

SECOND EDITION COVID-19 COUNTRY REPORT
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CHAPTER 3: LEGAL AND REGULATORY RESPONSES

[Things to include or to update in yellow]

[Recommendations to include in the conclusion in blue]

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General introduction

In the second year of the pandemic, the most pertinent question is probably “what will living with COVID-19 look like, for the long term?”

From 10 June to 26 September 2021, South Africa was hit by a third wave, driven by the Delta variant. The third wave was characterised by a change in patterns of infections emanating partly from the decision not to close schools (as had been done during the first and second waves). In addition, vaccination coverage and varying levels of immunity changed the picture of the pandemic and the NICD called for a shift in thinking about COVID-19 from acute waves to a mindset of “living with the virus”.¹

The Omicron variant was responsible for the most infections in South Africa since the 15th of November 2021. It was associated with significantly less hospital admissions, which might suggest that it causes less severe disease than the previous variants. However, this could also be due to the fact that it coincided with higher vaccination rates.²

¹ <https://www.nicd.ac.za/covid-19-its-time-to-look-at-the-finer-details-of-south-africas-pandemic-picture/>

² <https://www.nicd.ac.za/diseases-a-z-index/disease-index-covid-19/surveillance-reports/special-public-health-surveillance-bulletin/> Issue 4: 18 Jan 2022.

The Omicron variant showed that the goal of “living with the virus” is a dynamic concept as the South African response evolved.³ As COVID-19 restrictions continued to relax and the emphasis shifted towards resuming “normal” life. It opened up the possibility to reconsider how to move from an “emergency” response to a sustainable long-term approach to pandemic control.

Consequently, the analysis in this chapter is shaped by looking at the resilience that the law showed, or not, and where it can be strengthened. The notion of resilience used in this chapter refers to “the capacity of a system to withstand or adapt to disturbance while maintaining the same basic structures and functions”.⁴ While “resilience” has its roots in the natural sciences,⁵ its associated concepts of “adaptive management” and “adaptive governance” are frequently employed in assessments of the governance of complex, hybrid natural/social shocks and stressors, like those presented by Covid-19.

In such assessments, the questions include whether governance and legal processes and systems have “enough flexibility, redundancy and learning capacity to adapt to disturbances and surprises without collapse or flipping into fundamentally different systems”.⁶ In other words, do we have systems in existence which can respond to events such as COVID-19 utilising existing infrastructure effectively and sustainably? While not infrequently regarded as inhibiting adaptive governance by virtue of its inherent rigidity, uniformity, predictability, top-down- and cross-contextual application,⁷ and capable of suddenly introducing adverse disturbances into social systems,⁸ law and legal principles (such as the rule of law and human rights) play a crucial role in propping up and stabilising social systems in times of flux while maintaining essential standards in the course of adaptive governance.⁹

The need and importance of a legal system being underpinned by these principles of resilience are well articulated in the Supreme Court of Appeal’s decision in *Esau*¹⁰ where Plasket JA stated ,

“what is the role of the courts in circumstances such as these? In Lord Aitkin’s famous

³ Emanuel EJ, Osterholm M, Gounder CR. A national strategy for the ‘new normal’ of life with COVID. *JAMA* 2022;327(3):211-212.

⁴ Craig Anthony Arnold “Resilient Cities and Adaptive Law” (2014) 50(2) *Idaho Law Review* 245.

⁵ For a thorough overview see Tracy-Lynn Humby “Law and Resilience: Mapping the Literature” (2014) 4(1) *Seattle Journal of Environmental Law* 85 at 89-94.

⁶ Arnold (cited above) at 246. See also Humby (cited above) at 95-99.

⁷ Craig Anthony Arnold & Lance H Gunderson “Adaptive Law and Resilience” (2013) 43 *Environmental Law Reporter* 10426 at 10427; Barbara A Cosens, JB Ruhl, Niko Sojininen & Lance Gunderson “Designing Law to Enable Adaptive Governance of Modern Wicked Problems” (2020) 73(6) *Vanderbilt Law Review* 1687 at 1723-1724; Humby (cited above) at 113.

⁸ Cosens et al (cited above) at 1725-1726.

⁹ Arnold & Gunderson (cited above) at 10427-10429; Humby (cited above) at 115-117; David Matyas “Towards a Legal Toolkit for Disaster Resilience and Transformation” (2020) 45(2) *Disasters* 453 at 453-455, 464; Margherita Pieraccini “Towards Just Resilience: Representing and Including New Constituencies in Adaptive Governance and Law” (2019) 31 *Journal of Environmental Law* 213 at 219.

¹⁰ *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA)

dissenting judgment in *Liversidge v Anderson*, he made the point that in times of national disaster – the Second World War, in that case – ‘the laws are not silent’; that ‘they speak the same language in war as in peace’; and that it ‘has always been one of the pillars of freedom . . . that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law’. These words echo what had been said by De Villiers CJ in this country, more than 60 years earlier, in the matter of *In re Willem Kok and Nathaniel Balie*, that even in times of upheaval, the courts’ ‘first and most sacred duty is to administer justice to those who seek it”.

There is little doubt that Covid-19 has been a “breaching incident” that generated tremendous change.¹¹ It has been argued that sometimes major shifts occur in human rights practices because of “[m]ajor shocks to the system” that then provides a small window of opportunity to effect large changes in the system.¹²

In this chapter, we outline the legal and regulatory frameworks that have underpinned the COVID-19 response and ensuing effects including crucial social systems - including the health system, health research, elections and democracy, social security and human settlements - before and during the pandemic. We are interested not only in whether and how rule of law, human rights and legal structuring of power have successfully guided and ensured accountability for adaptive governance in these contexts, but also in establishing whether the experience of governing through the Covid-19 pandemic has shown up fault-lines in the conception or implementation of existing legal and regulatory frameworks that may usefully be adapted to enhance resilience.

Rule of law & decision-making issues

The extension of the state of disaster

The first report evaluated the state’s choice and application of the Disaster Management Act. The state of disaster has been extended in terms of section 27(5) by the Minister of COGTA for one month at a time, so as to retain the state of disaster, until 5 April 2022. During that time, the South African response to COVID-19 has been almost entirely located within the DMA with the State of Disaster declared on 27 March 2020 lasting [750] days.

The extensive and unprecedented use of the Disaster Management Act to govern the lengthy, national response to the pandemic resulted in extensive litigation challenging various aspects including the constitutionality and legality of the state of disaster as well as the Disaster Management Act itself.

¹¹ The Evolution of the Right to Health in the Shadow of COVID-19

¹² Oona Hathaway in “Do Human Rights Treaties Make a Difference?” (2002) 11 Yale Law Journal, 1935, at 2002-2003.

Many of these cases were dealt with in the first report. Since then, the Supreme Court of Appeal confirmed in *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* that executive power was validly exercised, and that there are enough accountability mechanisms in the Constitution to oversee the power.¹³ In the meantime a Private Member's Bill¹⁴ (from the Freedom Front Plus) was introduced in parliament, asking for an amendment to the DMA to insert similar provisions as is required in the State of Emergency Act.¹⁵ [Remember to update the outcome].

The state of disaster was eventually lifted on 5 April 2022 amidst looming threats of litigation. Although it was ultimately lifted without resort to courts, there remains a concern about the absence of proper checks on the Minister's power to extend the state of disaster. The definition of "disaster" again becomes important. In terms of section 1 of the South African Disaster Management Act, a "disaster" is

- a progressive or sudden, widespread, or localised, natural or human-caused occurrence which
- (a) causes or threatens to cause-
 - (i) death, injury or disease; [...]
 - (iii) disruption of the life of a community; and
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources

The question is whether, if a disaster is no longer of "a magnitude that exceeds the ability of [the state] to cope with its effects using their own resources", an extension of a state of disaster is warranted.

As alluded to earlier, the fourth pandemic wave did not constrain government resources, nor pose the same risks as the previous waves. Since the Disaster Management Act is silent on what the Minister must consider when extending a state of disaster, it must be assumed that the Minister deemed Covid-19 to still be a disaster and deemed the pandemic still to be of such a magnitude that it exceeded the ability of national government to deal with it using its resources, and hence continued extending the state of disaster.

But it also appears that government was more likely faced with the problem that the kinds of regulations that were necessary to deal with "living with Covid-19" all depended on a state of disaster being in place, since 'ordinary' public health regulations (such as regulations under the National Health Act 61 of 2003) were insufficient. Indeed, while amendments to the 'ordinary' public health regulations were underway, they were not completed in time for the ending of the state of disaster,

¹³ Par 55.

¹⁴ Reference of the Bill.

¹⁵ Add here what was suggested.

which lead to a curious insertion that certain regulations would continue for 30 days after the state of disaster lapsed, in order to ensure an overlap with the promulgation of appropriate regulations under the National Health Act.

In law there are mainly two options for holding the Minister accountable when extending the state of disaster, in the absence of oversight mechanisms built into the Act itself. First, through the general function of the legislature to oversee the executive function. This entails that the executive is individually and collectively accountable to parliament (section 85 of the South African Constitution).¹⁶ Second, by judicial review of the Minister's decision to extend the state of disaster in terms of PAJA or the legality principle.

In terms of the United Nation's Human Rights Commission guidance,¹⁷ supervision of the exercise of emergency powers is an important part of democracy and the rule of law. This requires periodic and independent scrutiny by the legislature. It is recommended that parliament should include such a requirement either in the National Disaster Management Framework or by an amendment to the Disaster Management Act, to mitigate the risk that a state of disaster is extended beyond the duration of a disaster.

Moreover, the fact that it was necessary to keep the Covid-19 state of disaster in place for longer than was perhaps strictly warranted by the impact of the pandemic points to a lack of adaptive capacity in the ordinary state of South African public health law. Attention should be paid to ensuring that 'non-disaster' public health laws and regulations are capable of responding appropriately to the health and social threats of pandemics without necessitating resort to a legislative state of exception.

The Disaster Management Act was used for more than just managing the disaster

In terms of administrative law, an administrator exercising power may only do so for the purposes set out in the empowering provision, i.e. the article in the Act.¹⁸ If power is not exercised within the limitation of the empowering provision, then such an act will not be lawful.¹⁹ The Disaster Management Regulations were passed to mitigate the effects of the Covid-19 pandemic, and does not authorize action to mitigate against other national crises.

Between 9 and 17 July, South Africa experienced a wave of unrest and looting predominantly in

¹⁶ This was also held to be the correct method in *Freedom Front Plus v President of the Republic of South Africa and Others* [2020] ZAGPPHC 266; *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9

¹⁷ Emergency measures and Covid-19: Guidance, https://www.ohchr.org/Documents/Events/EmergencyMeasures_Covid19.pdf

¹⁸ G. Quinot, A. Anthony, J. Bleazard, S. Budlender, R. Cachalia, H. Corder, M. Finn, M. Kidd, T. Madonsela, & P. Maree. (2021). *Administrative Justice in South Africa: An Introduction Second Edition: Vol. Second edition*. Oxford University Press Southern Africa [e-book].

