

# The Role of the Judiciary to Construct a Concise and Balanced Judgment on the Right to Life *vis-à-vis* Economic Life of Persons: Some Thoughts on *Mohamed v President of the Republic of South Africa* 2020 (7) BCLR 865 (GP) and *De Beer v Minister of Co-operative Governance and Traditional Affairs* 2020 (11) BCLR 1349 (GP)

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## Abstract

This article examines the centrality of the judicial response to government's constitutional obligations in balancing competing rights in the protection of the right to life *vis-à-vis* the preservation of human livelihood when government declares a state of emergency. The objective is to decipher whether the judgments managed to properly balance the competing interests during emergency times. The challenge to the regulations was their alleged failure to meet the minimum standard of reasonableness and justification envisaged by the Constitution, resulting in adverse effects on people's fundamental rights. Consequently, the judiciary was called to play its indispensable role and resolve the legal discords. The article argues that the protection of life *vis-à-vis* economic livelihood are interdependent as they (in)directly influence the enjoyment of each right. The argument is built on the regulations that restricted the movement of persons adopted with the intent to "flatten the curve" as a result of the COVID-19 pandemic. The article imparts that balancing constitutional rights is imperative not only when emergency times arise. It also posits that it is not how an individual person portrays a regulation in a particular circumstance. Rather, what is key is whether those on the receiving end are willing to

appreciate the reason behind a policy and its regulatory framework. It is also whether the imposition of the law on others is done with care and sensitivity.

**Keywords:** COVID-19; judiciary; human rights; regulations; principle of legality

## Introduction\*

On March 15, 2020, South Africa declared a national state of disaster.<sup>1</sup> Two days later, regulations were promulgated.<sup>2</sup> Contrary to what was anticipated, growing concerns about their validity emerged, immediately after the regulations were promulgated. Prominent among these concerns were arguments that the regulations were not constitutional, because they did not satisfy the reasonableness and justifiability criteria. Furthermore, there were questions about their practical enforcement. In the context of the facts of the *Khosa*<sup>3</sup> judgment, one would not dare to fault an argument made that, indeed, the regulations' enforcement was unreasonable and unjustified because of the degrading treatment evinced by the conduct of security forces against human beings at their residence. As a result, only a few months after the regulations came into effect, courts were called upon to resolve legal discord which arose, challenging same, or their enforcement. The challenge was mainly on whether they were unreasonable and unjustified, or had been enforced in that manner.

This article examines the centrality of the judicial response to the government's constitutional obligations in balancing competing interests in the protection of the right to life *vis-à-vis* the preservation of human livelihood in emergencies with reference to *Mohamed v President of the Republic of South Africa*<sup>4</sup> and *De Beer v Minister of Co-operative Governance and Traditional Affairs*<sup>5</sup> judgments. The objective is to decipher whether the judgments managed to balance the competing interests. The article argues that the protection of life *vis-à-vis* economic livelihood are interdependent as they

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1 This decision was informed by the rapid increase in infections around the globe. The World Health Organisation (WHO) declared the COVID-19 a global pandemic on March 11, 2020, because within a short space of time the number of infections rose exponentially. By January 30, 2020, the virus had been detected in about 114 countries after its first detection in November 2019. At the time, the number of infections in South Africa was still low, standing at 1160. See also *Khosa v Minister of Defence and Military Veterans* 2020 (7) BCLR 816 (GP) para 26.

2 The Minister of Co-operative Governance and Traditional Affairs (COGTA) promulgated the *Lockdown Regulations (Regulations)* in terms of s 3 of the Disaster Management Act 57 of 2002, in respect of the necessary enforcement steps government was to take. *De Beer* paras 4 and 7; *Mohamed* para 7. Regulation 1 defines COVID-19 as a novel Coronavirus (2019-nCoV2), which is an infectious disease caused by a virus that has previously not been scientifically identified in humans. The virus emerged in 2019 and was declared a global pandemic by the WHO in 2020. In some quarters, it is regarded as being caused by a severe acute respiratory syndrome Coronavirus 2 (SARS-CoV-2), and was first identified in 2019 in Wuhan, the capital of Hubei, China.

3 *Khosa v Minister of Defence and Military Veterans* 2020 (7) BCLR 816 (GP).

4 2020 (7) BCLR 865 (GP).

5 2020 (11) BCLR 1349 (GP).

(in)directly influence the enjoyment of each right. However, it appears that sometimes one right may dominate another for protection, especially if certain factors are considered. The regulations that restricted the movement of persons are at the centre of this contribution.

## Setting the Tone for Constitutional Adjudication in the Enforcement of Rights

The dawn of democracy ushered in a new lease of life for the adjudicative powers that are vested in the courts. Indeed, courts as final arbiters occupy an invidious and delicate position in the interpretation of regulations. They also ensure that their application strikes a balance between the duty government has *vis-à-vis* the enjoyment of human rights by persons in ensuring that justice is not only served but is seen to be served.

The democratic period witnessed a slow recovery from the effects of apartheid, which compromised the independence of the courts (Dugard 1998, 110; Penna 1990, 5–21; Du Bois 2006, 1–67). The supremacy of the Constitution<sup>6</sup> has grounded the affirmation of that role that is assigned to them. The supremacy of the Constitution entails the constitutional structure of the organs of the state, which, as Limbach (2001, 3) contends, is characterised by “the possibility of distinguishing between the constitution and other laws; the legislator being bound by constitutional law, which presupposes special procedures for amending constitutional law; and an institution with the authority, in the event of a conflict, to check the constitutionality of governmental legal act.”

