened court rolls, a number of salient legal precedents were created. The pandemic and subsequent governmental reaction, which undoubtedly has limited

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<sup>1</sup> Secs 27(1)(a) & (b) of the Disaster Management Act 27 of 2002 (DMA).

numerous rights and freedoms, have been challenged through various cases, colloquially referred to as 'lockdown' litigation. This article will analyse three particular judgments that were delivered during 2020, in the midst of the COVID-19 pandemic, and examine the influence that these cases had on the rationality test in South African administrative law.

I first discuss the history and origins of the rationality test in the South African legal framework. I then proceed to discuss how the rationality test has been understood and applied in more recent case law. Second, I turn to how the test for rationality was applied in three particular so-called 'lockdown' cases during the course of 2020. These cases deal, among others, with the closure of early childhood development centres; restrictions placed on exercising; and the sale of various grocery items; as well as the declaration of a national state of disaster in its entirety. Third, I discuss the influence that these cases might have on future interpretation of the rationality test and consider whether the trying times of the COVID-19 pandemic have created or influenced good or bad administrative law in South Africa.

## 2 Hard cases make bad law

The famous old legal maxim goes that hard cases make bad law. As the American jurist and former Supreme Court Justice, Oliver Wendell Holmes Jr noted in his judgment in *Northern Securities Co v United States*, '[g]reat cases like hard cases make bad law. For great cases are called great, not by reason of their importance ... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.'<sup>2</sup>

The maxim describes the notion that certain cases muddy the judicial waters due to their complexity. It is argued that they create exceptions to general law and that interpretations are contorted in order to achieve justice in a particular case.<sup>3</sup> More simply put and, as Justice Holmes wrote, the pressures of a case of great importance often distorts the judgment of the judiciary in their efforts to seek equitable remedies while dealing with complex legal questions. This often becomes necessary in so-called 'hard cases' because general law is drafted for common circumstances to create social order and not necessarily for unexpected and uncertain circumstances.<sup>4</sup>

2 *Northern Securities Co v United States* 193 US 197 (1904).

3 P Heath 'Hard cases and bad law' (2008) 16 *Waikato Law Review* 12.

4 F Hayek *Studies on the abuse and decline of reason: Text and documents* (2010) 69.

This well-known legal adage has resulted in a variety of similar sayings, for example, its converse, namely, that ‘bad law makes hard cases’. During exigencies such as the COVID-19 pandemic the question arises of whether bad times make for bad law. Unprecedented times have always served as a litmus test for the judiciary but these bad times have not always and necessarily resulted in rushed and judicially-unsound precedent. As Lord Aitkin famously remarked in his dissenting judgment in the landmark British case of *Liversidge v Anderson*,<sup>5</sup> ‘the laws are not silent’ that ‘they may be changed, but they speak the same language in war as in peace’.

It has been argued that tumultuous times have in the past resulted in derogations from the rule of law and violations of human rights around the world.<sup>6</sup> In South Africa the state of emergency was infamously used during the 1980s to ban and restrict certain organisations and to rampantly detain opponents to the apartheid regime.<sup>7</sup> Moreover, as Austrian-British philosopher Friedrich Hayek famously writes, “[e]mergencies” have always been the pretext on which the safeguards of individual liberty have been eroded’.<sup>8</sup>

The article argues that when it comes to the judicial review of governmental action during times of crisis, as has been the case during the COVID-19 pandemic, our courts should err on the side of constitutional freedoms and liberties. This can be achieved by adopting a tiered judicial review process similarly to that of the US, where a more stringent review standard is adopted when it comes to questions relating to fundamental constitutional rights.

### 3 History of the rationality test

South Africa finds its administrative law roots in English law.<sup>9</sup> Although its administrative law has been influenced by Roman-Dutch law, which forms the general historical foundation of our law, this influence is limited in our administrative law.<sup>10</sup> As Hoexter writes, ‘[t]he influence of English constitutional doctrines and grounds of review was enormous. Indeed, this influence is still apparent throughout South African administrative law.’ As such, the administrative law

5 *Liversidge v Anderson* 1942 AC 206 (HL).

6 E.J. Criddle & E. Fox-Decent ‘Human rights, emergencies, and the rule of law’ (2012) 34 *Human Rights Quarterly* 39.

7 J.-A. Stemmet ‘“In case of emergency. South African states of emergency ca 1985-1988: Synopsis and chronology’ (2015) 40 *Journal for Contemporary History* 60.

8 F. Hayek *Law, legislation and liberty, volume 3: The political order of a free people* (2011) 124.

9 C. Hoexter *Administrative law in South Africa* (2012) 14.

10 M. Wiechers *Administratiefreg* (1973) 19 34-36.

that South Africa inherited from the English is intertwined with a Westminster style constitutionalism and, consequently, our early administrative law was underpinned by parliamentary sovereignty.