¹⁹ *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng*, 2013 (5) SA 24 (SCA).

Gauteng and KwaZulu-Natal which caused over 300 deaths and more than a billion rands worth of damage to the economy.²⁰ There was no direct correlation between Covid-19 and the unrest, and there was a separate call for managing this crisis through the potential of declaring a state of emergency.²¹ To address the effect of the unrest, the Minister of Employment and Labour issued directions in terms of regulation 4(10)²² of the Disaster Management regulations to introduce a temporary financial relief scheme for destroyed, affected or looted workplaces.²³ The relief scheme is a direct response to the unrest and looting.²⁴ Even though the Minister of Employment and Labour found their mandate within the Unemployment Insurance Act,²⁵ the regulations were passed in terms of the disaster management framework.

The passing of these directions was irregular, as the underlying rationale of the relief scheme (the purpose) did not align with the empowering provision that deals with mitigating Covid-19. It was also not possible for the Minister to rely on existing authority under the Unemployment Insurance Act to justify the directions that is passed in terms of Disaster Management regulation 4(10). Rather, the Minister should have made regulations or directions under the Unemployment Insurance Act.

When enacting regulations, administrators such as Ministers should carefully consider the real authorization provided to them and act within the legal bounds of such authorization. The vast nature and impact of the Covid-19 pandemic does not provide a rationale for all government interventions.

The draft National Health Act regulations

On 15 March 2022 the Minister of Health published draft regulations for comment, to amend the Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions.²⁶ The regulations cover a wide range of precautions. One explanation might be that it is a draft document that invites comments, and that after the comment period the regulations would be reduced.²⁷

²⁰ <https://www.businessinsider.co.za/r120-million-looted-from-atm-during-south-africa-unrest-2021-8;>
[https://www.nbcnews.com/news/world/after-protests-looting-tear-through-south-africa-nation-wonders-what-n1275585.](https://www.nbcnews.com/news/world/after-protests-looting-tear-through-south-africa-nation-wonders-what-n1275585)

²¹ <https://www.capetalk.co.za/articles/421752/7-things-you-should-know-about-declaring-a-state-of-emergency-in-south-africa>

²² Regulation 4(10) provides that –

“Any Cabinet member may issue and vary directions, as required, within his or her mandate, to address, prevent and combat the spread of COVID-19, and its impact on matters relevant to their portfolio, from time to time, as may be required, including- disseminating information required for dealing with the national state of disaster; implementing emergency procurement procedures; taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimize the effects of the national state of disaster; or taking steps to facilitate international assistance.”

²³ Notice 712 of 2021, GG 44978 (10 August 2021).

²⁴ [http://www.labour.gov.za/uif%E2%80%99s-temporary-relief-scheme-approved-to-assist-workers-of-looted-businesses-in-kzn-and-gauteng.](http://www.labour.gov.za/uif%E2%80%99s-temporary-relief-scheme-approved-to-assist-workers-of-looted-businesses-in-kzn-and-gauteng)

²⁵ 63 of 2001.

²⁶ N 1882 GG 46048 15 March 2022.

²⁷ [https://www.news24.com/news24/analysis/explainer-a-look-at-the-proposed-covid-19-regulations-now-that-the-state-of-disaster-is-over-20220406.](https://www.news24.com/news24/analysis/explainer-a-look-at-the-proposed-covid-19-regulations-now-that-the-state-of-disaster-is-over-20220406)

The amendment deals with a wide array of notifiable medical conditions, listed in Annexure A, in tables 1, 2, 3 and 4 at the end of the regulations. In terms of the current regulations, the Minister (of Health) may declare, by notice in the Government Gazette, a medical condition not listed in the Annexure as a notifiable condition in certain circumstances.²⁸ While there is no duty on the Minister to consult before publishing such a notice, the Minister remains as a cabinet member jointly and individually accountable to parliament in terms of the Constitution.²⁹

The problem is that there is nothing in the regulations that sets out the parameters for the Minister to impose restrictions on fundamental rights in combating notifiable diseases. It further appears that the full content of the Covid-19 Disaster regulations have simply been incorporated in the ‘notifiable conditions’ regulations, and are capable of being triggered not only in the event of flareups of Covid-19 but also of other notifiable conditions.³⁰ [update]

The draft regulations have come under severe criticism, with the official opposition party, the DA, stating that that “our government now seems to be hell-bent on normalizing the restrictions that we faced for so long by introducing regulations to the Health Act that will effectively normalize this very abnormal state of affairs and will shift the power of unnatural regulations to the minister of health”.³¹ Likewise the EFF noted that “[w]e must ensure this government does not smuggle regulations into law, which will give them power to micro-manage the political terrain and enhance their ability to conduct illegal and corrupt procurement.”³² There has also been a general criticism levied against the government from various medical experts who believe that, given the seemingly milder impact of the Omicron variant, vaccination coverage and immunity from prior infection, the extent to which rights are limited by the covid-related regulations are no longer warranted.³³

For the sake of accountability and transparency, there should be a requirement that the Minister must give reasons for listing a condition as an NMC. It is also suggested, in light of our experience with the Omicron variant, that it is not only the transmittability of a disease, but also its severity and impact on the health system that must be taken into account before a limitation on Constitutional rights can be justified. In line with international guidelines and section 36 of the Constitution, there should be criteria and processes for declaring a pandemic or an endemic, and regulations should explicitly only provide for such restrictions on fundamental rights as are proportional to and justified by the threat

²⁸ Regulation 12.

²⁹ {, 2020 #828}; {, 2020 #714}.

³⁰<https://www.dailymaverick.co.za/article/2022-03-22-the-incoherent-and-illogical-new-government-covid-19-regulations-are-the-real-state-of-disaster/>

³¹<https://www.businesslive.co.za/bd/national/health/2022-04-05-we-do-not-want-to-control-lives-says-phaahla-in-defence-of-covid-19-plan/>

³² <https://www.citizen.co.za/news/covid-19/3067499/we-must-ensure-that-govt-doesnt-smuggle-regulations-into-law-eff-on-national-health-act/>

³³ See <https://www.dailymaverick.co.za/article/2022-03-22-the-incoherent-and-illogical-new-government-covid-19-regulations-are-the-real-state-of-disaster/>; {Maslo, 2022 #1485}; {Madhi, 2022 #1484}.

posed by a particular ‘notifiable condition’. In particular, the criminalisation of non-compliance with regulations should be reconsidered.

Regulations in terms of the Occupational Health and Safety Act

The Department of Employment and Labour has listed SARS CoV2 (Covid-19) as a group 3 hazardous biological agent (HBA) under the Hazardous Biological Agents regulations published in terms of the Occupational Health and Safety Act,³⁴ which require employers to control exposure to HBAs in the workplace. This means that Covid-19 is recognised as a hazard that “may cause severe human disease, which presents a serious hazard to exposed persons, and which may present a risk of spreading to the community, but for which effective prophylaxis and treatment is available”. In terms of regulation 10(4)(g), a registered vaccine can be made available to control exposure to HBAs in the workplace where reasonably practicable.

The department also published a code of practice³⁵ “to guide employers and employees in managing exposure to SARS-CoV-2 in the workplace by providing guidance to employers and employees” with regards to conducting risk assessment regarding exposure, limiting infection, transmission, absence from work due to infection, isolation and adverse effects vaccination and trying to accommodate employees who refuse or fail to vaccinate against Covid-19.³⁶ This code came into effect when the state of disaster ended. Correctly, it removes the code from the regulations made in terms of the DMA, and places them under the Labour Relations Act instead.

The code limits the ground for employees to refuse to get vaccinated (only medical reasons are regarded as justifiable).³⁷ This is in line with the CCMA cases that upheld the decision of employers to suspend or dismiss employees who refuse to get vaccinated or take weekly tests.³⁸ [update]

Decision-making and public participation

The duty to facilitate public participation in law-making

An HSRC survey found that South Africans’ willingness to suspend their liberties to fight the pandemic was linked to how they felt about the president and national government. People who felt that the president was handling the pandemic well, were more inclined to accept limitations on their rights. At the beginning of the pandemic (and the survey) trust was fairly high, but it diminished over the period of the survey.³⁹

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³⁵ Code of Practice: Managing exposure to SARS-COV-2 in the workplace, 2022, No R 1896, 16 March 2022.

³⁶ Paragraph 2(1).

³⁷

³⁸ Reference to the cases.

³⁹ COVID-19 and human rights limitations: Taking public opinion into account (HSRC)

After the *De Beer*⁴⁰ and other cases⁴¹ challenging various aspects of the disaster response, and as the pandemic progressed, the social compact seemingly started to unravel, with certain demographics being less willing to accept a limitation of their rights. This, the HSRC survey suggests, shows “an association between human rights sacrifice and policy preferences”.⁴²

As the pandemic progressed, people’s negative experiences and strained emotional well-being lead to anger, irritability, depression, sadness and stress, which also diminished their willingness to have their freedoms curtailed and their. Frustration and distress caused by lockdowns lead to a diminished commitment to the common good and⁴³ impacted on the willingness to follow regulations.

Based on the aforementioned, several recommendations are made:⁴⁴

- Processes should be participatory, inclusive and adaptive, to ensure support and adherence to the regulations, particularly by those affected and most vulnerable. This will require that decision-making bodies like the NCCC and the Ministerial Advisory Committee (MAC) on Covid-19 include the representation of a diversity of voices and scientists from a much broader range of disciplines. The pandemic is not only a medical problem, and social scientists and humanities scholars have an important role to play in these advisory structures.⁴⁵
- Regulations must be of limited duration, must be evidence-based, and must be open for review. In this aspect, the blanket ban on tobacco, for instance, was ineffective, lead to deep polarisation and reduced confidence in the government’s handling of the pandemic.⁴⁶
- Independent oversight of government actions and how it impacts on rights of society, communities and individuals is crucial. Chapter 9 institutions (such as the South African Human Rights Commission) have an important role to play, and civil society should feel confident to challenge the regulations in court if needed.⁴⁷ This has been mostly the case in South Africa, but should continue as new regulations are made under the National Health Act, and we learn to adjust to living with Covid-19.

The making of the Covid-19 regulations significantly tested government’s ability to allow for public participation in the law-making process, given that gatherings were restricted and regulations often had to be made on short notice. However, the public have a right to participate in decision-making, sourced in sections 59(1), 72(1)(a) and 118(1)(a) of the Constitution, in terms of which each sphere of

⁴⁰ reference

⁴¹ Reference cases.

⁴² COVID-19 and human rights limitations: Taking public opinion into account (HSRC).