It is deduced from Limbach that the supremacy of the Constitution lays a solid framework for both the state and the judiciary to move beyond the confines of formal liberties of democracy and ensure that the Constitution advances the socio-political, legal, and cultural dimensions of the citizenry (Suttner 2019). As envisaged in section 172(1) of the Constitution,<sup>7</sup> the judiciary is now conferred with powers to pronounce on any law or conduct that is inconsistent with the values and principles of the new dispensation as opposed to its limited role during the apartheid period. This particular role is made distinct by the fact that the Constitution, including legislation that has been adopted to contextualise it, is rights-oriented as opposed to South Africa’s past.<sup>8</sup> The knowledge and jurisprudence that have since been developed have unearthed the impact of South Africa’s past, which privileged a few and suppressed the majority. It did not just deny the majority of rights, but dehumanised and deprived them of dignity and all

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6 Section 2 of the Constitution, which reads: “This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

7 The section provides that when deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including (i) an order limiting the retrospective effect of the declaration of invalidity and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

8 *S v Makwanyane* 1995 (6) BCLR 665 para 7.

rights accorded to the human person.<sup>9</sup> Without focus on this history, section 172(1)<sup>10</sup> is intertwined with section 165 of the Constitution, which entrenches the independence of the judiciary. It is clear from section 165 that courts are endowed with independence in the application of the law without fear or favour and their decisions are subject only to the Constitution and the law. Swart (2019, 1–20) correctly captures the concept of the independence of the judiciary. Although the concept is not defined and varies from jurisdiction to jurisdiction, first, it does not detract from its status as a cornerstone of the rule of law; second, it does not mean that there are no core features of judicial independence upon which there is universal agreement; third, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests; and fourth, it is, therefore, conceived and understood in relation to other institutional actors.

It is without doubt that the concept of judicial independence is multidimensional as it is characterised by different institutional, legal, social, cultural, and operational arrangements that are designed to ensure its independence. Of particular importance is institutional and individual independence, which forms the core of such independence. The affirmation of judicial independence is concretised by various factors<sup>11</sup> that capture the institutional and individual independence of the judiciary. The former relates to the constitutional protection accorded to the judiciary as a branch of the state to function without interference from anyone, including other branches and spheres of government. On the other hand, the latter relates to internal professionalisation and socialisation in the judicial-making process of an individual judge.<sup>12</sup>

Furthermore, the supremacy of the Constitution and independence of the courts are intertwined with the provision for a right and a guarantee for anyone to invoke a right in the Bill of Rights if that person is of the opinion that the right has been infringed through, for example, improper exercise of power.<sup>13</sup> Section 38 of the Constitution gives content to the competency of anyone to enforce the rights and provides that “anyone listed in the section has the right to approach a competent court, alleging that a right in

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9 Mokgoro J in *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) paras 72–73.

10 See also *Qwelane v SAHRC* [2019] ZASCA 167 para 89.

11 These include, but are not limited to: a transparent process for the appointment and promotion of judges as undertaken by the Judicial Services Commission in South Africa established in terms of s 178 of the Constitution; the terms and conditions of judicial tenure; financial autonomy and court administration though in South Africa, the judiciary’s budget comes through the Department of Constitutional Development and Correctional Services. There are consistent calls from the Office of the Chief Justice for a proper allocation. Judicial conduct has been a concern and the JSC has been heavily criticised for taking long in completing some matters of judicial misconduct that have been reported to it. See further analysis in *DOHA Declaration: Promoting a Culture of Lawfulness February 2020*.

12 *DOHA Declaration: Promoting a Culture of Lawfulness February 2020*.

13 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69, and endorsed in *Khosa* para 70

the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”

Fabricius J in *Khosa* contextualised the significance of section 38. It entails that an allegation that a right has been infringed or is threatened; and a court is entitled to grant appropriate relief, including a declaration of rights; and when the section is applied, it must be construed purposely in light of section 172(1)(b) of the Constitution. Evidently, the enforcement of a right is intertwined with the provision of an appropriate remedy for a breach to properly uphold and enhance the values underlying the proper vindication of the rights entrenched in the Constitution. It is the responsibility of courts to forge new tools as well as to shape innovative remedies to achieve the goal.<sup>14</sup> With the constitutional guarantees, as per Krieger J in *Ex Parte The Minister of Safety and Security: In Re The State*, held that the “Constitution commands the State and all its organs to respect, protect, promote, and fulfil all the rights protected by the Bill of Rights.”<sup>15</sup>

### **Adoption of the Lockdown Regulations**

Against the background of the supremacy of the Constitution, independence of the judiciary, and an affirmation not only of the enforcement of rights, but also the accorded remedies on the establishment of a violation of a right, the government adopted the lockdown regulations<sup>16</sup> as a measure to curb the spread of the COVID-19 pandemic. The main regulations for determination were those related to restrictions on the movement of persons and goods under *Regulation 3(b)(i)*.<sup>17</sup> The regulation provided that for the period of lockdown:

Every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving or chronic medical attention.

The regulation was drafted in this manner before it was amended under Alert Levels 4 and 3 permitting some movement of people in certain industries. It appears structured as all-encompassing and intended to prohibit any form of movement of persons outside their residences. As can be seen, one deduces that their promulgation was meant to cover a wide range of areas. The core of the promulgation centred on the restriction of

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14 *Hoffman v South African Airways* 2001 1 SA 1 (CC) quoted in *Khosa* paras 70–71. See also *Fose* para 69.

15 *Ex Parte The Minister of Safety and Security: In re the State* (Case CCT 28/01). See s 7(2) of the Constitution, 1996 read with s 8(1) of same.

16 The *Regulations* define “lockdown” as “the restriction of movement of persons during the period for which this regulation is in force and effect, namely from 23H59 on Thursday March 26, 2020 until 23H59 on Thursday, April 16, 2020, and during which time the movement of persons is restricted” The content and the operation of the regulation has constantly been changed from time to time depending on the infection rate of the virus.