The English constitutional law scholar Dicey had a significant influence on the early development of South African administrative law. His influence contributed to the prevailing approach that administrative law was mainly concerned with formal or procedural fairness.<sup>11</sup> Dicey argued that the rule of law which, *inter alia*, consists of the legality principle, comprises three predominant principles:<sup>12</sup> first, the principle of the supremacy of the law; second, equality before the law; and, third, that fundamental rights are protected through existing institutional remedies and what he referred to as 'ordinary' courts.<sup>13</sup> For Dicey the central characteristic of the rule of law was legal equality before the law. Dicey strongly opposed the abstract guarantees contained in written constitutions, yet despite this fact, he has left a lasting influence on South African administrative law even after the adoption of its constitutional dispensation.<sup>14</sup>

However, subsequently South African administrative law has deviated, arguably positively, from its English law roots. One clear example of this divergence is the ability under South African administrative law to challenge the constitutionality of legislation through judicial review, unlike the United Kingdom where English law does not permit judicial review of primary legislation passed by Parliament.<sup>15</sup> English law to a great extent has maintained its strict standard as set out in the case of *Associated Provincial Picture Houses v Wednesbury Corporation*<sup>16</sup> in favour of parliamentary sovereignty.<sup>17</sup> However, since the adoption of the South African Constitution and the subsequent rights-based jurisprudential framework that was ushered in, our courts, particularly the Constitutional Court, have been tasked with gradually refining how the test for rationality is applied. This process is highlighted through a number of impactful cases, which are briefly discussed below.<sup>18</sup>

11 Hoexter (n 9) 139-140.

12 AV Dicey *Introduction to the study of the law of the Constitution* (1885) 188.

13 As above.

14 Hoexter (n 9) 21.

15 C Forsyth & W Wade *Administrative law* (2009) 30.

16 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

17 A Street *Judicial review and the rule of law* (2013) 18.

18 The listed cases are by no means exhaustive.

### 3.1 Rationality as part of legality

In *New National Party*<sup>19</sup> the Constitutional Court was called upon to decide whether sections of the Electoral Act<sup>20</sup> were constitutional. The impugned sections provided that South Africans who wanted to register as voters on the national common voters' roll and to vote in an election had to be in possession of a valid identity document.<sup>21</sup> The majority judgment of the Constitutional Court held that the standard of review was whether there was a 'rational relationship' between the scheme (in this case the section that required voters to have a valid identity document) and the achievement of a legitimate governmental purpose.<sup>22</sup> This decision by the Constitutional Court has been relatively universally repudiated.<sup>23</sup> During the juvenescent years of the apex court, the Court dealt with this particular challenge which related to the electoral requirement that voters had to hold an identification document that contained a barcode in order to be allowed to cast their vote. The majority decision, which followed Yacoob J's reasoning, held:<sup>24</sup>

There must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.

Yacoob J argued that 'reasonableness will only become relevant if it is established that the scheme [or reviewed decision], though rational, has the effect of infringing the right of citizens to vote.'<sup>25</sup> Reasonableness as a consideration, therefore, is added when it is clear that the impugned decision which is subject to review infringes upon a constitutional right.

In her dissenting judgment O'Regan J criticised the approach followed by the majority of the Court while arguing for a reasonableness standard to be included in the rationality test. O'Regan J was critical of the narrow interpretation of 'rationality',

19 *New National Party v Government of the Republic of South Africa & Others* (CCT9/99) 1999 (5) BCLR 489 (*New National Party*).

20 Act 73 of 1998.

21 *New National Party* (n 19) paras 15-18.

22 *New National Party* (n 19) para 19.

23 J Fowkes 'Right after all: Reconsidering *New National Party* in the South African canon' (2015) 31 *South African Journal on Human Rights* 151.

24 *New National Party* (n 19) para 19.

25 As above.

arguing that it should be viewed as more than a mere connection between a legitimate state purpose and the means to achieve the said state purpose. O'Regan J went further by arguing that *equitable considerations* should be permissible when considering these types of rationality questions. The addition of reasonableness as a consideration in rationality reviews pushed the boundaries of the functions of the judiciary but it arguably maintained the entrenched separation between the judiciary and the executive.<sup>26</sup>

The test for rationality was formalised early on by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa (PMA case)*.<sup>27</sup> This case has become widely referenced in cases involving the rationality of actions exercised through public power. The *PMA* case dealt with the question of whether the President of South Africa can bring an Act of Parliament into force. In concurring with the findings of *New National Party* Chaskalson J held:

Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

In addition, the Constitutional Court held that in order to determine whether the exercising of a decision is rationally related to the purpose that empowers the action, that an objective test should be followed.<sup>28</sup> The Court found that, regardless of whether the President acted in good faith, the Constitution requires that public powers be exercised in an objectively rational manner and that the empowering provision enabling the decision has to exist and be in place. Consequently, the Constitutional Court confirmed the decision and judgment by the lower court.

For a number of years the Constitutional Court maintained a limited reading and bounded approach to the test for rationality. In *Law Society of South Africa v Minister of Transport*<sup>29</sup> the Court had the opportunity to extend the rationality test beyond the traditional approach followed in *PMA*. However, the Court persisted in the

26 PJH Maree 'Investigating an alternative administrative law system in South Africa' LLD thesis, University of Stellenbosch, 2013 80.

27 *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (3) BCLR 241.

28 *Pharmaceutical Manufacturers* (n 27) para 86.

29 *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) para 29.

approach of merely looking at the rational connection between the purpose and the ends of the decision.<sup>30</sup>

The sequence of development regarding the test for rationality and its current prevailing reading perhaps has been most succinctly summarised in the case of *Booyesen v Acting National Director of Public Prosecutions* wherein it is stated:<sup>31</sup>

The test [for rationality] is therefore twofold. Firstly, the [decision maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.

The development of the rationality test is encapsulated and legislated in terms of the Promotion of Administrative Justice Act (PAJA),<sup>32</sup> which flows from the right to just administrative action guaranteed in section 33 of the Constitution.<sup>33</sup> Some academic authors have argued that the current interpretation of PAJA is an unconstitutional reading that unduly infringes upon the separation of powers.<sup>34</sup> Whether PAJA's extended interpretation of the test for rationality is constitutionally valid, however interesting, is a question for another day and discussion. For purposes of this article a brief analysis of PAJA is provided.