⁴³ COVID-19 and human rights limitations: Taking public opinion into account (HSRC).

⁴⁴ COVID-19 and human rights limitations: Taking public opinion into account (HSRC) for more detailed explanations.

⁴⁵ COVID-19 and human rights limitations: Taking public opinion into account (HSRC); Academy of Science of South Africa (ASSAf) (2020) Public Statement on COVID-19. Accessed 25 September 2020, <https://www.assaf.org.za/index.php/news/626-publicstatement-on-covid19>.

⁴⁶ COVID-19 and human rights limitations: Taking public opinion into account (HSRC) reference also the court cases.

⁴⁷ COVID-19 and human rights limitations: Taking public opinion into account (HSRC).

government must facilitate public involvement in legislative and other processes.⁴⁸ Section 195(1)(e) of the Constitution further requires that the public administration must include people's needs and must encourage the public to participate in policy-making. The Constitutional Court has on several occasions emphasised the importance of public involvement in law-making processes.⁴⁹

The *New Clicks*⁵⁰ case recognised that what will be sufficient public participation will differ from case to case. Participation can include simply taking part, being actively involved, expressing views and opinions, and being heard or reaching consensus between lawmakers and the public on the course of action to be taken.⁵¹

There was little evidence of broader public participation in the initial lockdown regulations. There was only one public call for inputs into the regulations.⁵² There were various reports of meetings between various stakeholders and the president,⁵³ but these meetings were not open, their contents not recorded and open to the public, and not with the correct functionary – namely the Minister of COGTA. While the swift action in March 2020 might have justified little input from the broader public, the absence of a call for broader public participation⁵⁴ as the pandemic progressed is worrisome.

These issues came before the court in the *Esau* case,⁵⁵ where the court accepted that in some instances a 48-hour deadline might be acceptable. It also noted that the DMA does not set out how regulations must be made, and that the Minister therefore enjoys a wide discretion.⁵⁶ The case has been criticised for focussing too much on the requirements in the DMA rather than the Constitution.⁵⁷

Recommendation: government must ensure that there are adequate mechanisms for public participation in the making of regulations in terms of the DMA. This can be included in the National Disaster Policy Framework.

Vaccines

Vaccines as public health intervention

The speed with which COVID-19 vaccine candidates moved along the development pipeline has been hailed as an unprecedented success.⁵⁸ However, this success has been deeply tempered by inequity.

⁴⁸ These sections are supported by sections 16, 17, 18, 19, 21, and 33 of the Constitution.

⁴⁹ Eg *Doctors for Life and Matatiele* cases.

⁵⁰ {, 2006 #825} par 630.

⁵¹ {Sobikwa, 2021 #1493} 313.

⁵²

⁵³ See for instance <https://www.engineeringnews.co.za/article/govt-still-poorly-consulting-with-private-sector-on-impacts-of-covid-19-lockdowns-says-blsa-2021-07-05>

⁵⁴ **Matatiele 2 2007 case.**

⁵⁵ *Esau* SCA.

⁵⁶ *Esau* par 97.

⁵⁷ {Sobikwa, 2021 #1493} 332.

⁵⁸ World Health Organization, "Advanced Market Commitments for Vaccines," *World Health Organisation* (September 7, 2020). Available on <https://www.who.int/immunization/newsroom/amcs/en/>.

Historically, private companies have prioritised profits, leading to higher profit markets being prioritised over low- and middle-income countries (LMICs). Consequently, access to vaccines in LMICs often lags years behind high-income countries.⁵⁹ This trend did not change during the COVID-19 pandemic.⁶⁰ Vaccines developed by private pharmaceutical companies are subject to extensive advanced market commitments that prioritise high-income countries, strong intellectual property (IP) protections and often carry unaffordable price tags, particularly for LMICs. Deficiencies in existing laws have undoubtedly hindered efforts to make vaccines affordable for developing countries.

Over the last two decades, demands to address this issue have led to the recognition of affordable medicines as an integral component of the right to health. A number of international legal instruments have been adopted to make lifesaving technologies accessible to LMICs. In response to the COVID-19, there were efforts to introduce new measures to overcome existing hurdles to accessibility of vaccines and medications.

COVID-19 Vaccine Accessibility Initiatives

C-TAP is a WHO initiative to share knowledge, data and IP related to COVID-19.⁶¹ Successfully implemented, C-TAP would help LMICs overcome two critical barriers to vaccine access: lack of know-how and IP protections. However, participation in C-TAP is voluntary and has overwhelmingly come from LMICs.⁶² Few high-income countries, and no pharmaceutical companies or vaccine developers have agreed to participate. Without mandating the participation of key actors, it is unlikely that C-TAP will translate into meaningful access.

The COVAX mechanism, led by Gavi, utilises the structure of the pneumococcal vaccine AMC to get LMICs quicker access to a COVID-19 vaccine.⁶³ It aims to strengthen vaccine manufacturing capacity, tech transfer and delivery systems. COVAX was able to negotiate \$3 doses of promising candidates.⁶⁴ While 172 countries applied to join AMC (advance market commitments), Gavi would decide who can

⁵⁹ Richard Mihigo et al., "Improving Access to Affordable Vaccines for Middle-Income Countries in the African Region," *Vaccine* 37, no. 21 (May 9, 2019): 2838–42, doi:10.1016/j.vaccine.2019.03.077.

⁶⁰ Oxfam International, "Small Group of Rich Nations Have Bought Up More Than Half of the Future Supply of Leading COVID-19 Vaccine Contenders," *Oxfam International*, (September 18, 2020). Available on <https://www.oxfam.org/en/press-releases/small-group-rich-nations-have-bought-more-half-future-supply-leading-covid-19>.

⁶¹ World Health Organization, "COVID-19 Technology Access Pool," (September 7, 2020). Available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool>.

⁶² World Health Organization, "Endorsements of the Solidarity Call to Action," (September 7, 2020). Available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool/endorsements-of-the-solidarity-call-to-action>.

⁶³ Gavi, "Gavi Launches Innovative Financing Mechanism for Access to COVID-19 Vaccines | Gavi, the Vaccine Alliance," *Gavi*, (September 7, 2020). Available at <https://www.gavi.org/news/media-room/gavi-launches-innovative-financing-mechanism-access-covid-19-vaccines>.

⁶⁴ World Health Organization, "172 Countries and Multiple Candidate Vaccines Engaged in COVID-19 Vaccine Global Access Facility," (September 7, 2020). Available at <https://www.who.int/news-room/detail/24-08-2020-172-countries-and-multiple-candidate-vaccines-engaged-in-covid-19-vaccine-global-access-facility>.

join and how doses are allocated.⁶⁵ Despite being co-led by WHO, COVAX lacks external oversight as the Gavi board exclusively holds powers to manage, dissolve and structure COVAX.⁶⁶

Due to the extensive AMCs high income countries were able to secure in exchange for funding the development of COVID-19 vaccines and the weaker bargaining power of countries like South Africa, the COVAX AMC became a primary mechanism to access COVID-19 vaccines in September 2020. Although several manufacturing deals were signed with pharmaceutical companies to produce large quantities of eventual vaccines, manufacturers have been unable to produce enough inoculations for the world's almost 8 billion people.⁶⁷

Middle-income countries, including South Africa, had to compete for access to COVID-19 vaccines with much wealthier countries that could not only pay more for such goods, but had also already clinched deals with drug companies to get vaccines first. Though South Africa initially participated in COVAX access to vaccines for the country came exclusively through bi-lateral arrangements with vaccine manufacturers including Pfizer and Johnson and Johnson.

Gavi's board approved 92 low- and lower-middle income countries to support financially; some (such as Angola, Eswatini, Lesotho, Zambia, Zimbabwe and Mozambique) would be fully or partially funded. In addition, 80 upper middle income economies, which would pay for the vaccines from their own public finance budgets (including Botswana, Brazil, Chile, Mauritius and South Africa), had submitted expressions of interest.⁶⁸ Some much wealthier countries (such as Finland, Canada, Norway, the United Arab Emirates and New Zealand) also indicated they would participate. However, COVAX did not require that high income countries procure exclusively through the COVAX AMC, instead allowing them to retain existing AMCs and bi-lateral agreements and even permitting participating countries to pursue bi-lateral arrangements. Ultimately, many countries (including South Africa) did not take doses from COVAX and instead procured vaccines through bilateral arrangements, seriously compromising the viability of the AMC. It was only in June 2021 that wealthier countries (who had by then vaccinated significant portions of their populations) agreed to donate doses to COVAX for distribution in LMICs.

AMCs like COVAX are crucial to ensuring affordable vaccine access, particularly in countries such as South Africa that have not been producing their own vaccines. However, COVAX was ultimately not a viable pathway for South Africa to obtain vaccines due to vaccine nationalism and political pressure in the country to expedite the vaccine roll out.

⁶⁵ Ibid.

⁶⁶ Gavi, "Annex A: Terms of the COVAX AMC," (2020). Available at https://www.gavi.org/sites/default/files/board/minutes/2020/30-july/04a%20-%20Annex%20A%20-%20Terms%20of%20the%20COVAX%20AMC_1.pdf.

⁶⁷ <https://www.un.org/en/sections/issues-depth/population/>

⁶⁸ <https://www.who.int/news-room/detail/24-08-2020-172-countries-and-multiple-candidate-vaccines-engaged-in-covid-19-vaccine-global-access-facility>

Intellectual property waivers

COVID-19 vaccines are Intellectual property (IP)-protected ‘public goods’, meaning that their production and distribution are governed according to intellectual property laws. Hence the COVID-19 pandemic reminds us of the detrimental impact that IP restrictions have on the scaling up of manufacture and supply of lifesaving pharmaceuticals. Similarly, the Coronavirus pandemic has prompted biopharmaceutical firms to invest in risky and costly research and development (R&D) to produce these vaccines. Although governments have funded some of this research, biopharmaceutical firms have relied on IP rights to commercialize the vaccines.

In October 2020, South Africa and India made a joint proposal to the World Trade Organization seeking a temporary waiver of IP rights on COVID-19-related pharmaceuticals.⁶⁹ In ensuring efficient vaccine development and production, other types of IP – manufacturing know-how, test data and cell lines – are also needed to facilitate production. Therefore, in addition to patent protection, the proposed TRIPS waiver under negotiation at the WTO included protection for industrial designs, copyrights, and undisclosed information in relation to the treatment of COVID-19.⁷⁰ Support for this waiver came primarily from developing nations (over 62 developing countries have co-sponsored the proposal), claiming that wealthy countries’ vaccine monopolies obstructed equal supply of COVID vaccines.

Granting a selected few pharmaceutical firms monopoly over COVID vaccine production is both unjustified and unproductive as it encourages ‘scientific research monopoly’ and results in global society paying a higher price for vaccines. This makes it difficult to scale up manufacturing and secure fair global access to COVID vaccines. It is therefore hoped that if the waiver is granted, countries will be able to produce diverse, considerably cheaper, COVID vaccines, thereby benefiting developing countries.