17 *GG 43199*, amended regulations of March 30, 2020. It amended Regulation 11B(1)(a). Also see *C D v Department of Social Development* [2020] ZAWCHC 25 para 3.

movement of persons and goods. The corollary effect was to bring the country to a standstill. The regulations were intended to confine persons to their places of residence, unless they were performing an essential service, obtaining essential goods or services, collecting a social grant, or seeking medical or other emergency needs like life-saving or chronic medical attention.<sup>18</sup> Regulation 11A defined “movement” as “entering or leaving a place of residence, or in the case of people not ordinarily resident in the Republic, their place of temporary residence while in the Republic.”<sup>19</sup>

It is clear that government developed the regulations to prevent and manage instances that could lead to a health catastrophe. The regulations were also meant to prevent putting the country’s emergency response system under chronic strain to the extent that it would not be in a position to cope and deal with the resultant number of infected persons. By reason of this regulation and its literal and conveyance of a strict interpretation, no person within the country was permitted to go to their workplaces, visit a church, drive or fly outside the borders of the country, visit a friend, take a walk, or simply stand outside their yard boundaries to speak to another.<sup>20</sup> From the various court challenges, the arguments centred on this very strict import of the regulations.<sup>21</sup> The preliminary question for this article is: In hindsight and looking at the escalation of the pandemic over a short space of time, can one argue that the proactive action taken by the Minister was justified? This is so because seven months later, at the end of September 2020, the number of persons confirmed as infected stood at over 653 000 in South Africa. Thankfully, about 86 per cent of these persons had recovered. Regrettably, the number of deaths stood at over 15 000. Globally, the number of persons confirmed as infected, inclusive of South Africa, stood at a staggering figure of over 30 million. However, the wonderful news was that the number of those who recovered stood at 21 million. But still, there were 9 million people who were still infected and had not yet recovered.

### **Regulating the Scourge of the Pandemic in Accordance with the Basic Constitutional Tenant of Legislative Drafting**

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO*,<sup>22</sup> the Constitutional Court spelt out the duty of the legislature when enacting legislation. It held that the

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18 See Regulation 11B(1)(a)(i). These were amended on April 16, 2020, GG 43232.

19 Regulation 11A.

20 Regulation 11B(1)(iv)(b)–(e) makes use of the phrases “must be closed” or “must remain closed” and “prohibited from.”

21 The strict approach was consistent with the purpose to ensure management and prevention of the escalation of the disaster or to alleviate, contain, and minimise its anticipated effects. Section 27(2) (a)-(o) of the DMA 2002; and COVID-19 Regulations, GN 318 GG 43107, published March 18, 2020.

22 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) (*Hyundai*).

“legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.”<sup>23</sup>

Disappointingly though and perhaps not staying true to its intended purpose of restricting movement, the regulation fell short in some instances. For example, no definition of a place of residence was provided; it was unclear whether it was the house itself, or the house, including its surrounding area. Normally, a place of residence is classified as the building, shack, or any other structure in which people reside, together with its outside or immediate surroundings. One would think that in an instance where an Act does not define a “place of residence”, then the generally known classification of a place of residence will automatically be adopted and applied by law enforcers even in situations where there is a pandemic. In the absence of a definition, interpretation would dictate a flexible approach that does not suggest that people had to be confined inside their houses even when they had a safe surrounding area such as a yard.

The regulation prohibited the convergence of people of different families together. In adhering to the regulation, it is unreasonable to expect members of the same family residing in the same residence to sit together inside the house but not do so inside the area classified as surrounding or yard of that same house. Where people would be confronted and arrested by government officials while sitting within the surrounding area/yard, such arrest would definitely call into question the application of that regulation. Thus, a lack of a definition of a “residential area” in *Regulations* was a failure of that regulation to be precise. A reasonable person would categorise such a regulation as less informative to citizens about their rights, and surely many would be justified to think that it restricted movement unreasonably, and was thus, unconstitutional. We argue that in this regard, the government failed to adhere to the basic constitutional tenant of legislative drafting pronounced by the Court in *Hyundai*.

With the lack of clarity on the definition of “residence” within the said regulation, another huddle is that the envisaged protection accorded to courts also does not detail or provide further sub-guiding principles within which courts must traverse in order to ensure the state fulfils its constitutional obligations as endorsed by Kriegler J. The COVID-19 pandemic put a severe strain on the functioning of the courts in an already ailing court system that has been affected by many factors which are not the subject of this article. With the courts having to respond to challenges of an alleged infringement of rights in an emergency situation, a thorny question has remained on the manner in which they have been able to uphold the government’s responsibility of protecting lives while on the other hand preserving the livelihood of the human person. This question became complex, because – as argued – the protection of human lives is interdependent with the preservation of human livelihood through the protection of economic life, which directly and or indirectly protects the right to life. With the complexity presented by COVID-19 on the balancing of competing rights *vis-à-vis* government’s

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23 *Hyundai* para 24.

constitutional responsibilities, the courts remained at the epicentre of constructing nuanced responses on the interdependence of the contesting claims. The main purpose of such an undertaking is to give effect to the general rights framework within the limitations imposed not only by the Constitution of 1996, but also by prescripts of international human rights law.

What follows is an exposition of court judgments, which brings to the fore the possible imbalance which caused distress to people's livelihoods, because regulations limiting their rights were drafted less informatively, and thus, ended up being viewed by the citizens as being applied in a manner that impermissibly restricted and limited their constitutional rights.

## Examining the Role of the Judiciary to Deliver Balanced and Concise Judgments

### **A Brief on the Judicial Review of Government Conduct in the Era of COVID-19 Litigation**

In *Makwanyane*, Ackerman J laid a foundation for the development of a concise balance in the delivery of judgments and affirmed a move from the “past that was characterised by arbitrariness in the operation of the law to a future where state action is capable of being analysed and justified rationally.”<sup>24</sup> Looking at the web of court challenges during the COVID-19 pandemic, balancing a person's constitutional rights *vis-à-vis* government's responsibility is grounded on section 36 of the Constitution.<sup>25</sup> The latter section compels government functionaries, in an instance where it may be necessary, to limit people's rights, such as in the lockdown situation to ensure that the limitation is consistent with the requirements listed in the said section. It is clear from the section that people's rights may be limited within the framework of the factors entrenched therein. It can be argued that, taken together, these factors should be seen as constitutional guarantees that when drafting legislation, government must ensure that the legislative drafting process upholds people's rights, and the subsequent enforcement of that legislation protects them. This legislative process should be grounded on a limitation that is designed for a reasonable and justifiable purpose in a democratic society, which involves the weighing up of competing values.<sup>26</sup> As endorsed in *Makwanyane*, this entails a two-stage process which seeks to establish the reasonableness of the limitation and its link to a legitimate government purpose.<sup>27</sup> This

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24 *Makwanyane* para 156.