### 3.2 Test for rationality

The test for rationality undoubtedly is a central pillar of South African administrative law. Section 33(1) of the Constitution provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'.<sup>35</sup> Moreover, section 33(3) requires the following:<sup>36</sup>

30 As above.

31 *Booyesen v Acting National Director of Public Prosecutions* 2014 (9) BCLR 1064 (KZD) para 15.

32 Promotion of Administrative Justice Act 3 of 2000.

33 Sec 33 of the Constitution provides: '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.'

34 L Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 130 *South African Law Journal* 812.

35 Sec 33(1) Constitution.

36 Sec 33(3) Constitution.



National legislation must be enacted to give effect to these rights, and must –

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.

Pursuant to section 33(3) of the Constitution, the PAJA was enacted to give effect to the constitutionally-protected right to just administrative action.<sup>37</sup> Section 6(2)(f)(ii) of PAJA provides for a rationality test and section 6(2)(h) provides for the general reasonableness test. The rationality test in PAJA provides that a court or tribunal has the power to judicially review an administrative action if

the action itself is not rationally connected to –

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator.<sup>38</sup>

Depending on the interpretation and application of section 6(2)(f)(ii) of PAJA, the rationality test either accords with section 33 of the Constitution or it broadens the scope.<sup>39</sup> However, the gap between the limited interpretation *vis-à-vis* the broadened interpretation of the rationality test has been somewhat aligned through the case of *SA Predator Breeders' Association*.<sup>40</sup> This case concerned the validity of particular regulations issued by the Minister of Environmental Affairs and Tourism regarding the hunting of lions in a small confined area, such as in a fenced-in area.<sup>41</sup> Although PAJA was not referred to in the *SA Predator Breeders' Association* case, the Supreme Court of Appeal essentially applied the test for rationality as set out in PAJA.<sup>42</sup> Hoexter argues that in light of the continuous development of the standard of rationality and how it is applied, the difference between the limited and broader interpretations of the rationality test is narrowed.<sup>43</sup>

37 J Klaaren & G Penfold 'Just administrative action' in S Woolman et al (eds) *Constitutional law of South Africa* (2006) 63-65.

38 Sec 6(2)(f)(ii) PAJA.

39 C Hoexter 'A rainbow of one colour? Judicial review on substantive grounds in South African law' in H Wilberg & M Elliot *The scope and intensity of substantive review* (2015) 178.

40 *SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA).

41 Hoexter (n 39) 178.

42 As above.

43 Hoexter (n 39) 180.

The four requirements listed in section 6(2)(f)(ii) of PAJA form the contemporary rationality test. All four hurdles have to be overcome in order for a decision to pass the rationality test. In this article three cases are analysed to determine how the Court dealt with the four hurdles of the rationality test in the midst of a global pandemic.

South Africa, however, has not developed tiered review standards for judicial review as other jurisdictions have.<sup>44</sup> Regardless of the social, economic and constitutional impact of the impugned decision, our courts have maintained and applied this sole unvarying review standard. The author would argue that the rationality test in South Africa should be developed similarly to the way in which the rational basis review in American administrative law has developed. There are three judicial review tests in American administrative law, namely, the rational basis test, the intermediate scrutiny test and the strict scrutiny test.<sup>45</sup> These three tiers of review tests range in stringency depending on the impact of the impugned decision on the liberties and constitutional freedoms at play.<sup>46</sup> The strict scrutiny test of review requires a 'compelling governmental interest' and the enabling legislation must be narrowly tailored to achieve that interest.<sup>47</sup>

As will be discussed below, despite the fact that South African courts apply our unvarying rationality test in judicial review, they have indirectly acknowledged the societal, economic and constitutional impact of the impugned decisions and as will be shown this has influenced the decision making and judicial reasoning in applying our rationality test.

#### 4 'Lockdown' litigation

The COVID-19 pandemic has undoubtedly been strenuous on governments that have to navigate a treacherous path. Due to the extreme interventions by the government aimed at curbing the spread of COVID-19 there has unexpectedly been a litany of litigation regarding government's response and policies to the pandemic. For purposes of this article the focus is placed on three particular and insightful cases that dealt with the question of rationality. How South African courts dealt with the element of rationality during exigent times and, moreover, in these three cases with considerable urgency

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44 RR Kelso 'The structure of strict scrutiny review' 17 August 2020 1, <https://ssrn.com/abstract=3675841> (accessed 11 November 2021).

45 As above.

46 Kelso (n 44) 2.

47 Kelso (n 44) 5.

has provided conflicting precedent which is discussed in more detail below.

#### 4.1 *Skole-Ondersteuningsentrum*<sup>48</sup>

Shortly after South Africa exited its so-called five weeks of ‘hard lockdown’<sup>49</sup> the non-profit organisation Skole-Ondersteuningsentrum went to court seeking an order reopening private early childhood development centres (which include pre-school and day care centres). In South Africa there are two sets of early childhood development centres, namely, those under the auspices of the Minister of Basic Education in terms of the South African Schools Act<sup>50</sup> and, second, those that fall under the ambit of the Children’s Act<sup>51</sup> and consequently under the portfolio of the Minister of Social Development. In essence, the difference between the two categories is that early childhood development centres that are guided by the South African Schools Act are associated with primary schools and fall under the definition of a *school* as defined in the Act to mean ‘public or independent schools which enrol learners in one or more grades from grade R to grade twelve’.