Historically, the patent system was designed in such a way that a single patent covered an entire invention. Over the years the pharmaceutical sector has witnessed a change in this whereby a single pharmaceutical product is covered by several patents, thus creating a dense patent landscape.⁷¹ By way of illustration, a potential vaccine manufacturer in South Africa must first identify all relevant patents pertaining to the manufacture of a COVID-19 vaccine, negotiate a license with the patent holders for each of these technologies, and only then begin producing a COVID-19 vaccine.

⁶⁹ WTO, (2020) ‘Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19’ available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True>.

⁷⁰ WTO, (2020) ‘Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19’ available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True>; Congressional Research Service, ‘Potential WTO TRIPS Waiver and COVID-19’ available at <https://crsreports.congress.gov/product/pdf/IF/IF11858>, accessed on 17 September 2021.

⁷¹ M Lemley & C Shapiro, ‘Patent Holdup and Royalty Stacking’ (2007) 85 *Texas Law Review* 1992.

The process of obtaining multiple licenses presents quite a number of challenges. First, there is a likelihood that the required licenses may not be granted by the patent holders. Secondly, the cost of multiple licensing could severely erode the pharmaceutical firm's potential for profit, thus creating a disincentive for these firms to develop COVID vaccines. Finally, in the process of carrying out a patent search and obtaining multiple licences, some patents may be missed out, resulting in costly litigation. Cumulatively, these challenges are likely to deter local pharmaceutical firms from working on developing COVID vaccines altogether.

In recent years, exemptions to patent rights have received increased scrutiny in IP policy discussions.⁷² As a result, the TRIPS Agreement has provided Member States with flexibilities that allow them to forego TRIPS obligations when enforcing their patent laws due to public health concerns. Pre-grant flexibilities apply before a patent is awarded and usually pertain to the grant procedure, whereas post-grant flexibilities allow a patent to be used in ways that would otherwise be considered patent infringement.

It has been extensively argued that existing TRIPS flexibilities — particularly compulsory licensing — are insufficient to suit the current pandemic situation, both in terms of procedure and legal substance. Applying for and issuing of a compulsory license is burdensome and time-consuming because it must be implemented product-by-product or country-by-country, and there are frequently major regulatory impediments to overcome.

The Doha Declaration of 2001, an agreement that allowed low- and middle-income countries to prioritise public health over IP rights through several measures that make medicines more affordable (including compulsory licenses and parallel imports, which allow for the production or import of cheaper drugs without the permission of the company which originally developed them)⁷³, has increased pharmaceutical manufacturing capacity and affordability of medicines in many developing nations. However, the Declaration was not geared towards vaccines and few of its measures assist in making vaccines more affordable.⁷⁴ Moreover, the Doha Declaration only deals with one type of intellectual property (patents), whereas the proposed TRIPS waiver plan encompasses other forms of intellectual property, as discussed earlier.

As a way of supporting worldwide vaccine distribution, the pharmaceutical sector has attempted to facilitate knowledge transfer of COVID-19 therapies through voluntary licensing agreements. Voluntary licensing is a practice whereby a vaccine manufacturer determines and under what

⁷² Evans Misati & Kiyoshi Adachi, 'The Research and Experimentation Exceptions in Patent Law: Jurisdictional Variations and the WIPO Development Agenda' (2010) *Policy Brief Number 7 ICTSD* 1.

⁷³ https://www.who.int/medicines/areas/policy/doha_declaration/en/

⁷⁴ [https://apps.who.int/iris/bitstream/handle/10665/127615/WP 5 - Access to Medicines and Vaccines.pdf;jsessionid=F188EFDB772BE35891D83C02ED32E2F0?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/127615/WP5-Access%20to%20Medicines%20and%20Vaccines.pdf;jsessionid=F188EFDB772BE35891D83C02ED32E2F0?sequence=1)

conditions and to whom its patent can be licensed to facilitate manufacturing. On 8 October 2020, Moderna, a US pharmaceutical company, announced its decision not to exercise its patent rights on its COVID-19 vaccine, just six days after South Africa and India proposed a waiver of the TRIPS agreement.⁷⁵ Despite this, there have been few confirmed cases of licenses being awarded to other companies or attempts to replicate Moderna's vaccine. Furthermore, the Director-General of the WHO, Tedros Adhanom Ghebreyesus, recently opined that voluntary licensing agreements “tend to be exclusive and non-transparent, compromising equitable access.”⁷⁶

It is useful to consider the example of the 2001 WTO TRIPS waiver towards HIV/AIDS drugs despite the existence of TRIPS flexibilities at that time. According to Médecins Sans Frontières, the prices of patented pharmaceuticals fell to less than a tenth of their former level in one year, allowing more countries to access HIV/AIDS drugs. Similarly, access to COVID-19 vaccinations is projected to improve as a result of the TRIPS waiver.

Even if the WTO approves a possible TRIPS waiver, it will not immediately affect WTO Member States' domestic IP laws. Each Member State would be required incorporate the TRIPS waiver into their domestic law.

It is undisputed that IP property rights foster biotechnology innovation. Accordingly, opponents of the India-South Africa proposal argue that granting the waiver would constrain manufacturing capacity and impede future advances due to lack of innovation. Some stakeholders have even argued that there is little to no evidence that IP rights are slowing COVID vaccine production and distribution.

While the waiver alone will indeed not guarantee increased vaccine uptake and would not automatically lead to increased and diverse manufacturing of COVID vaccines particularly in South Africa, it would simplify the complex global IP regime and allow countries to work on technology transfers and exports without fear of trade retribution. This will lessen reliance on a few countries for the manufacturing of COVID vaccines while also reducing the danger of export restrictions.

The only way to ensure that the vaccine is distributed fairly and transparently around the world is by making the public vaccine a public good.⁷⁷ Public goods may be defined as products and services that enable people to live in dignity and that everyone should have access to in equal quantity and quality. There is a need to think seriously about how to create mechanisms to make vaccines subject to IP protections affordable in developing countries. This could include investments to improve

⁷⁵ See <https://investors.modernatx.com/news-releases/news-release-details/statement-moderna-intellectual-property-matters-during-covid-19>.

⁷⁶ The New York Times, 'I run the WHO and I know that rich countries must make a choice' available at <https://www.nytimes.com/2021/04/22/opinion/who-covid-vaccines.html>.

⁷⁷ Nivedita Saksena, 'Global justice and the COVID-19 vaccine: Limitations of the public goods framework' 2021 (16) 8-9 *International Journal for Research, Policy and Practice*.

capacity and infrastructure for vaccine production or instituting global price regulation on critical vaccines.

Emergency Use Authorisations and COVID-19 Vaccines

South Africa experienced difficulties in processing and issuing approvals for vaccine candidates, with SAPHRA having to balance the need to issue quick approvals against the need to ensure that vaccines are safe and effective. Immediately the first bottleneck in the approval process was the delays in vaccine manufacturers submitting dossiers to SAPHRA for approval. For example, despite the Moderna vaccine undergoing Phase III trials in South Africa, the manufacturers refused to file a dossier with SAPHRA or pursue registration with SAPHRA from their vaccine due to commitments to sell the vaccine to the US government. The Sisonke Trial was used to allow for the Johnson and Johnson candidate to be approved and rolled out to healthcare workers within three weeks of efficacy results being made available. SAPHRA has come under fire for taking too long to approve some vaccines rolled out in other LMICs such as the Sinopharm and Sputnik vaccines where only limited data on efficacy has been made available to regulators globally. However, this stringent approach has ensured that South Africans are only given access to proven vaccines that are effective as required by the Medicines And Related Substances Act 101 of 1965.

Vaccine Injury Fund

The bi-lateral agreements the South African government entered into with vaccine manufacturers required, in some instances, that the manufacturers of the COVID-19 vaccines be given immunity against civil litigation arising from vaccine-related harms and that the South African government bear this liability.⁷⁸ As a consequence, the government introduced the COVID-19 Vaccine Injury No-Fault Compensation Scheme in April 2021.

Concerns were raised over the government's ability to manage such a fund,⁷⁹ in light of the failures of the Road Accident Fund. Concerns include how the quantum of the claims will be calculated, how valid claims will be determined, and which compensation regime will be adopted.

Nevertheless, the scheme was established in terms of section 27(2)(c), (m) and (n) of the Disaster Management Act (DMA), and is administered by the National Department of Health (NDOH).⁸⁰ It is to

⁷⁸ A Abdool Karim and J van Dyk, How South Africa's COVID vaccine injury fund will work, *Bhekhisisa* available at <https://bhekhisisa.org/health-news-south-africa/2021-04-20-how-sas-covid-vaccine-injury-fund-will-work/>

⁷⁹ <https://www.news24.com/fin24/opinion/khaya-sithole-can-sa-run-a-vaccine-claims-fund-when-the-raf-is-in-such-a-mess-20210422>

⁸⁰ Regulations 89-90, the Amendments to Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, available at <http://www.health.gov.za/wp-content/uploads/2021/04/2021-04-15-Amendments-to-DMR-for-CoVID-19-Vaccine-Injury-Compenation-Scheme-for-public-comment.pdf> (the Scheme Regulations). The scheme is contained in chapter 8 of the amended regulations under the Disaster Management Act (insert reference 4 april 2022 regs). Regulation 100 makes it clear that this chapter 8 and its directions will not cease to operate or cease to be of forced and effect merely because the national state of disaster comes to an end. The lawfulness of which is unsure since the state of disaster is terminated. Cross reference to discussion above.

be funded through either a parliamentary Act, or through the Public Finance Management Act, 1999 (update).⁸¹ The scheme seeks to provide “expeditious and easy access to compensation, for person who suffer from a COVID-19 Vaccine Injury caused by the administration of an approved COVID-19 vaccine”, without having to establish fault.⁸² It authorises the Minister of Health in consultation with the Minister of Finance to issue directions in respect of the requirements relating to the administration of the scheme, the reporting of injuries, the claims system, eligibility requirements, matters surrounding the Adjudication panel etc.⁸³ The Minister of Health published directions on 4 April 2022.⁸⁴

With regard to eligibility to claim from the fund, regulation 93 allows a person who has suffered a vaccine injury that has been caused by the administration of a SAPHRA registered COVID-19 vaccine procured and distributed by the Government. Only serious injuries specified in the directions is covered.⁸⁵ The claim will be contingent upon a determination by a panel that the injury was *causally related* to a COVID-19 vaccine.⁸⁶ The types of vaccines covered and the quantum of claims is to be determined through the issuance of directions by the Minister of Health.⁸⁷ A person who has submitted a claim for compensation under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 is not eligible for compensation under this scheme.⁸⁸

The Department of Health will provide the human resources and technology to manage the scheme, approve and release payments to those who are entitled to compensation, and advise the Minister on any matters concerning the compensation of persons who suffer from a vaccine injury.⁸⁹ The Directives set out the adjudication panel’s constitution, powers and functions in detail.⁹⁰

The injuries that qualify for compensation are injuries resulting in permanent or temporary or mental impairment and death.⁹¹ Only vaccines administered after 17 May 2021, and procured before 5 April 2022 will be subject to the scheme.⁹² A person who wishes to claim must report to a panel within 30 days after the onset of symptoms, and if it is determined to be a causally linked injury, the claim must be lodged within 30 days.⁹³ The amount of compensation is capped at R150 000 in the event of a death, with a pro ratio determination (with a maximum of R150 000) in the event of permanent disability. In the case of a temporary disability, an amount of R5 000 per month with a maximum of 6

⁸¹ Regulation 91.