25 The section provides that: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, which include (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

26 *Makwanyane* para 104.

27 *Makwanyane* para 104.

approach falls within the context of the argument in this article as it seeks to establish the rationality of the regulations which were drafted as means to curb the spread of the COVID-19 virus.

In giving content to the question raised herein on the intersectionality of the means and an end adopted by the state, the crux of the role of the courts in the delivery of a balanced construction of competing interests is not to “second-guess” the intention of the other two branches of the state.<sup>28</sup> This means that courts have to maintain a delicate and sensitive balance in upholding the powers that are vested in each of the branches while they execute their adjudicative role. As expressed above, COVID-19 presented a complex situation not only for South Africa, but also for the global community. In the construction of this balance, lessons developed could be of assistance on how courts have responded to the impact of the pandemic.

### *Mohamed*

The applicants, in this case, sought to have *Regulation 11B(1)(a)(i)* and (ii) referred to earlier, which predated the Lockdown Alert Level 3 regulations, declared to be overbroad, excessive, and unconstitutional and that respondents be ordered to amend regulations to permit the movement of persons between residences and places of worship. In line with section 36 of the Constitution, they contended that people’s rights were not to be infringed upon without reasonable or justifiable cause.<sup>29</sup> In their argument, they went on to assert that because funerals were permitted, places of worship could also be permitted.<sup>30</sup> The unreasonableness of the regulations was that they criminalised the performance of what the applicants considered to be a compulsory act of worship in terms of the Islamic religion. They were being forced to make a choice between disobeying the fundamental tenant of their belief and disobeying the regulations, which to them were too stringent and not flexible to permit them to practise their religion.<sup>31</sup> Thus, their view was that the regulations violated their right to freedom of movement, religion, association as well as their right to dignity.<sup>32</sup>

The respondents based their case on two arguments. First, there was no constitutional violation entailed in the regulations. Second, the relief sought was neither competent nor just and equitable given the circumstances of the case.<sup>33</sup> Within this argument, the respondents conceded that the challenged regulations, both the original and the amended, indeed posed severe restrictions and serious encroachment on every person’s constitutional rights, especially those related to movement and association.<sup>34</sup> However, the restrictions were both reasonable and justifiable given the threat the virus posed to

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28 *Makwanyane* para 104.

29 *Mohamed* para 18.

30 *Mohamed* paras 3.1–3.4 and 22–23 and 25.

31 *Mohamed* paras 15 and 18.

32 *Mohamed* para 15.

33 *Mohamed* para 31.

34 *Mohamed* para 32.

human life, dignity, and access to the same healthcare people argued they had a right to.<sup>35</sup> They argued that urgent and drastic measures were necessary and had to be taken to curb the infection rate. It was also a means to manage the healthcare system and protect it from being overwhelmed and eventually collapsing.<sup>36</sup> Looked at broadly, this argument also addressed why the limitation was important under section 36 of the Constitution. In totality, the application was whether *Regulations* 11B(1)(a)(i) and (ii) reasonably and justifiably limited human dignity, equality, and freedom;<sup>37</sup> the direct question is whether the regulation extended the limitation beyond what was constitutionally permissible.

The first question is whether government concerns were sufficiently important and if there was sufficient high risk. Neukircher J emphasised that the government regulations affected almost everyone, including all churches as none of these institutions could hold their usual services as they normally did.<sup>38</sup> All the churches accepted the situation and made tremendous sacrifices for the greater good.<sup>39</sup> This has to be viewed in the context of the explanation and arguments presented by government in *Mohamed*.<sup>40</sup> Neukircher J set the test in agreement with government's arguments to determine a reasonable and justifiable limitation with respect to the regulations and held: "Respondents need not show that they will achieve their objectives of stemming or eradicating the COVID-19 pandemic, it is sufficient to show that the Lockdown regulations are a rational measure designed to achieve that end."<sup>41</sup>

It is submitted that the test combines two factors and it appears both were directed at assisting to establish why it was necessary to implement a limitation at a particular time. The test in *Mohamed* suggests that the gaze by which the government's concerns are looked at should not seek to establish the success of eradicating what a policy is adopted for, but the rationality of the introduced measures to achieve their end. Whether the measures were reasonable or justifiable to limit rights will have to pass the stage of rationality.

### *De Beer*

In this case, the applicants challenged the restrictive nature of the regulations to the freedom of movement of persons as arbitrary and unreasonable.<sup>42</sup> Government action

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35 *Mohamed* para 32.

36 *Mohamed* para 33.

37 *Mohamed* para 34.

38 *Mohamed* paras 13–14.

39 *Mohamed* para 14.

40 It is also worth noting that the case was supported by various social groups. This argument is not part of this article.

41 *Mohamed* para 57.

42 Among other things, the applicants argued that: (i) the declaration of a national state of disaster was unconstitutional, unlawful, and invalid; (ii) all the regulations promulgated by the Minister be declared unconstitutional, unlawful, and invalid; (iii) all gatherings be declared lawful, alternatively, be allowed subject to certain conditions; and (iv) as an alternative and subject to consultation with

was arbitrary, because the Constitution bestows individual rights to all persons not to be treated arbitrarily and affirms that people have freedom of movement, freedom of speech, and freedom to seek employment and be employed without hindrance.

The first challenge the court faced was the fact that the arguments postulated that all the regulations had to be declared unconstitutional, without pinpointing each specific regulation. The second challenge for the court was that the applicants simply made generalised arguments without substance.