At the heart of the relief sought was a declaratory order that all private pre-school institutions not affiliated with public schools and offering early childhood development services (Grade R and lower) were entitled to re-open immediately. The relief sought was based on the fact that the South African government had relaxed certain restrictions enacted through the state of disaster in terms of the alert level 3 lockdown, coupled with the directions issued by the Minister of Basic Education on 29 May 2020 as amended on 1 June 2020, providing, among others, that learners were able and allowed to return to schools across South Africa on a phased-in basis. In terms of the Minister of Basic Education’s directions early childhood development centres affiliated with public schools were allowed to reopen. However, early childhood development centres that were not affiliated with any public school (that is, private early childhood development centres) and that consequently

48 *Skole-Ondersteuningsentrum NPC & Others v Minister of Social Development & Others* [2020] 4 All SA 285 (GP) (*Skole-Ondersteuningsentrum*). (The author was the attorney of record acting on behalf of the applicants in this matter.)

49 On 15 March 2020 the Minister of Cooperative Governance and Traditional Affairs declared a national disaster in terms of sec 27(1) of the Disaster Management Act 57 of 2002 (DMA). The purpose of the declaration was to augment the existing measures undertaken by organs of state to deal with the COVID-19 pandemic. Initially it was stated that the state of disaster would last three weeks, which was later extended to five weeks in total.

50 South African Schools Act 84 of 1996.

51 Children’s Act 38 of 2005.

fell under the jurisdiction of the Minister of Social Development were left in the dark. Despite requests for clarity sent by the Skole-Ondersteuningsentrum to the Minister of Social Development, the letters remained unanswered. On 4 June 2020 the Minister of Social Development issued a statement requiring all early childhood development centres under her auspices to remain closed, despite the fact that their public school counterparts were allowed to return to school subject to the necessary safety and health precautions. This conflicting situation compelled the parties to approach the court for urgent relief.<sup>52</sup>

The uncertainty surrounding the reopening of early childhood development centres, both those affiliated with public schools and those that were not, was compounded by the fact that various peremptory circular letters were sent by both the Minister of Basic Education and the Minister of Social Development after the initial decision was taken to reopen all public early childhood development centres. The Court was critical of the manner in which the government in effect governed by diktat in a disjointed and consequently unconstitutional manner. The Court held as follows: 'I have yet to hear of a case in which a Minister may make law, by the mere production, to a confined group of persons and without consulting interested parties, of a letter expressing an opinion or an intent to do something unexplained in the future.'<sup>53</sup> The Court was critical of the insouciant manner in which the Minister of Social Development initially failed to act and later was critical of the arbitrary and irrational manner in which regulations keeping early childhood development centres closed were 'enacted' through ministerial diktat.<sup>54</sup> The Court held that it was entirely irrational for a member of the executive to make regulations through the issuing of a press statement. The fact that the Minister of Social Development failed to allow for any public participation in her decision-making process and due to the conflicting regimes that arose between public and private early childhood development centres, the Court held that the decision communicated by the Minister in her media statement was unlawful, irrational and unconstitutional. The Court succinctly described the situation as an 'unfair and unlawful discriminatory and irrational vacuum' between the two sets of early childhood development centres. The Court stated:<sup>55</sup>

I also agree with the submissions of counsel for the applicants that there can be no rational and justifiable ground, when interpreting

52 *Skole-Ondersteuningsentrum* (n 48) para 23.

53 *Skole-Ondersteuningsentrum* para 38.

54 *Skole-Ondersteuningsentrum* para 39.

55 *Skole-Ondersteuningsentrum* para 15.

the Regulations, upon which it was envisaged that schools offering ECD programmes including Grade R and lower which forms part of schools as defined in the Schools Act (which include both public and independent schools), are permitted to re-open from 6 July 2020 in terms of the directions, but that other private pre-schools offering ECD education for children, in Grade R or lower are not permitted to open or simply left in a vacuum.

The Court held further that the irrationality of the decision to keep early childhood development centres closed was linked to the failure by the Minister of Social Development to consider the best interests of the child in a holistic manner, despite being required to do so in terms of section 28(2) of the Constitution as well as section 9 of the Children's Act.<sup>56</sup> Despite the constitutional obligation placed on the Minister of Social Development to consider the best interests of a child in every matter concerning the child, the Minister simply failed to act at all. The Minister failed to consider the various factors that play into the best interests of the thousands of children who were unable to return to the ECDs and, moreover, in no way engaged with how the rights of the children were weighed up against the duty to protect against the spread of COVID-19.

The doctrine of vagueness entails that executive decision making is required to be certain. Although vagueness is not listed in PAJA as a ground for review our courts have held that the requirement of decision making to be certain and clear flows from the rule of law as a foundational constitutional value.<sup>57</sup> In the *SA Hunters* case the Constitutional Court held that '[t]he doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives'.<sup>58</sup>

The courts, therefore, have acknowledged that perfect clarity is not a requirement for rational decision making and that the role of government is to further legitimate social and economic goals. This arguably includes protecting against the spread of COVID-19. However, turning back to *Skole-Ondersteuningsentrum* the Court was critical of the vagueness of the decision making. The Court, per Fabricius J, held:<sup>59</sup>

<sup>56</sup> *Skole-Ondersteuningsentrum* para 17.

<sup>57</sup> *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* (CCT 59/2004) [2005] ZACC 14 para 249.

<sup>58</sup> *Minister of Safety and Security v South African Hunters and Game Conservation Association* (CCT177/17) [2018] ZACC 14 para 13.

<sup>59</sup> *Skole-Ondersteuningsentrum* (n 48) para 43.

I interpose to say that the doctrine of vagueness is founded on the rule of law. It requires that laws (and I would say directions as well) be written in a clear and accessible manner. Reasonable certainty is required, so that those who are bound by them know what is required so that they may regulate their conduct accordingly.