⁸² Regulation 89(3).

⁸³ Regulation 89(4). Further guidance on the panel is in regulation 92.

⁸⁴ Directions for the establishment of a covid-19 vaccine injury no-fault compensation scheme: issued in terms of the Disaster Management Act, 2002, n 1987, GG 46196 4 April 2022.

⁸⁵ Regulation 93(1)(b).

⁸⁶ Regulation 97.

⁸⁷ Regulation 93(3).

⁸⁸ Regulation 93(4).

⁸⁹ Directive 3.2.

⁹⁰ Chapter 2 of the directive.

⁹¹ Directive 8.

⁹² Directive 10.

⁹³ Directive 11.

months will be paid.⁹⁴

The general government's Compensation Fund that deals with workplace injuries has certain requirements to accept the side-effects from Covid-19.⁹⁵ Compensation is governed by its normal rules for compensation, and when an employee have received a vaccine approved in South Africa. This can exclude workers who received their vaccinations outside South Africa.⁹⁶ It is important that there must be a link between the vaccine and the injury.

The effectiveness of the vaccine injury fund is concerned can only be assessed once it has become operational and there is more data. However, Sithole's warning to learn from the failure of the Road Accident Fund should be headed. Determination of the compensation amount can be a long protracted process, with litigation adding to the costs that the Fund might have to bear. The fact that there is a cap on the amount of compensation payable means that the bulk of the problems of determining compensation will probably be avoided.

What is also concerning is that this fund does not fit within the Disaster Management Act framework. Disaster legislation, especially when it comes to managing disaster, is not meant to continue beyond the actual existence of the disaster. Furthermore, once there is no longer a state of disaster, the legal authority for the existence of regulation and directions is no longer there, and can possibly be challenged based on it being unlawful. It is thus suggested that these regulations be moved to under the National Health Act.

Mandatory vaccination

Vaccine hesitancy has emerged as a major barrier to a successful vaccination program in South Africa. A new survey conducted by the Human Sciences Research Council of nearly 8,000 people indicates that 28% of those surveyed in June and July 2021 are reluctant to take a COVID-19 vaccine.⁹⁷ But hesitancy is not the only barrier – socio-economic factors also limit access to vaccination sites.⁹⁸

Vaccine mandates is a controversial issue in South Africa as everywhere else. Our Constitution protects the right to health, the right to life, the right to freedom of religion, the right to a healthy environment and the right of freedom and security of person which includes the right of security and the right of control over one's own body, the right not to be subjected to medical or scientific experiments without one's consent. Any limitation on these rights is permissible only insofar as it

⁹⁴ Schedule 6 to the directives.

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⁹⁶ <https://www.businessinsider.co.za/sa-compensation-fund-rules-for-covid-19-vaccine-payouts-as-workplace-injury-2021-10>

⁹⁷ <http://www.hsrc.ac.za/uploads/pageContent/1045979/2021-08-18%20UJ-HSRC%20Report%20%20Explaining%20vaccine%20acceptance%20and%20hesitancy2.pdf>

⁹⁸ <https://health-e.org.za/2021/10/25/vaccine-hesitancy-takes-on-a-whole-new-dimension-in-sa/>

complies with the limitation clause in section 36 of the Constitution, which essentially embodies a proportionality analysis. In other words, the bigger the risk to public health, the larger the limitation may be on individual rights.⁹⁹

The question about mandating vaccines can be divisive. There are legal scholars that argue against mandatory vaccinations,¹⁰⁰ while there are many strongly advocating for it.¹⁰¹

Arguments against (immediate) mandatory vaccinations:

- The Constitution, as the supreme law, holds the moral vision that people are autonomous moral agents, capable of rationality and forming their own opinions.¹⁰²
- Before a mandate is warranted in terms of the Constitution, less restrictive policy options (such as incentive schemes and strategies promoting vaccine uptake) must first be used.¹⁰³
- Due to the lack in public trust in government as well as government's failures in vaccine rollout,¹⁰⁴ vaccine mandates might be counterproductive.
- In some instances vaccine hesitancy is also driven by conspiracy theories that vaccines is a way for government to get authoritarian control over people. This means that there might be a greater pushback against vaccines if it is made mandatory.¹⁰⁵

Arguments for (immediate) mandatory vaccinations:

- The Siracusa principles requires that restrictions on human rights be based on law, also as section 36 of the Constitution requires. Together with the National Health Act 61 of 2003 (and regulations relating to notifiable medical conditions) and the Disaster Management Act, restriction on individual rights through mandatory vaccinations are not arbitrary. Rather, the requirement is that it must be based on a legitimate objective and must be strictly necessary for the achievement of a policy objective. This objective is the prevention of the transmission of infection. The focus then shifts to the fact that the limitation must be based on scientific evidence, that it should not be arbitrary, discriminatory or unreasonable. The fact that the Covid-19 vaccine has been implemented globally based on good safety data and protecting people from severe disease and death, bolster the argument for that such a restriction on individual rights will be reasonable. Since we do not have the "luxury of time during a public health emergency", this then justifies the immediate mandation.¹⁰⁶

⁹⁹ <http://www.saflii.org/za/cases/ZACC/2018/30.html>

¹⁰⁰ <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/>

¹⁰¹ <https://theconversation.com/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682>

¹⁰² <http://www.saflii.org/za/cases/ZASCA/2012/107.html> [BAT case]

¹⁰³ <https://theconversation.com/why-a-covid-19-vaccine-mandate-is-not-the-best-policy-option-for-south-africa-166195>

¹⁰⁴ <https://www.dailymaverick.co.za/article/2021-08-16-vaccine-hesitancy-no-government-failure/>

¹⁰⁵ <https://theconversation.com/why-a-covid-19-vaccine-mandate-is-not-the-best-policy-option-for-south-africa-166195>
<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0251605>

¹⁰⁶ <https://theconversation.com/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682>

How it can be done:

- There are some vaccines that are already mandatory.¹⁰⁷ The Notifiable Medical Conditions Regulations¹⁰⁸ have been in place for various diseases for over a decade. In 2020 Covid-19 became a notifiable condition under these regulations. The regulations provide a mechanism for a healthcare provider to administer, among other things, a vaccine to a person who refuses to accept one. The process is complicated and requires the head of the provincial department of health to apply for a court order before any vaccine can be administered. A court must assess the application on a case-by-case basis to determine whether it is justifiable to compel the person to take a vaccine without their consent.
- State of Disaster Regulations¹⁰⁹ regulates things like compelled testing and isolation. Similar to these, the process to compel people to test or isolate¹¹⁰ can be done by a range of people to apply at the magistrate for an order to compel them. **Xxx insert the case where the court ordered quarantine to end.**

However, because these regulations apply to individuals on a case-by-case basis, they are unlikely to be feasible options for making a COVID-19 vaccine compulsory for the entirety of the South African population. The practicalities of COVID-19 vaccination are complex and multi-layered. For this reason, it is important that vaccine mandates are developed in a way that provides some means to consider specific objections on a case-by-case basis and possibly attempt to accommodate employees where this can be done safely.

The South African Human Rights Commission argues that given the crisis of the pandemic, it is likely that if a law is passed to mandate vaccines, this will pass constitutional muster.¹¹¹ The commission, however, prefers voluntary vaccination hoping that the public will see the greater benefits for themselves. Mandates should be the last resort.

Sectoral decisions

Children

When vaccines were rolled out for children aged 12 and 17, there was concern raised that this age group can get vaccinated without parental consent.¹¹² Accepting that in principle children may in

¹⁰⁷ Anyone who wants to travel to a high-risk area or country is required to produce proof that they have been vaccinated for yellow fever before being allowed to re-enter South Africa. Similarly, the Department of Basic Education requires that parents submit a vaccination report, in the form of an immunization card, when making their child's Grade 1 application.

¹⁰⁸ https://www.nicd.ac.za/wp-content/uploads/2017/12/41330_15-12_Health-compressed.pdf

¹⁰⁹ https://www.gov.za/sites/default/files/gcis_document/202003/4314825-3cogta.pdf

¹¹⁰ <http://www.samj.org.za/index.php/samj/article/view/12911/9192>

¹¹¹ <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2823-media-statement-on-the-position-of-the-sahrc-on-the-issue-of-mandatory-covid-19-vaccination> Cf this with the person from the SAHRC stating otherwise.

¹¹² <https://www.dailymaverick.co.za/opinionista/2021-10-26-legal-obstacle-course-vaccinating-children-aged-12-to-17->

certain circumstance make certain medically related decision for themselves, one opinion warned that that is not so simple. Section 7 of the National Health Act provides that health service requires the user's informed consent. Section 129 of the Children's Act, in turn, deals with "consent to medical treatment and surgical operation". A child, in this case, may consent to their own medical treatment if they are over 12 years old, and of sufficient maturity and has the mental capacity to understand the benefits and the risks of the treatment. There is a further requirement that a child be assisted by his or her parent or guardian.¹¹³ There can thus be an argument made out that at least the knowledge of the parents are required. *Baron and others v Claytile (Pty) Limited and Another*¹¹⁴ stated that for consent to be legal, "it must have been given [...] freely and voluntarily with the full awareness of the rights being waived".

- Children aged 5 – SAPRHA and court cases of ACDP.

Workplace vaccination

The Minister of Labour issued a direction with reference to vaccines in the workplace, in terms of which employers are required to "find a reasonable resolution that accommodates all parties where employees refuse to be vaccinated for medical and constitutional ground".¹¹⁵ The basis of the directions issued is that employers and employees must show mutual respect: public health is important, employees have constitutional rights, and the employer has an interest in the efficient operation of the business. The directions are mindful of the right to bodily integrity and the right to freedom of religion, belief and opinion.