It would appear that for an interpretation to make a meaningful contribution, each provision had to be given due regard. In *Shaik v Minister of Justice and Constitutional Development*,<sup>43</sup> the court considered it a sound discipline in constitutional litigation to identify with accuracy statutory provisions challenged due to their unconstitutionality. This would be especially important in instances where a person's right was limited and the other sought to justify the lawfulness of such a limitation.<sup>44</sup> Clearly, *De Beer* was such a case. It must be highlighted, however, that in *Shaik*, Ackermann J did not regard the rule as one grounded on inflexibility. The circumstances of a case may dictate otherwise.<sup>45</sup> The paucity in the level of arguments aside, in *De Beer*, it can be identified from the applicant's contentions that the applicants did mention the basis of their plea and argued what they alleged was not constitutional in the regulations they intended to place before the court for scrutiny.<sup>46</sup> What was lacking from their arguments was the specific mention of the actual provisions on which the applicants relied. Thus, the paucity in their arguments impeded Davis J from making an informed decision in the case and thus, curtailed a proper analysis of the basis of the applicant's arguments.

Fundamentally expressing his view with respect to what he considered should have been government's starting point, Davis J held that:

Government should have asked: how do we as government limit constitutional rights in the least possible fashion whilst still protecting all inhabitants? Instead, government started on the wrong footing, by seeking to achieve its own goals by whatever means,

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the Essential Services Committee contemplated in section 70 of the Labour Relations Act 66 of 1995, they argued that all businesses, services, and shops be allowed to operate subject to reasonable precautionary measures of utilising masks, gloves, and hand sanitisers. See *De Beer* para 3. At the time of hearing of the matter, some of the regulations contended had already been relaxed by the Minister, titled "Alert Level 3 Regulations" (lockdown level 3 regulations) adding a chapter to existing lockdown regulations.

43 *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24.

44 *Shaik* paras 24–25.

45 *Shaik* para 25.

46 First, the declaration of the national state of disaster was in terms of sections 3 and 21 of the DMA 2002. Second, all regulations related to COVID-19. Third, all regulations related to gatherings. Fourth, all regulations related to the closure of businesses.

irrespective of the costs to *people's livelihoods*. Government determined, *albeit* incrementally, which constitutional rights people had to exercise.<sup>47</sup>

The manner in which Davis J started appears flawed *vis-à-vis* the tests already stated in *Mahomed*, because the view begins by seeking alternatives to what government has implemented rather than asking whether the adopted measure was connected to the purpose. Nevertheless, Davis J, in his attempt to balance, but also ensure harmony, simultaneously applied the limitation and rationality principles to the facts before him. Momentarily, he agreed by acknowledging that saving lives was the supreme duty imposed by the constitutional imperative and that it was one of the fundamental rights entrenched in the Bill of Rights.<sup>48</sup>

In the same breath, Davis J acknowledged that at that moment, it had to be accepted that government was facing a conundrum to choose between a “plague and famine.”<sup>49</sup> It is evident that Davis J’s thoughts and approach changed to embrace “social cohesion” and “economic viability.” His opinion was that the issues pertinent in the case could not solely be limited to the loss of lives. He began to express the alternatives by expressing what he thought could have been government’s approach. He said that if government was unable to completely prevent the spread of infections, then the object should have been to attempt to limit the spread or the rate of infection while maintaining social cohesion and economic viability.<sup>50</sup> Davis J decried the government’s plans that, according to him, seemed not to have properly considered the limitations occasioned by the regulations before they were promulgated and the impact they would have on people’s constitutional rights. In other words, to Davis J, there seemed to have been no *sine qua non* between the imposed limitations and the effect that such limitations would have on the persons on whom they were to apply. He alluded to the unfortunate situation in which government failed to assist the court to provide a substantive argument as it did in *Mohamed* with respect to the measures it took to ameliorate the limitation on people’s rights. All there was to assist the court was a merely generalised affidavit from the department’s director general.<sup>51</sup> Due to the lack of substantive evidence, Davis J – without analysing any particular section – held that government seemed not to have heeded the fact that the regulations, which sought to limit a person’s rights, must be subject to section 36 of the Constitution to establish the rationality of the adopted measure.<sup>52</sup>

Despite his criticism, however, we are of the view that Davis J failed in his judgment to set out a proposed and detailed layout of how government could have maintained social

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47 *De Beer* para 7.17.

48 *De Beer* para 6.10.

49 *De Beer* para 6.10.

50 In fact, he held that this was the aim scribed in sections 27(2) and 27(3) of the DMA 2002, which compels government to take measures as far as is reasonable to assist, protect, and provide relief to the public, and deal with destructive effects of a disaster. *De Beer* para 6.11.

51 *De Beer* para 7.16.

52 *De Beer* para 7.17.

balance and economic viability in the face of a virus spread that took lives at high rates while the government was still trying to understand how its malignancy could be curtailed. In our view, what struck at the core of his approach was what seemed to be his failure to consider the core content of the right to life, which is foundational to all other rights and the person's livelihoods. O'Regan J brought this content to life in *Makwanyane* in her contextualisation of the interdependence between the right to life and livelihood. She held that:

The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.<sup>53</sup>

The preceding paragraph precisely speaks to what courts have to bear in mind and which right to prioritise at times. They must also be alive to the fact that when they set out to ascertain whether a limiting measure is reasonable, scrutiny will vary in its intensity. Some limits must be approached with scepticism, and some infringements will be scrutinised intensely. The right at issue will determine the intense scrutiny required in the circumstances.<sup>54</sup>

The fallacy of this case was also evidenced by its appeal in its entirety in *Minister of Co-operative Governance and Traditional Affairs v De Beer*.<sup>55</sup> The court's first comment was that "the case ... is an object lesson as to how a constitutional challenge to promulgated regulations should not be brought."<sup>56</sup> However, the court found the case to be raising matters of national and international importance.<sup>57</sup> The court acknowledged from the onset that in declaring a pandemic in March 2020, the government took advice from the National Coronavirus Command Council (NCCC), which was a group of experts drawn by government from various fields in order to advise it on the manner in which it would handle the pandemic, and De Beer did not dispute this fact.<sup>58</sup> Thus, for the government, jurisdictional facts for declaring the national state of disaster contemplated by section 27(1)(a) and (b) of the DMA 2002 had been established.<sup>59</sup>

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53 *Makwanyane* para 326.