Despite the exigent circumstances created by the COVID-19 pandemic, the Court held that the directions by the Minister of Social Development should have allowed members of the public to 'glean, with a degree of clarity what the purpose' was of the decision to differentiate between the two sets of early childhood development centres.<sup>60</sup> There is an added responsibility placed on the decision maker to ensure that the decision making is rational and clear because the decision limits a constitutional right and, moreover, it affects the rights of children in particular.<sup>61</sup>

Taking the four hurdles of the rationality test into account, although the judgment did not advertently list these requirements as set out in section 6(2)(f)(ii) of PAJA, it is evident that they were all duly considered. Regarding the purpose for which the decision was taken, the Court held:<sup>62</sup>

It is simply impossible to recognise the rationality in a decision, allowing pre-school learners who are admitted and phased into school systems prior to 23 June 2020 to continue to attend school, but to prohibit pre-school learners (of the exact same age) that have not yet been admitted as of 23 June 2020 from attending schools for the total period of the pandemic.

While cognisant of the above-mentioned fact, the Court furthermore held, per Fabricius J, that the Minister of Social Development acted outside of her mandated powers. The judgment held that the Minister of Social Development had acted without legal authority and violated the rule of law through the issuing of a media statement and then enforcing the statement as a legally-binding and lawful regulation.<sup>63</sup> The Court found that the Minister of Social Development had taken the decision to keep pre-schools under her auspices closed without taking any supporting information into account. The Court highlighted the fact that not a 'single reason or motivation for the refusal to re-open ECD's and Partial-Care facilities whilst the underlying basis and rationale' was given.<sup>64</sup>

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60 *Skole-Ondersteuningsentrum* para 45.

61 *Skole-Ondersteuningsentrum* para 46.

62 *Skole-Ondersteuningsentrum* para 44.

63 *Skole-Ondersteuningsentrum* para 46.

64 *Skole-Ondersteuningsentrum* para 25.

Given the polycentric nature of the COVID-19 pandemic, the Minister of Social Development and all decision makers in the South African executive tasked with making decisions in terms of the declared national state of disaster undoubtedly were faced with a difficult task. However, in the *Skole-Ondersteuningsentrum* case the Minister's initial failure to make a decision at all and the disjointed decision that followed failed to pass the test for rationality despite the exigent surrounding circumstances. This early 'lockdown' case quite firmly held that despite the trying circumstances, decision makers should be held to the same, if not more stringent, scrutiny regarding the rationality of their decision making. The test for rationality arguably should be applied stringently, and with due cognisance of section 36 of the Constitution, during dire national challenges.<sup>65</sup>

What made the decision in the *Skole-Ondersteuningsentrum* case unique and in the end judicious was the fact that two similar decisions, namely, the one to reopen early childhood development centres associated with the Minister of Basic Education while the Minister of Social Development kept schools in terms of the Children's Act closed, were juxtaposed. Review applications often take place in the absence of a comparable and similar decision. The *Skole-Ondersteuningsentrum* case provided the opportunity to measure the rationality of a decision by one decision maker, namely, the Minister of Social Development, with that of another, namely, the Minister of Basic Education, in nearly identical circumstances, both in nature and in time.

## 4.2 *Esau*

The *Esau* case<sup>66</sup> was heard on appeal from the Western Cape Division of the High Court, Cape Town by the Supreme Court of Appeal. The applicants in the matter in the court *a quo* were private citizens who challenged the proper functioning of the branches of government when a state of national disaster is declared.<sup>67</sup> The application argued that it was irrational for the state in the exigent circumstances created by the COVID-19 pandemic to make overly broad and irrational regulations affecting the lives of millions of South Africans.<sup>68</sup> Moreover, the applicants in the court *a quo* argued that

65 M van Staden 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa' (2020) 20 *African Human Rights Law Journal* 501.

66 *Esau & Others v Minister of Co-Operative Governance and Traditional Affairs & Others* (611/2020) [2021] ZASCA 9 (*Esau*).

67 *Esau* (n 66) paras 1-4.

68 As above.

the court had to hold the executive arm of government to account for breaches of the rule of law.

In summary, the applicants challenged, first, the existence of the so-called National Coronavirus Command Council (NCCC), an entity purportedly set up by the national government to coordinate the response to COVID-19; second, the declaration of the national state of disaster; third, the prohibition on the sale of certain foods and clothing; and, finally, the restrictions placed on outdoor exercising during the national state of disaster.<sup>69</sup> Retrospectively some of these regulations to supposedly 'curb the spread of the COVID-19 pandemic' on the face of it seem entirely irrational. However, at the time and amidst a crisis caused by a then novel virus many people initially indifferently accepted the many seemingly irrational regulations. As the German philosopher Friedrich Schlegel stated, 'the historian is a prophet looking backwards'.

The court *a quo* rejected the contention and found that the disaster regulations were made in a procedurally rational manner because the Minister of Cooperative Governance and Traditional Affairs undertook consultations with various stakeholders, state entities and institutions before making the disaster regulations.<sup>70</sup> Because the COVID-19 pandemic required an 'urgent' and 'exigent' government response, so the court *a quo* reasoned, an effective public participation process was not necessary.<sup>71</sup> The basis for this finding was that the impugned regulations were necessary to 'deal with the effects of a novel global pandemic'.<sup>72</sup> The Court held that should a narrow interpretation have been followed it would have limited the government's ability to contain COVID-19.<sup>73</sup> The applicants were granted leave to appeal to the Supreme Court of Appeal.

The *Esau* judgment pronounced on the rationality of four of the impugned regulations, namely, the National Coronavirus Command Council; the declaration of the state of disaster itself; the prohibition on outdoor exercise; and the restrictions imposed on the sale of certain foods and clothing. Each regulation is briefly discussed below.

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69 *Esau & Others v Minister of Co-operative Governance and Traditional Affairs & Others* 2020 (11) BCLR 1371 (*Esau High Court*) para 1.