In terms of the consolidated occupational health and safety direction, an employer must now include in its risk assessment whether it intends to make vaccinations compulsory. This requires a three-step enquiry:

- First, the employer must make an assessment based on the operational requirements of the workplace. This is done in terms of the general duty of employers in terms of the Occupational Health and Safety Act 85 of 1993 to provide *a working environment that is safe and without risk to the health of his employees and persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety*.
- Secondly, if the employer decides to make vaccination mandatory, it must conduct a risk assessment. During this risk assessment it must identify which employees will be required to be vaccinated. This is done by identifying the employees whose work poses a risk of

with-or-without-parental-consent/

¹¹³ <https://www.dailymaverick.co.za/opinionista/2021-10-26-legal-obstacle-course-vaccinating-children-aged-12-to-17-with-or-without-parental-consent/>

¹¹⁴ (CCT241/16) [2017] ZACC 24; 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC) (13 July 2017).

¹¹⁵ http://www.labour.gov.za/employment-and-labour-minister-issues-new-direction-with-regard-to-vaccination-in-the-workplace?_ga=2.235366913.1620009773.1631202027-247680014.1627656712

transmission or a risk of severe Covid-19 or death, due to their age or comorbidities.

- Thirdly, once identified, it must amend its plan to vaccinate employees as and when the vaccine becomes available.

Human rights

A general right to health

The right to health is guaranteed in many human rights instruments. In the first instance, the Constitution of the WHO and the Universal Declaration recognise a right to health underpinned by a number of components including access to medical care, housing, food, social security and food.¹¹⁶ The WHO defines health as a state of complete physical, mental and social wellbeing, which means it is not restricted to the absence of disease or infirmity. In other words, social isolation that comes at a mental health cost will need to be included in our consideration of “health”.¹¹⁷

Within the South African constitution, there is a right to healthcare contained in section 27(1)(a) alongside a number of other critical social and economic rights which underpin a right to the highest attainable standard of living. Section 27(1)(b) places a duty on the State to “take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right”. Section 27(3) makes it clear that no one can be denied emergency medical treatment.

The International Covenant of Economic, Social and Cultural Rights (ICESCR)¹¹⁸ provides for the “enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity”, which includes the prevention, treatment and control of epidemics, and endemic occupational and other diseases. The right to health is linked to the rights of privacy, liberty, dignity, non-discrimination and life. There is a specific duty to take effective measures to address epidemic and infectious diseases. This requires health care facilities, goods and services to be available in sufficient quantity, that it must be physically accessible and economically accessible to everyone, and must be ethically and culturally acceptable, and of a medically appropriate quality.¹¹⁹

International instruments, as well as the Constitution itself, provide guidance on when and how rights may be limited and when infringement of rights may be permissible. The International Covenant on Civil and Political Rights¹²⁰ (ICCPR) allows for the limitation of rights in the case of a public emergency.

¹¹⁶ Article 25 of the Universal Declaration of Human Rights stated:

‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’

¹¹⁷ {van Zyl, 2022 #1467}.

¹¹⁸ Art 12. See also African Charter on the Rights and Welfare of the child, article 16/22.

¹¹⁹ General Comment No.14 (2000) The Right to the Highest Attainable Standard of Health, (Article 12 of the International Covenant of Economic, Social and Cultural Rights). UN Committee on Economic, Social and Cultural Rights, 2000. para 12.

¹²⁰ Art 4

Likewise, the Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights¹²¹ (Siracusa Principles) deal specifically with the derogation of rights, requiring that it be “in accordance with the law; based on a legitimate objective; strictly necessary in a democratic society; the least restrictive and intrusive means available; and not arbitrary, unreasonable, or discriminatory”.¹²² There is a specific need to balance human rights and public health restrictions.¹²³

When it comes to the issue of public health, there is often a tension between public health measures and individual human rights (not just the right to healthcare).¹²⁴ This is because measures implemented in response to outbreaks, can limit human rights to achieve public health objectives.¹²⁵ There were many such examples in South Africa during the course of the pandemic, most declared lawful by the courts, while some of which was found to be unlawful.¹²⁶

There is an increase understanding that disease control measures improving public health and individual human rights can also complement each other, especially where the realisation to the right of health is concerned. This is especially so where there is improved access to health care, infrastructure improvement, improvement in disease surveillance and reporting; and improvement of methods to control the spread of disease.¹²⁷ Improved public health can lead to healthy individuals that fulfils the right to health, life, bodily integrity and the ability to lead a more dignified life.¹²⁸

Where there is a great tension between public health goals and specific human rights, the limitation of the human right must be justifiable under section 36 of the Constitution.¹²⁹

[what can follow here is a short evaluation of adherence to right to health etc, perhaps with reference of what is reported later – how resilient was the health system]

In the beginning of the pandemic, amidst great uncertainty, people were more willing to allow the limitation in the interest of the public health and the greater good. But with hindsight we can ask whether the drastic measures did contain COVID-19, and there are opinions that it did not. We have seen excess deaths way above normal.¹³⁰ While many limitations were necessary, activists are critical of the fact that government advisors that generally excluded civil society and human rights activists

¹²¹ reference

¹²² reference

¹²³ Principle 25.

¹²⁴ {Karim, 2021 #1483} 536.

¹²⁵ {Karim, 2021 #1483} 536, BM Meier, DP Evans & A Phelan ‘Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease’ (2020) 82 *Infectious Diseases in the New Millennium* 217, 253.

¹²⁶ Insert reference to cases here. De Beers exercise and hot food, tobacco cases. Reference quarantine and Botes & Thaldar article, also S Karim articles.

¹²⁷ {Karim, 2021 #1483} 537.

¹²⁸ {Karim, 2021 #1483} 537.

¹²⁹ {Karim, 2021 #1483} 537.

¹³⁰ <https://blog.petrieflom.law.harvard.edu/2021/04/13/human-rights-rule-of-law-south-africa-covid/>

seem to not understand the right to health especially during epidemics.¹³¹

Covid exacerbated the already existing socio-economic challenges in South Africa, which was struggling with inequality, poverty and unemployment.¹³² Specific spotlight is shined on healthcare and social security systems.¹³³

Some of the human rights issues:

- Evictions during pandemic
- Police brutality
- Measures taken to protect people living in informal settlements
- Migrant and domestic workers – access to secure housing during pandemic and after
- Limitation of the effect on socio-economic rights since covid?
- Fair and equitable access to social safety net measures
- Gender-based violence

Often a balancing of rights: curbing spread of covid vs these individual rights.

The right to free and fair elections during covid

The COVID-19 pandemic has affected the way elections are conducted across the world. During the first few months of the pandemic, many countries postponed elections.¹³⁴ South Africa, too, was faced with having to decide whether to postpone its municipal elections, scheduled for 27 October 2021.¹³⁵

President Cyril Ramaphosa gave almost six months' notice by announcing 27 October 2021 as the date for the elections on 21 April 2021.¹³⁶ The Constitution requires that an election be held within 90 days of the end of the term of office for local government. Since the last local government elections were held on 3 August 2016, an election had to be held by 1 November 2021. No provision is made for discretion to postpone the elections in the constitution or in legislation.

As the Electoral Commission of South Africa started preparing for elections, some political parties flagged the challenges of holding elections during the COVID-19 pandemic. The commission then constituted an inquiry,¹³⁷ headed by former deputy chief justice Moseneke, to ascertain if the

¹³¹ <https://blog.petrieflom.law.harvard.edu/2021/04/13/human-rights-rule-of-law-south-africa-covid/>; see also the National School Nutrition Program case.

¹³² {Staunton, 2020 #1378}.

¹³³ {Ntlama, 2020 #1380} 88; {Forman, 2020 #1381} 376.

¹³⁴ {Afek, 2020 #1086} p 3 states that between February - July 2020, 70 countries postponed national and subnational elections and referendums, and 53 countries held the elections as scheduled.

<https://theconversation.com/postponing-south-africas-local-elections-what-the-constitutional-court-must-decide-166970>

¹³⁵ <https://www.thepresidency.gov.za/newsletters/president-announces-27-october-2021-date-local-government-elections>.

¹³⁶ <https://www.thepresidency.gov.za/newsletters/president-announces-27-october-2021-date-local-government-elections>

¹³⁷ <https://www.elections.org.za/freeandfair/>

elections would be free and fair if held in October. The inquiry found¹³⁸ that there was a possibility that elections in October might not be free and fair. It suggested they be postponed to February 2022. Based on this report, the electoral commission applied to the Constitutional Court to have the elections postponed.¹³⁹ However, the Constitutional Court did not agree.

Recommendation: The IEC must ensure that it has contingency plans and is flexible for possible future disaster situations – maybe consider whether there should be a discretion to move elections and what it would look like.

Housing

Informal settlements and impoverished areas proved far less resilient against the health- and economic impacts of Covid-19 than more upmarket suburbs.¹⁴⁰ The pandemic appeared to implicate human settlements in three interrelated ways. First, sub-optimal living conditions in informal settlements, overcrowded inner-city buildings and backyards aggravated vulnerability to infection and serious illness. Secondly, adherence to “stay at home” lockdown measures, as well as their efficacy and social impact, were contingent on the nature of home environments.¹⁴¹ Thirdly, the economic consequences of lockdown threatened the security of housing arrangements and rendered people vulnerable to eviction.

With similar pressures being felt elsewhere, institutions such as UN Habitat and the UN Special Rapporteur on the Right to Adequate Housing warned against pandemic responses that exacerbated housing-related vulnerability.¹⁴² In particular, states were urged to protect vulnerable populations against eviction, to observe proportionality in living environment interventions and to observe human rights, including the right to housing, throughout.

On 16 April 2020, the initial South African Disaster Management Regulations were amended to include an absolute prohibition on evictions during the (then level 5) lockdown. This prohibition was incrementally amended as lockdown measures were relaxed over the coming months. Under alert levels 1, 2 and 3, eviction orders could be granted in compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), but could not be executed until the end of the state of national disaster, unless considerations of justice and equity directed otherwise.¹⁴³

¹³⁸ <https://www.elections.org.za/freeandfair/lge2021/Report-Livestream>

¹³⁹ <https://collections.concourt.org.za/handle/20.500.12144/36806>

¹⁴⁰ See {Turok, 2021 #1382}.

¹⁴¹ See {Makoni, 2020 #1373} 553.

¹⁴² See Leilani Farha (UN Special Rapporteur Rapporteur on the Right to Adequate Housing) *COVID-19 Practice Note: Protection for those Living in Homelessness* (2 April 2020) available through <http://unhousingrapp.org/user/pages/07.press-room>; UN Habitat *Policy Statement on the Prevention of Evictions and Relocations during the COVID-19 Crisis* (14 May 2020) available at https://unhabitat.org/sites/default/files/2020/05/unhabitat_policy_statement_on_prevention_of_evictions_and_relocations.pdf

¹⁴³ For exposition of the different legal iterations of the prohibition on eviction see Felix Dube & Anel Du Plessis “Unlawful Occupiers, Eviction and the National State of Disaster: Considering South Africa’s Emergency Legislation and Jurisprudence during COVID-19” (2021) 65(S2) *Journal of African Law* 333 at 335-337.