54 *Mohamed* para 56. See also *Dladla v City of Johannesburg* 2018 2 SA 327 (CC) para 77.

55 [2021] ZASCA 95, para 30.

56 *De Beer* 2021 para 2.

57 *De Beer* 2021 para 2.

58 *De Beer* 2021 para 20.

59 *De Beer* 2021 para 21.

The SCA, in agreement with some commentators, disagreed with the approach Davis J took in *De Beer*. Like De Vos (2020), they noted some fundamental faults in the High Court judgment. The SCA confirmed that the Level 3 regulations were not argued in the affidavits and not properly before the court.<sup>60</sup> Furthermore, the court made a fundamental mistake to rule against the government without hearing its side.<sup>61</sup> The SCA agreed with De Vos's views<sup>62</sup> which we also share, especially with *De Beer* coming immediately after *Mohamed* that the High Court could not strike down regulations whose legality it did not examine for want of legality. Therefore, the judgment went beyond the pleaded case.<sup>63</sup> Regulations cannot be the product of pronouncement as a decision of a court if they have not been forensically tested by both sides on issues necessary for the decision.<sup>64</sup> Brickhill (2020) went on to express the view that Davis J muddied the rationality review and limitations analysis. The author criticised Davis J for having applied a “hybrid rationality-limitations analysis” which led the court astray. He opined that Davis J blurred the “means-ends” rationality questions into the question “whether the limitation of any right is justifiable under section 36.” Davis J held that if the regulations did not satisfy rationality, then they fail section 36. Thus, Brickhill considered this approach to have been flawed. According to him, Davis J should have adopted different approaches when analysing the rationality and limitations tests. His view was that Davis J applied a proportionality approach rather than rationality.

The question is whether Davis J would have ruled differently had government presented plausible arguments similar to the *Mohamed* case. Government's arguments could not have been materially different from those it submitted in *Mohamed*, a case decided in favour of government just a few months earlier. The question finds more relevance now that the SCA has questioned and determined that Davis J heard a matter which was not properly put before the court for determination:

Thus, not only was the Minister denied a proper hearing, but the respondents were granted relief that had never been sought. In that sense, not only did the judgment suffer a failure of proper judicial reasoning, but it also failed to recognise and respect – as it was constitutionally obliged to do – the limits of the judicial function, and hence the separation of powers.<sup>65</sup>

Indeed, the facts in the *Mohamed* and *De Beer* cases were distinguishable, but the policy relied upon by government and the rationale behind it were for all material purposes the same. Therefore, the arguments presented by government in both cases would necessarily be similar and would have assisted Davis J in his decision. Courts are cautioned from interfering with how parties conduct their cases, but the principle is for

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60 *De Beer* 2021 paras 28 and 82.

61 *De Beer* 2021 paras 82–85.

62 *De Beer* 2021 paras 83.

63 *De Beer* 2021 paras 84.

64 *De Beer* para 3.

65 *De Beer* [2021] paras 85–89. The court also cited *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; [2009] 2 All SA 243 (SCA) paras 15–16.

them to identify or formulate a dispute, and the courts to determine it, and it should be that dispute alone. Courts should not raise new issues, much as they may suggest a line of argument or how a case may be approached. Parties remain entitled to adopt or not adopt that advice.<sup>66</sup>

It is our considered view that a proper construction and structure of the dispute consistent with the presentation of evidence would have enhanced the court's judicious decision-making functions. Failure to do so also constituted a lapse in providing judicial leadership/guidance on the judge's part, because eventually, he decided that there already was an existing case which dealt with similar policy-based issues/arguments by government. It was, therefore, unfortunate that in the context of the case, Davis J found many regulations unconstitutional only based on his own wisdom.<sup>67</sup>

### The "Lens" in COVID-19 Litigation

As a point of departure in giving authority on the role of the other branches, the courts, as evidenced by the content of the cases, the question was not whether government regulations should not have been promulgated. Rather, it was whether their restrictive nature was reasonable and justified or the enforcement thereof. The applicable law in the instance is the Disaster Management Act, as well as the subsequently promulgated regulations.<sup>68</sup> The regulations were promulgated to apply to all citizens, permanent residents, and visitors who were in the country lawfully. The definition of movement set out earlier clarifies this as the provision includes such persons by limiting their movements. The regulations applied to everyone without distinction, although they were silent on people in the country illegally; it is without doubt that *Mohamed*<sup>69</sup> responded decisively to the question posed in this article. This case eloquently captured the rights of people and delineated the balance and limitation of constitutional rights of persons.

Thus, in the context of the argument in *Mohamed*, the section 36 provision will be used as a baseline to determine whether the regulations intruded unreasonably and unjustifiably in their departure from the benchmark to serve an important purpose to "flatten the curve."

After setting out the requirements under section 36 of the Constitution, the court in *Mohamed* held that to examine the arguments, an important principle must at all times be observed: both a standard of "justifiability test" and that of "proportionality" had to be applied. The test cannot be less than this simply because a state of national disaster

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66 *Fischer v Ramahlele* 2014 ZASCA 88 paras 13–15.

67 *De Deer* paras 7.1–7.13.

68 The DMA 2002 is clear on what the executive is required to do when exercising its powers where a national disaster has been declared. See s 26(2)(a) and (b), as well as s 27(1) and (2) of the DMA 2002.