70 *Esau High Court* (n 69) para 160.

71 *Esau High Court* para 166.

72 *Esau High Court* para 251.

73 Van Staden (n 65) 498.



On appeal the Supreme Court of Appeal dismissed the case, save to the limited extent set out in paragraph 2 of the order, which read:<sup>74</sup>

- (a) [T]he regulations ... is invalid to the extent that it limited: the taking of exercise to three means, namely walking, running and cycling; the time during which exercise could be taken to the hours between 06h00 and 09h00; and the location for taking exercise to a radius of five kilometres from a person's residence; and
- (b) the level 4 regulations are invalid to the extent that they prohibited the sale of hot cooked food, otherwise than for delivery to a person's home.

The appeal was dismissed, save for the revision of the order to declare that restrictions placed on outdoor exercise and the prohibition placed on the sale of certain food should be allowed. Regarding the restrictions on outdoor exercising the Court held that they were 'not capable of justification because it was not rational or proportional' and 'that no rational connection has been established between the restrictions and their ostensible purpose'.<sup>75</sup> Interestingly, on the question of a general infringement on the liberty of all South Africans, the Supreme Court of Appeal held:<sup>76</sup>

It is clear that regulation 16 infringed this right by confining everyone to their residences, albeit with exceptions and conditions. At the same time, by placing such a fundamental restriction on peoples' autonomy and freedom of choice, regulation 16 also infringes the right of everyone to human dignity in terms of section 10 of the Constitution.

The Court held that no rational link exists between the restriction placed on outdoor exercise and the purpose that it purportedly aimed to achieve.<sup>77</sup> Moreover, the Court found that the restriction was arbitrary as the 'necessity has not been demonstrated, and nor is it obvious or explained'.<sup>78</sup>

Similarly, the Court struck down the prohibition placed on the sale of certain foods and clothing which was enacted through directions by the Minister of Trade and Industry. Regarding this particular prohibition, the Court still pronounced on this issue despite the fact that the prohibition had been lifted long before the case was heard before the Supreme Court of Appeal after pressure from civil society

<sup>74</sup> *Esau* (n 66) para 2 of the order granted.

<sup>75</sup> *Esau* (n 66) paras 144 & 146.

<sup>76</sup> *Esau* para 117.

<sup>77</sup> *Esau* paras 144-147.

<sup>78</sup> *Esau* para 146.

ensured that the decision was reversed.<sup>79</sup> The Court found that the decision to determine that certain items of clothing and hot food may not be sold during the state of disaster was 'clouded with a good measure of irrationality'.<sup>80</sup> The prohibition consequently was reviewed and set aside as it had 'no connection with the purpose of that regulation, namely the dissemination of information in order to 'prevent and combat the spread of COVID-19'.<sup>81</sup>

The Supreme Court of Appeal viewed the establishment of the National Coronavirus Command Council as rational finding that 'the NCCC is a cabinet committee' and that 'the cabinet may function through committees and that decisions taken by cabinet committees bind the entire cabinet as much as decisions taken by the entire cabinet in a cabinet meeting'. However, what the Court failed to appreciate was the encroaching *de facto* legislative power that the Disaster Management Act gave to the Minister of Cooperative Governance and Traditional Affairs and, by proxy, to the National Coronavirus Command Council, which resulted in nearly all of South African life being coordinated and legislated through an array of published *Government Gazettes* without any parliamentary supervision throughout the entire national state of disaster.<sup>82</sup> Moreover, the purpose of section 27 of the Disaster Management Act, which was the empowering provision used to enact the national state of disaster and to control South African life through the various issued regulations, was largely ignored. Section 27(1) of the Disaster Management Act clearly states that a national state of disaster may be declared if and only when 'existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster'.<sup>83</sup> The Court could have and, arguably, should have *mero motu* considered the fact that the Minister was acting beyond the empowering provision of section 27(1) of the Disaster Management Act by not reverting to existing legislation to deal with the spread of COVID-19. Given the magnitude of the case, this would not have been judicially indecorous. As Van Staden argues, it is accepted that the court may consider provisions regarding constitutionality without it being expressly placed before court.<sup>84</sup> Despite the slight deviation by the Supreme Court of Appeal

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79 S Bega 'Dear SA applies for some bans to be lifted' *IOL News* 9 May 2020, <https://www.iol.co.za/saturday-star/news/dear-sa-applies-for-some-bans-to-be-lifted-47765806> (accessed 11 March 2021).

80 *Esau* (n 66) para 156.

81 *Esau* para 155.

82 Van Staden (n 65) 509.

83 Sec 27(1)(a) DMA.

84 Van Staden (n 65) 501.

in the *Esau* case, the Court missed an opportunity to find in favour of freedom and the protection of constitutionally protected rights.<sup>85</sup>

The regulations promulgated in terms of the Disaster Management Act undoubtedly affect a vast array of constitutional rights and freedoms. Rather than erring on the side of freedom, the Supreme Court of Appeal in *Esau* missed the opportunity to develop the rationality test to include the fact that any governmental decision, especially of this magnitude, must have compelling governmental interest and not a mere rational connection between the decision and the enabling provision.

### 4.3 *De Beer*

Among the most notable lockdown litigation cases, the *De Beer* case<sup>86</sup> arguably was the most far-reaching judgment, at least on paper, without it being correspondingly effectual in practice. In order to properly frame the analysis of the *De Beer* judgment, it is prudent to provide a brief background to the declaration of the national state of disaster which, by and large, governed the entire country for the course of the COVID-19 pandemic. The President of the Republic of South Africa declared the national state of disaster in March 2020 in terms of the Disaster Management Act (DMA).<sup>87</sup> In terms of section 27 of the DMA:<sup>88</sup>

- (1) In the event of a national disaster, the Minister may, by notice in the Gazette, declare a national state of disaster if –
  - (a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or
  - (b) other special circumstances warrant the declaration of a national state of disaster.

and

- (3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of –
  - (a) assisting and protecting the public;
  - (b) providing relief to the public;
  - (c) protecting property;
  - (d) preventing or combating disruption; or
  - (e) dealing with the destructive and other effects of the disaster.