From the outset, the South African government was particularly concerned about the impact of the virus in informal settlements, where many inhabitants suffered from underlying conditions and where overcrowding and underservicing would complicate attempts at enforcing social distancing and hand hygiene. The Minister of Human Settlements, Water, and Sanitation outlined the Department of Human Settlements, Water and Sanitation (NDHSWS)'s planned response to the pandemic on 24 March 2020. There were two main components to this: First, water, sanitation, and hand-washing facilities would be rapidly upscaled in communities lacking formal supply. Secondly, twenty-nine informal settlements across the country had been identified as requiring specific intervention and would be considered for “de-densification”. This would involve relocation of certain residents to temporary relocation areas (TRAs) on land “not far from” the settlements.¹⁴⁴

Civil Society Organisations (CSOs) objected strongly to the “de-densification” plans. Fourteen CSOs jointly released an “urgent call to rethink de-densification as the dominant proposed strategy in the context of Covid-19” on 11 April 2020, warning that de-densification could “equate eviction and forced removal” in circumstances where informed consent to relocation was not obtained, would disrupt people’s social support networks, and threaten their livelihoods, and would involve cumbersome and time-consuming processes that were ill suited to combating a medical emergency.¹⁴⁵

NDHSWS realised the need for an “all of government” and “all of society” approach to the pandemic, and established virtual platforms for dialogue between officials from different spheres of government, CSOs, academia and community leaders. It created and coordinated a WhatsApp group and Google group discussion forum, and hosted weekly “informal sector coordination group” meetings via Zoom. These were focused on the response to the pandemic in informal settlements, but also canvassed water and sanitation interventions, and food parcel distribution during the initial lockdown.¹⁴⁶

These fora contributed significantly to the refinement of NDHSWS’s Covid-19 response and to bridging the divide with CSOs. A “partnership framework agreement” between NDHSWS and CSOs was negotiated, and published on 8 June 2020.¹⁴⁷ It committed to only limited relocations to TRAs as short-term emergency response, in accordance with a process of meaningful engagement aimed at securing full informed consent from affected households. While the NDHSWS initially attempted to draft disaster management directives guiding this process, these were jettisoned in favour of procedures in

¹⁴⁴ South African Government Media Statement “Remarks by Minister of Human Settlements, Water and Sanitation, Hon. LN Sisulu, at the occasion of media briefing to outline interventions to curb the spread of COVID-19” (25 March 2020) available at <https://www.gov.za/speeches/minister-lindiwe-sisulu-interventions-curb-spread-coronavirus-covid-19-25-mar-2020-0000>.

¹⁴⁵ Various “An Urgent Call to Rethink De-Densification as the Dominant Proposed Strategy in the Context of COVID-19” (11 April 2020), statement published on the websites of signatory-organisations. See e.g. <https://planact.org.za/an-urgent-call-to-rethink-de-densification-as-the-dominant-proposed-strategy-in-the-context-of-covid-19/>

¹⁴⁶ See Marius Pieterse “Balancing Socio-economic rights: Confronting COVID-19 in South Africa’s Informal Urban Settlements” (2021) 39(1) *Nordic Journal of Human Rights* 33 at 37-38.

¹⁴⁷ *Partnership Framework Agreement between Civil Society Organisations (CSOs) and the National Department of Human Settlements (NDHS) around Interventions in Informal Settlements in the Context of COVID-19* (8 June 2020).

terms of the Emergency Housing Programme (EHP) provided for by the National Housing Code (2009).

Apart from emergency relocations, the “partnership framework agreement” envisaged that conditions in informal settlements would be tackled through upscaled implementation of the Upgrading of Informal Settlement Programme (UISP), also contained in the 2009 Code.¹⁴⁸ The choice of the UISP as preferred policy vehicle for addressing the vulnerabilities highlighted by the pandemic in informal settlements, instead of regulations under the Disaster Management Act (DMA), is welcomed. The DMA envisages the creation of an inherently temporary regulatory framework, designed to last only for the duration of a state of disaster. Indeed, the Constitutional Court had previously held that relocations in terms of the DMA could only be temporary unless they also complied with the PIE Act.¹⁴⁹ This makes the DMA an inappropriate legal vehicle for sustainably addressing overcrowding in informal settlements. In addition to outlasting the state of disaster, responses under the UISP had the further benefit of alignment with municipalities’ Integrated Development Plans and Spatial Development Frameworks.

However, the urgency of interventions during the pandemic highlighted several hurdles to upscaled implementation of the UISP. *In situ* upgrading of informal settlements is time consuming, due not least to poor alignment of the UISP’s objectives with prevailing processes pertaining to land acquisition, environmental authorisations and water user licencing. The UISP lacks provisions authorising interim upgrading and service provision in parallel to the pursuit of these processes, while local government zoning bylaws typically do not allow for incremental upgrades. It has further long been pointed out that prevailing standards in terms of the National Building Regulations and Building Standards Act 103 of 1977 are premised on formal construction and do not cater for building in informal settlement environments. These instances of poor articulation of different regulatory and legal frameworks restrained the agility of the response under the UISP.¹⁵⁰

Upholding the moratorium against evictions also proved challenging, especially in the context of increased illegal land occupations during the lockdown, where authorities had to balance obligations under the moratorium with similarly pressing obligations to uphold law and order.¹⁵¹ On several occasions, municipalities responded to occupations with evictions and demolitions, notwithstanding the moratorium. Where challenged, as for instance in several high-profile cases brought against the City of Cape Town, courts have criticised municipalities’ wilful ignorance of the moratorium, interdicted their eviction practices and declared their actions unlawful and unconstitutional.¹⁵²

¹⁴⁸ Ibid.

¹⁴⁹ *Pheko v Ekurhuleni Municipality* 2012 (4) BCLR 388 (CC).

¹⁵⁰ See further Pieterse 2021 (cited above) at 36.

¹⁵¹ See Dube & Du Plessis 2021 (cited above) 334-335.

¹⁵² See for instance *Community of Hangberg v City of Cape Town* [2020] ZAWCHC 66; *SAHRCH v City of Cape Town* 2021 (2) SA 565 (WCC); *SAHRC v City of Cape Town* (WCHC case 8631/2020, judgment of 15 July 2022, unreported). For discussion see Dube & Du Plessis, 2021 (cited above).

There were further reports of continued extra-legal evictions by “private” landlords, especially in the informal backyard rental sector.¹⁵³ These highlight the lack of state control over informal markets and the insidiousness of human rights violations in this context. Perhaps relatedly, anecdotal reports of increased homelessness emerged from many major urban centres.

While most municipalities increased homeless shelters and associated support, these sometimes came under fire. In Cape Town, a panel of independent experts appointed by the South African Human Rights Commission (SAHRC) released a report decrying human rights violations inherent to conditions at an emergency “homeless camp” at Strandfontein, in April 2020.¹⁵⁴ The facility was closed shortly afterwards. The City was further criticised for barring the SAHRC’s observers from the camp, not least by the Cape High Court, which declared this unlawful in March of 2021.¹⁵⁵

Yet, while there were initial fears that its response might aggravate housing need and contribute to evictions, displacement and homelessness, the NDHSWS can be commended for remaining open to devising more nuanced solutions in conformance with international guidelines and in dialogue with civil society and other stakeholders. In particular, the establishment and coordination of dialogic fora to coordinate the response was a major strength of the response and it is hoped that such a deliberative approach to human settlement governance can be institutionalised going forward.

Overall, Covid-19 highlighted systemic weaknesses in the legal and institutional architecture of human settlements governance, that had long predated the pandemic. In particular, the struggle to settle upon and implement an appropriate response to the pandemic in informal settlements underlines how housing problems are systemic in nature and are not easily or consistently solved through short-term emergency measures.

Obstacles encountered in attempts to upscale implementation of the UISP point to a need for streamlining the many legal and policy instruments that impact on human settlements, in a manner that prioritises giving effect to the constitutional right of access to adequate housing.

Inconsistent adherence to the moratorium on evictions, inconsistent capacity to upscale UISP implementation and inconsistent responses to land invasions at municipal level further arguably highlight a need for a more strongly defined and consistent role for municipalities in the human

¹⁵³ See <https://www.newframe.com/lockdown-means-eviction-for-many-backyard-dwellers/>.

¹⁵⁴ OM Stern; G van Cutsem; D Laurenson; J King & T Jenkins *Independent Report submitted to the South African Human Rights Commission concerning the City of Cape Town’s COVID-19 Shelter for Street-based People - Strandfontein, Cape Town* (11 April 2020).

¹⁵⁵ *City of Cape Town v South African Human Rights Commission* (WCHC case5633/2020, judgment of 7 March 2021, unreported). See J Stenty ‘Court slams City of Cape Town for barring access to homeless camp’ *GroundUp* (17 March 2021) available through www.groundup.org.za.

settlements sector.

Social grants

- Section 27 right to social security.¹⁵⁶
- Government introduced a R350 Covid grant.
- Nearly 7 million beneficiaries

StatsSA – poorest 60% of south African household relies on social grants to attain overall household income.¹⁵⁷ The impact of the Covid measures taken on the labour market had a disproportionate impact on individuals in lower-income households.¹⁵⁸

When Covid hit the South African government could not provide exceptional support programmes for businesses and household to mitigate the effect of the lockdown. Surveys suggest that between 2 million and 3 million people lost their jobs between February and April 2020.¹⁵⁹ Another big problem is that around 3 million people (18%) work in the informal sector, meaning that they do not qualify for social assistance unless they qualify for old-age, child support or disability grants.¹⁶⁰

While it seems that government grants did help to protect livelihoods in poor communities and compensate for high unemployment rates, there is a fear that once the labour markets recover this support will be withdrawn.¹⁶¹

In their analysis¹⁶² the Budget Justice Coalition, an alliance of leading civil society organisations, draws particular attention to below-inflation increases for crucial social grants like the Child Support Grant. Although the R350 Social Relief of Distress (SRD) Grant has been extended for a year, its paltry amount remains the same. The failure to commit to further extensions of this grant into 2023/24 and 2024/25 means basic income of the most vulnerable remains uncertain and results in an overall reduction of social protection spending averaging 3.0% a year over the Medium-Term Expenditure Framework. The coalition calls for a human rights impact assessment to be conducted of this and other “individual budget decisions where human rights are impacted”.¹⁶³

Food systems

¹⁵⁶ <https://blog.petrieflom.law.harvard.edu/2021/04/13/human-rights-rule-of-law-south-africa-covid/>

¹⁵⁷ {Ntlama, 2020 #1380} 90. StatsSA 2019.

¹⁵⁸ {Bhorat, 2021 #1391} i.