69 One may say that in the first case related to the pandemic, being *Moela v Habib*, [2020] ZAGPJHC 69, Weiner J was not as elaborative as Neukircher J was in *Khosa*.

exists.<sup>70</sup> In *Qwelane*, the SCA opted for the test setting out the extent to which courts must engage in the scrutiny of that challenged regulation set in *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)*.<sup>71</sup> In *Laugh it Off*, the Constitutional Court held that:

Legislation may be a means to provide a baseline against which to measure the extent of any limitation so that the greater the intrusion and the further the departure from that baseline, the stricter the scrutiny that is required.<sup>72</sup>

Hence in *Qwelane*, Navsa JA held that when rights come into conflict, the constitutional standard is one of proportionality as set out in section 36 of the Constitution; there is no hierarchy of rights, one trumping the other.<sup>73</sup> Section 36 is the baseline test to determine the unconstitutionality of a provision limiting a person's rights. In *Mohamed*, the court held that:

Precisely, the proportionality exercise has to relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption for which the applicant asked, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.<sup>74</sup>

It is deduced from *Mahomed* that proportionality under section 36 envisages that a balancing act is adopted, first by the functionary purporting to limit another's right. Further, by a court as its primary focus when it determines whether a constitutional right has been, or is being, or will be limited beyond permissible constitutional bounds. The test set in *Mohamed* appears to be consistent with the test set by the Constitutional Court in *Minister of Home Affairs v NICRO*.<sup>75</sup> In *NICRO*, the Court expressed itself that parties and courts alike must take into cognisance the reality that where a determination involves a justification analysis, then facts and policy are bound to collide in an intertwined form. The standard by which the analysis must be conducted is both subjective and objective. However, this standard depends on the circumstances of that case. In our view, and in applying the test using this standard, it would appear that what the Constitutional Court had in mind was that *subjectively*, where a government entity implements a particular policy, it may not be knowable that the results occasioned by that implementation will be effective. In fact, simply because that determination could not be made, it does not necessarily follow that an adopted government policy is *objectively* not reasonable or justifiable. The Court went on to hold that what was important was the concerns that the policy and its implementation sought to address.

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70 *Mohamed* para 26.

71 *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

72 *Qwelane* para 51.

73 *Qwelane* para 82; and *Laugh it Off* para 47.

74 *Mohamed* para 42.

75 *Minister of Home Affairs v NICRO* 2005 3 SA (CC) para 35.

What must be shown, however, is that (i) concerns are of sufficient importance, (ii) risks associated with concerns are sufficiently high, and (iii) there is a sufficient connection between means and ends.<sup>76</sup>

Thereof, section 36 places the obligation on the imposer who limits another's right. This ensures that a balance between the duty of the imposer and the rights of the receiver is maintained. The person to whom the limitation is intended to apply must accommodate reasonable restrictions. Equally, the imposer has a duty to address the limitation and prove the importance of its purpose. In this regard, the argument presented by government was that, because the regulations were time bound, the impact was only on the right to congregate and the State accepted that such a limitation was painful in a time of many limitations. In government's view, in *Mahomed*, the question was whether the failure to allow congregational worship was reasonable and justified and whether the refusal to allow for an exemption in that regard contributed to the overall important purpose, thus was reasonable and justified<sup>77</sup> to intrude on people's constitutional rights. Thus, the primary question to be asked as a test was "whether it is reasonable and justifiable for the State to refuse to allow an exemption to permit congregational worship."<sup>78</sup>

Therefore, by posing this question, the respondents changed the trajectory of the applicants' argument from being about the unconstitutionality of the regulations to being about whether the refusal to permit congregation was reasonable. In advancing its argument, government sought to prove that it appreciated the fact that indeed regulations had to strike a delicate balance between limiting social contract and possibly allowing the virus to spread on one hand and meeting short- and long-term needs of people on the other.<sup>79</sup> The challenge was that, because the limitation was intended to protect every citizen, as a collapse of the system was not going to only affect the infected,<sup>80</sup> the limitations – if considered from a broad perspective – were, therefore, reasonable and permissible under section 36<sup>81</sup> and thus served an important and legitimate purpose. In fact, before government acted, it received advice from the NCCC and made its decision based on the council's diagnostic analysis of the spread of the virus. The advice that the virus needed to be contained was followed step-by-step by government, and looking at the number of persons who were expected to be infected, the steps justified the action to intrude on the rights or limit movement of persons.<sup>82</sup>

Another dimension to the judicial response to the COVID-19 litigation is the enforcement of the regulations by the security forces. The *Khosa* judgment is a case in

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76 *NICRO* para 35; *Mohamed* para 56.

77 *Mohamed* para 43.

78 *Mohamed* para 55.

79 *Mohamed* para 33.

80 *Mohamed* para 37.

81 *Mohamed* para 39.

82 *Mohamed* para 35.

point, where the rationality of the enforcement of the regulations in the fulfilment of the government's purpose of curbing the spread of COVID-19 and the impact it would have had on the healthcare system showed regress on the commitment to the prescripts of the new constitutional dispensation.

In *Khosa*, no arguments were made that the regulations were irrational or arbitrary. Nevertheless, in the context of human rights, the facts of the case show a despicable display of unconstitutional disrespect of person's fundamental rights in the manner in which the regulations were enforced against the Khosa family. The applicants in this case argued that in terms of section 38 and 172(1)(b) of the Constitution, read with section 21(1)(c) of the Superior Courts Act 10 of 2013 during, and notwithstanding the declaration of the state of disaster and the lockdown under the *DMA* 2002, all persons within South Africa are entitled to certain rights which are non-derogable even during the state of emergency. These, *inter alia*, include the right to life and human dignity.<sup>83</sup>

What emerges and is disquieting from a human rights perspective is that the assaulted persons (Mr Khosa and his brother-in-law) were all inside what one would regard as a residential area/yard – specified in the regulations – and not outside. The security forces arrived at the front yard of the family house and Mr Khosa (the deceased) was inside the house and his brother-in-law was sitting outside with an unattended glass of beer. The security forces enquired about the owner of the glass of beer and they learnt that he was inside the house. The brother-in-law was instructed to get inside the house as no person was allowed outside. Inside the house, the deceased was found having his meal. The security forces enquired about the glasses of beer and an argument ensued. The deceased and his brother-in-law were ordered to go and stand in the street in front of the yard, where they were assaulted for not complying with the lockdown regulation.<sup>84</sup> The deceased died after being severely assaulted by the security forces. His head was slammed on the cement pavement of their house gate.<sup>85</sup> After the assault, the security forces left without even calling for medical assistance for the injured. Paramedics were called, and on arrival, they declared Mr Khosa dead because of the assault wounds.