85 Van Staden (n 65) 502.

86 *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 (*De Beer*).

87 DMA (n 1).

88 As above.

After the declaration of a state of disaster, the responsible member of cabinet, being the Minister of Cooperative Governance and Traditional Affairs, was tasked with issuing regulations pursuant to the declaration of the state of disaster to manage the disaster and protect the South African public against the spread of COVID-19. Early on during the pandemic it was announced by the national government that the state of disaster was necessary in order to prepare the South African public health system for the inevitable rise in COVID-19 cases. South African life as we knew it was 'locked down' to provide time to prepare for the pandemic. When the state of disaster was announced in March 2020, South Africa only had 62 active COVID-19 cases.<sup>89</sup> The state of disaster, therefore, doubtlessly was announced as a precautionary and pre-emptive measure. The Disaster Management Act allows for a state of disaster to be enacted for three months after which it may only be extended on a month-to-month basis.<sup>90</sup>

The *De Beer* case sought to challenge the validity of the declaration of the state of disaster and consequently challenge the ancillary prohibitions on gatherings and commerce which were enacted through the regulations that followed the declaration of the state of disaster.<sup>91</sup> It should be noted that the *De Beer* case was marred by numerous interlocutory applications, *amicus curiae* admissions and withdrawals by attorneys of record on behalf of the applicants and *amici curiae*. The case was also followed by an appeal and cross-appeal as well as an application for contempt of court. All these procedural oxbows undoubtedly played a part in the manner in which the case was heard and consequently adjudicated upon.

The test for rationality was central to the adjudication of the *De Beer* case.<sup>92</sup> The Court, per Davis J, pertinently dealt with the question of the empowering provision, namely, section 27 of the DMA and the regulations that flowed therefrom and the rational purpose of the regulations. The Minister of Cooperative Governance and Traditional Affairs submitted that the declaration of the national state of disaster and the appurtenant regulations were necessary for the government to protect South African citizens and to curb the spread of COVID-19. Moreover, the government argued that 'there

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89 'Coronavirus: African states impose strict restrictions' *BBC* 16 March 2020, <https://www.bbc.com/news/world-africa-51906053?> (accessed 14 March 2021).

90 Secs 27(5)(a) & 27(5)(c) DMA.

91 *De Beer* (n 86) para 3.

92 *De Beer* paras 3.5-3.6.

exists no existing legislation by which the national executive could deal with the disaster'.<sup>93</sup>

However, the Court, per Davis J, held that 'the mere say-so that there exists no existing legislation by which the national executive could deal with the disaster is disputed by the applicants and they contend that any such determination by the Minister was both misplaced and irrational'.<sup>94</sup> When the national state of disaster was initially declared, it was justified by the government by arguing that the state of disaster and ancillary lockdown were necessary in order to allow for the South African public health system to prepare for the imminent surge of COVID-19 cases.<sup>95</sup> The Court was critical of the fact that the national government later on changed the purported purpose for the declaration of the state of disaster.

One of the most interesting aspects of the *De Beer* case is that the Court, per Davis J, held that the rationality of a decision was pliant and susceptible to change over time. The Court stated that 'the rationality of this policy direction [initially declaring a state of disaster] taken by the national executive then appeared readily apparent to virtually all South Africans'.<sup>96</sup> The Court was of the view that the decision taken at the time was rational and, consequently, constitutional. However, the Court questioned the rationality of the regime of regulations in its totality as well as in light of the numerous extensions of the national state of disaster. In this regard it is prudent to consider two noteworthy paragraphs contained in the judgment:

Despite these failures of the rationality test in so many instances, there are regulations which pass muster. The cautionary regulations relating to education, prohibitions against evictions, initiation practices and the closures of night clubs and fitness centres, for example as well as the closure of borders. (Regulations 36, 38, 39(2)(d) and (e) and 41) all appear to be rationally connected to the stated objectives.

So too, are there ameliorations to the rationality deficiencies in the declarations by other cabinet members in respect of the functional areas of their departments promulgated since Alert Level 3 having been declared, but these have neither been placed before me nor have the parties addressed me on them. This does not detract from the constitutional crisis occasioned by the various instances of irrationality, being the impact on the limitation issue foreshadowed in section 36 of the Constitution referred to in paragraph 6.1 above.

93 *De Beer* para 4.9.

94 As above.

95 *De Beer* (n 86) para 4.12.

96 *De Beer* para 5.1.

The fact that the Court correctly stepped in to protect the liberty and freedom of South Africans should be celebrated. Given the country's history of institutional injustice caused by unchecked law making, the *De Beer* case is an important judgment in ensuring that the checks and balances and separation of powers in its constitutional framework function well and in accordance with their constitutional obligations, even during a pandemic. However, the judgment was not without its faults. As Brickhill correctly noted, the *De Beer* judgment seemed to have conflated the rationality requirement with the requirement of reasonableness.<sup>97</sup> Nevertheless, the Court dealt thoroughly with the requirements of rationality. Regarding the purported purpose for which the lockdown regulations were enacted, the Court held that 'this paternalistic approach, rather than a constitutionally justifiable approach' and 'in an overwhelming number of instances the Minister has not demonstrated that the limitation of the constitutional rights already mentioned, have been justified in the context of section 36 of the Constitution'.