The question thereof was whether the enforcement of the regulations by the security forces, which appeared to be “unnecessarily militant”, was consistent with the promotion, respect, protection, and fulfilment of human rights. In addition, there were questions on whether the enforcement was reflective of the government's responsibility to respect people's fundamental rights. An ancillary question, bearing in mind the absence of a definition of “residential area” in the regulations, was whether the deceased and his brother-in-law could have been regarded as contravening the regulations simply because they were sitting outside their house, but inside the surrounding area/yard.

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83 *Khosa* para 23.

84 *Khosa* para 34.

85 *Khosa* para 23.

What *Khosa* and other like cases tells us is that shortfalls and subsequent effects of mechanisms implemented to limit fundamental rights often emerge once the practical operation of that mechanism takes effect against the intended recipients. The practical reality is that the regulations may go overboard through enforcement or another form, thus infringing on person's dignity, equality, and freedom.

Looking at *Khosa*, the conduct of the security forces suggested that they did not act in a manner recognising the intrinsic value enshrined in the fundamental worth of being "human" as was held by O'Regan J in *Makwanyane*.<sup>86</sup> The manner in which the security forces carried themselves in *Khosa* is a direct reflection of a regulation that has been applied by a government functionary too restrictively. Their conduct displayed an intrusion on the baseline set under section 36 of the Constitution far beyond permissible grounds, while at the same time failing to be sensitive, not paying attention to the fact that the regulation's promulgation stood to negatively and directly affect many persons' livelihoods in an unprecedented manner. The security services were not sympathetic and did not comprehend the fact that the restrictions imposed were encroaching on and grinding people's livelihoods to a halt. For the people, the effect of curtailment was severe on their human dignity and freedom of movement and their rights to live as they pleased. This was so because as much as the lockdown was for a commendable cause or important purpose and for a limited period, there was uncertainty about when normalcy would return.

It is no overstatement that the manner of enforcement in *Khosa* is likely to exacerbate distrust between people and government in future. People will not respect the purpose for which particular regulations are promulgated. Rightfully, Fabricius J brought to the fore the distrust which citizens tend to develop against government and its functionaries as a result of the ill-treatment of the kind at times displayed against the populace with respect to enforcement of regulations.<sup>87</sup> In addition to being worried about contracting the virus, people were made to fear and worry about police brutality. Furthermore, people had to worry about what would be the economic situation after the lockdown as unemployment, insecurity, and despair were likely. There was a concern that many families would not be in a position to provide sustenance and income to their members.<sup>88</sup>

With reference to such incidents as in *Khosa*, Calitz (2020) questioned whether government's response to COVID-19 had upheld human rights. The author concluded that government's action did not comply. He, however, seemed to say this from a different context.

Certainly, the answer to the question posed earlier is not difficult to comprehend as the facts in *Khosa* are clear that the security forces did not observe human dignity. In the process, one may argue that their actions cast a dark cloud on the commendable purpose

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86 *Makwanyane* para 328.

87 *Khosa* para 19.

88 *Khosa* para 19.

for which the regulations were promulgated. Thus, it is inescapable that when pandemics hit our shores, the legal issue which courts must determine, must not only be in relation to the unconstitutionality of the regulations, but also the livelihood of persons.

## Conclusion

From the cases, the applicants' discomforts were directed at defending their constitutionally entrenched rights from what they considered an unreasonable and unjustified infringement of same, either by the adoption of the regulations themselves, or by the manner in which the regulations were implemented to achieve their purpose. So, in essence, the legal contest was between the "means-ends" and the "limitation or proportionality" tests *vis-à-vis* the "legality or rationality" test.

On the legality or rationality question, government stood firm that it had a constitutional obligation to defend people's right to life. In government's view, the right to life is guaranteed to all persons and will be protected at all times and at all costs. Where catastrophes such as pandemics place that right in extreme danger, government's obligation is automatically triggered, calling upon the relevant functionaries to take reasonable measures to deliver on that guaranteed protection. Depending on the danger faced at the time, government functionaries are obliged to create an environment in which people's livelihood is protected from harm.

The challenge is that at times government action impermissibly goes overboard the limitation or proportionality limit it must uphold and thus compromising the conducive and safe environment it must create for all. Criticising government regulation as irrational and making a point in the context of enforcement and the proper functioning of the social contract between government and its citizenry, the judgments clarify that there is a relationship between the preservation of human lives and economic progression. On the other hand, the enforcement of the regulations must equally be within the limits prescribed by the law as envisaged in section 36. If the regulations have to intrude on people's fundamental rights, such intrusion must be justifiable, and the least restrictive measures must be sought, applied, and communicated to the public.

In sum, a point may be made that the reading of Davis J's disapproval of government action in *De Beer* suggests or appears to suggest that he did not mean that government could not or should not have taken the steps it took to achieve its purpose. However, what is of paramountcy is that government has a duty to demonstrate to the same people how their lives will not unnecessarily or unreasonably be impacted upon as a result of the limiting effect of that regulation contemplated for implementation. Where government fails that test, its actions, no matter how well intended, must be regarded as falling below the constitutional standard it must uphold.

In this regard, we support Davis J’s approach unequivocally as the constitutional underpinning principle, which functionaries must observe and uphold at all times. This is a fundamental principle of constitutional law. The constitutional principles of accountability, responsiveness, and openness demand that it is fostered from all organs of State. Such must be done by providing the public with timely, accessible, accountable, and accurate information. Government must be held accountable to these principal obligations. If government acts as expected, citizens will obey lawful rational regulations.<sup>89</sup>

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