Moreover, the Court dealt with the question regarding the information before the decision maker as well as the reasons provided for the decision. The Court, per Davis J, held:

The clear inference I draw from the evidence is that once the Minister had declared a national state of disaster and once the goal was to 'flatten the curve' by way of retarding or limiting the spread of the virus (all very commendable and necessary objectives), little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not. The starting point was not 'how can we as government limit constitutional rights in the least possible fashion whilst still protecting the inhabitants of South Africa?' but rather 'We will seek to achieve our goal by whatever means, irrespective of the costs and we will determine, albeit incrementally, which constitutional rights you as the people of South Africa may exercise.'

The Court directed that the regulations promulgated by the Minister of Cooperation and Traditional Affairs in terms of section 27(2) of the Disaster Management Act 57 of 2002 were declared unconstitutional and invalid. Moreover, the declaration of invalidity was suspended until the Minister had reconsidered the regulations to comply with the order made. Arguably due to the urgent manner in which the *De*

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97 J Brickhill 'Constitutional implications of COVID-19: The striking down of the lockdown regulations' *ResearchGate* (2020), [https://www.researchgate.net/publication/341931946\\_Constitutional\\_implications\\_of\\_COVID-19\\_The\\_striking\\_down\\_of\\_the\\_lockdown\\_regulations\\_De\\_Beer\\_v\\_Minister\\_of\\_Cooperative\\_Governance](https://www.researchgate.net/publication/341931946_Constitutional_implications_of_COVID-19_The_striking_down_of_the_lockdown_regulations_De_Beer_v_Minister_of_Cooperative_Governance) (accessed 14 March 2021).

*Beer* case was heard but, more importantly, due to the fact that the lockdown regulations were ever-changing, uncertainty regarding the status of the lockdown regulations remained. Moreover, the case has been rendered largely moot due to the South African relaxing of the regulations. The case, however, remains noteworthy given its prominence and given the particular precedent that it has created for reviews of decisions taken during pandemics. Lastly, this case, as well as the others discussed above, was crucially important during these unprecedented times. When the separation of powers was significantly blurred, the courts stepped in during these cases to solidify South Africa's constitutional and rights-based dispensation. Often under extreme pressure and singlehandedly faced with decisions of great magnitude, the Court in all three cases erred on the side of freedom and caution against governmental overreach.

## 5 Conclusion

The three cases discussed in this article have delivered somewhat conflicting judgments. Moreover, these three cases are but a handful among dozens of other prominent lockdown-related cases heard by various courts in South Africa during the course of the state of disaster. Given the polycentric nature of the COVID-19 pandemic, the incongruous outcomes of the various cases perhaps is understandable. As Davis J noted in the *De Beer* judgment, 'the possibility of conflicting judgments due to a multiplicity of applications in different courts at different times' and 'lack of cohesion and coordination is unsatisfactory but the multitude of regulatory instruments issued by different role-players over a short space of time is the most probable cause thereof'.<sup>98</sup> These cases, however, have provided interesting approaches to the determination of rationality of administrative and executive decision making during times of crisis. COVID-19 is not the first pandemic that South Africa and the world have faced and it certainly will not be the last. It therefore is imperative to learn from the COVID-19 pandemic. We are called upon to critically evaluate how our legal system held up during these exigent times.

It has been held in other jurisdictions that the rule of law disciplines the conduct of the executive even when a state of disaster arises. In the New Zealand case dealing with the limitation of rights *vis-à-vis* the protection against the COVID-19 pandemic, *Borrowdale v Director General of Health*,<sup>99</sup> the foreign Court held that 'even in times of emergency, however, and even when the merits of the government's

98 *De Beer* (n 86) para 3.4.

99 *Borrowdale v Director General of Health* [2020] NZHC 2090.

response are not widely contested, the rule of law matters'. Similarly, in the British case of *(FC) & Others v Secretary of State for the Home Department*<sup>100</sup> per Lord Hoffman the Court held that 'of course the government has a duty to protect the lives and property of its citizens. But that is a duty it owes all the time and which it must discharge without destroying constitutional freedoms.'

Initially when the national state of disaster was declared, it is evident that the South African government did not offer a clear and coherent explanation that shed light on the rational connection between the litany of regulations that limited various constitutional rights and prohibited various aspects of ordinary life. Likely due to the rapid onset of the COVID-19 pandemic, the government had to act swiftly and to justify their decision making *ex post facto*. The posterior policy justification took place not only in respect of each individual aspect, that is, school closures, the limitation of certain commerce, and so forth, but justification was needed for the state of disaster in its entirety. The courts, therefore, were called upon, in fulfilment of their constitutional obligations, to ensure that the approach followed by the executive accorded with our rights-based dispensation. The COVID-19 pandemic was a strenuous challenge for South Africa's *trias politica*. Not only were its courts called upon to check executive action, but they were called upon to evaluate executive action that had vast legislative effect. As the Constitutional Court noted in *Economic Freedom Fighters v Speaker of the National Assembly*: 'The judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.'<sup>101</sup>

In this regard these three judgments commendably walked the precarious fine line of the separation of powers in favour of the freedoms contained in the South African Bill of Rights. It is submitted that the test for rationality and, more importantly, the Constitution does not change with the onset of a pandemic. Moreover, the scrutiny applied over governmental decision making should not waiver. Although the current COVID-19 pandemic as well as other future pandemics does and may likely in the future provide justification for temporary governmental conduct, the foundational principles of our administrative law and, indeed, the rule of law must remain intact.

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100 *(FC) & Others v Secretary of State for the Home Department* [2004] UKHL 56 [95].

101 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC) paras 92-93.