¹⁵⁹ {Turok, 2021 #1382} 1.

¹⁶⁰ {Ntlama, 2020 #1380} 90.

¹⁶¹ {Turok, 2021 #1382} 4.

¹⁶² <https://section27.org.za/wp-content/uploads/2022/02/BJC-Post-Budget-2022-Statement.pdf>

¹⁶³ ‘Budget 2022: Cuts to essential public services are expensive and unaffordable’ - MAVERICK CITIZEN: TUESDAY EDITORIAL, *Daily Maverick* 1 March 2022. Available at: <https://www.dailymaverick.co.za/article/2022-03-01-budget-2022-cuts-to-essential-public-services-are-expensive-and-unaffordable/> [Accessed 1 March 2022].

Agriculture was the only sector that grew during the first year of Covid. However, this picture does not account for the inequality in the system itself. Small-scale farmers and fishers, for instance, lost their access to markets due to a prohibition on street trade, curfews and little access to storage and refrigeration. With the closure of the hospitality industry that is a big market for these actors, means that this exasperated the problem. [update and expand]

Surveillance and privacy

The use of contact tracing apps to monitor and manage Covid-19 infections raised important questions about the balance between public health interests and the protection of the privacy of individual citizens. More specifically, the legal nature and consequences of this type of surveillance that may continue post pandemic are cause for concern.

Like many other countries, South Africa has also repurposed existing technologies, such as the Global Positioning System (GPS), wi-fi, and Bluetooth to track and trace people either is infected, or may have been exposed to someone who is infected, and to notify people of your infection status to allow them to seek the necessary medical attention.¹⁶⁴ The South African government introduced the COVID Alert SA app to allow people some free movement and economic activity, with the ability – and responsibility - to manage their own risk of being exposed to possible infection or spreading any infection.¹⁶⁵ This app that is based on smartphone technology enabled and readily available functions developed by Apple or the Google Exposure Notification System, allows mobile phones that are in close proximity to each other for a certain period of time to exchange a randomly generated code which can be activated when the holder of a phone tests positive for Covid-19 to anonymously alert others through the simple click of a button.¹⁶⁶ Generally the use of these so-called “exposure notification systems”, whose function relies on proximity awareness as opposed to the collection, storage and use of a person’s location data, has been supported by privacy law scholars around the world.¹⁶⁷

However, the use of these technologies, especially in the South African context has been criticised. To practically enable close proximity location between mobile phones, cell tower metadata (supplied by electronic communication service providers) relies on signal strength and delay times to triangulate the position of a cellular phone, which may be highly inaccurate. This inaccuracy may be caused by

¹⁶⁴ Botes WM. Unpacking the legal and ethical aspects of South Africa’s COVID-19 track and trace app. The Conversation, Africa. 2020. <https://theconversation.com/unpacking-the-legal-and-ethical-aspects-of-south-africas-covid-19-track-and-trace-app-147137> (accessed 25 August 2022).

¹⁶⁵ https://play.google.com/store/apps/details?id=za.gov.health.covidconnect&hl=en_ZA&gclid=CjwKCAjwwab7BRBAEiwAaPqpTJaUMIM0vPYR1eUowVC9LVokqy60e8Zw6SylfoMgWJNdU3RthoNylXoCyMAQAvD_BwE (accessed 25 August 2022)

¹⁶⁶ See Botes WM. Unpacking the legal and ethical aspects of South Africa’s COVID-19 track and trace app. The Conversation, Africa. 2020. <https://theconversation.com/unpacking-the-legal-and-ethical-aspects-of-south-africas-covid-19-track-and-trace-app-147137> (accessed 25 August 2022).

¹⁶⁷ Whittaker Z. Hundreds of academics back privacy-friendly coronavirus contact tracing apps. Techcrunch. 2020. <https://techcrunch.com/2020/04/20/academics-contact-tracing/> (accessed 25 August 2022).

buildings that scatter signals in urban areas, while in rural areas the lack of cell towers makes triangulation impossible, which ultimately questions the real contribution that such technologies can make in identifying or locating Covid-19 cases or contacts.¹⁶⁸ Further inaccuracies, such as false positives, also proved to be an international problem which was affected by factors such as whether a phone was in a person's pocket or bag, or whether the person was inside a building or outside.¹⁶⁹ In addition, many people, often entire poor populations only poses very old phones (if they poses a phone at all) which are unable to use contact tracing apps, leaving these most vulnerable populations, specifically during a pandemic, out of any equation.¹⁷⁰ Moreover, the COVID ALERT SA app is officially owned and managed by the South African government. Many people expressed their concerns in this regard, not only in South Africa, but also in the UK, about who was in charge of tracing activities and overseeing their data, and the majority of people indicated that they much rather prefer health organisations, as opposed to government to manage infection surveillance.¹⁷¹

At the height of the pandemic and the rolling out of the COVID Alert SA app, the Protection of Personal Information Act (POPIA) had not yet been enacted. Thus, in the absence of critical and legally enforceable privacy guidance, but mindful of the need for privacy protection, the South African Information Regulator urged parties to nonetheless proactively adhere to the basic principles of privacy protection, including accountability, lawful processing, purpose of collection and processing, retention and restriction of records, quality of information and security measures as per a guidance note the regulator published early in 2020.¹⁷² Fortunately POPIA has since been enacted and should provide effective and legally binding privacy protection during the next pandemic, national health emergency, or state of disaster.

Exiting a state of disaster and post pandemic the one (global) point relating to surveillance and privacy that raises the most concern is so-called "function creep", when technology that was deployed for a seemingly benign purpose, such as tracking and tracing Covid-19 infections, slowly gets repurposed for problematic ends, and long-term loss of autonomy. A historical example of this is how many post-9/11 surveillance programs are still active today, decades after the terrifying incident, in which

¹⁶⁸ Viljoen IM, Castelyn C, Pope A, Botes M, Pepper MS. Contact tracing during the COVID-19 pandemic: Protection of personal information in South Africa. *South African Journal of Bioethics and Law*. 2020;13(1):15-20.

¹⁶⁹ O'Neill P H. Bluetooth contact tracing needs bigger, better data. *MIT Technology Review*. 2020. <https://www.technologyreview.com/2020/04/22/1000353/bluetooth-contacttracing-needs-bigger-better-data> (accessed 25 August 2022).

¹⁷⁰ Bradshaw T. 2 billion phones cannot use Google and Apple contact-tracing tech. *Ars Technica*. 2020. <https://arstechnica.com/tech-policy/2020/04/2-billion-phones-cannot-usegoogle-and-apple-contrast-tracing> (accessed 25 August 2022); Viljoen IM, Castelyn C, Pope A, Botes M, Pepper MS. Contact tracing during the COVID-19 pandemic: Protection of personal information in South Africa. *South African Journal of Bioethics and Law*. 2020;13(1):15-20.

¹⁷¹ Botes WM. How emerging communication technologies impact clinical ethics. Presented on 2 December 2021 in the Category: Emerging technologies and Clinical Ethics at the 16th Annual International Conference on Clinical Ethics and Consultation in South Africa.

¹⁷² Information Regulator, South Africa. Guidance note on the processing of personal information in the management and containment of COVID-19 pandemic in terms of the Protection of Personal Information Act 4 of 2013 (POPIA). No date. <https://www.justice.gov.za/inforeg/docs/InfoRegSAGuidanceNote-PPI-Co> (accessed 15 April 2020).

personal information is being misused and data collection is extended beyond what was initially authorized or envisioned.¹⁷³ Due to the poor uptake of tracking and tracing technologies in South Africa this may seem to be less of a problem, but considering that epidemics and pandemics will be forever present, the recommendations may increase the resilience of future privacy respecting, and effective, surveillance programmes and technologies.

To appreciate and successfully implement privacy respecting surveillance technologies it is important to understand that privacy preferences, the right to limit privacy rights and decision made in one setting, such as the Covid-19 pandemic, do not necessarily apply to a different setting, such as Monkey Pox (which is currently raging across the globe).¹⁷⁴ This will require us to appreciate and investigate how our interactions with other people, institutions, and technologies happens in specific contexts, and how particular norms of appropriateness govern people's expectations of how personal information should be collected, stored and used (flow) within a certain given context. According to this theory of "contextual integrity" the following factors shape norms of appropriateness for the use of privacy invasive technologies and need to be taken into account:

- **Context:** This will entail the backdrop against which future surveillance technologies will be implemented. As was the case with Covid-19, surveillance technologies were implemented with the aim to track and trace infected people, whilst still allowing them to freely move around in an effort to stimulate the economy and household income. The infectious nature of the next pandemic virus, the state of fully integrated, accessible, and existing technology at that time, the state of the nation, and latest legal developments in privacy laws (amongst others) will determine this context and which surveillance technologies (or other measures) will be the most appropriate to implement in this specific environment. For example, the lack of usable smartphones that could enable tracking and tracing, mistrust the governmental owned tracing app, and POPIA that was not yet enacted at the implementation of tracking and tracing apps affected the appropriateness and ultimately the uptake and effectiveness of technologically enabled tracking and tracing on South Africa.
- **Actors:** the various parties involved in the context explained above. Resource poor, marginalised, and vulnerable citizens, a government that does not conjure the necessary trust when it comes to respectfully survey its citizens and deal with their information in a privacy preserving way, existence of effective legislation, and access to courts that could enforce such legislation affected the appropriateness of the surveillance technologies used in South Africa. In future it would be advisable to use technologies to which the majority of the population has access easy access to, and that is implanted by trustworthy, reputable, and independent third parties such as medical

¹⁷³ Díaz A. Coronavirus, location tracking, and civil liberties. The Brennan Center. 2020.

<https://www.brennancenter.org/our-work/analysis-opinion/coronavirus-location-tracking-and-civil-liberties> (accessed 25 August 2022).

¹⁷⁴ Nissenbaum H. Privacy as contextual integrity. *Washington Law Review*. 2004;79, 119–157; Nissenbaum H. Privacy in context: Technology, policy, and the integrity of social life. Stanford University Press. 2010.

institutions.

- **Attributes:** the different types of information at stake. The implementation of Apple or the Google Exposure Notification Systems was globally found to be legally acceptable because of their privacy preserving technological nature. This stood in stark contrast to the criticism that the South African government received when they wanted to establish a Covid-19 data base containing the name, address, contact particulars, and health status of individuals, which information constituted special personal information that was collected without consent or explanation of future use. However, now that the POPIA has been enacted in South Africa, these attributes can be measured against legal terms and conditions.
- **Transmission principles:** the terms and conditions that shape or constrain the flow of information. The main instrument in this regard will now be the POPIA and related privacy and surveillance regulations and guidelines. It is trite, and discussed elsewhere in this report, that it is completely legal to limit certain human or foundational rights, including privacy, during exceptional times such as pandemics and that the legislative frameworks triggered under such circumstances, such as the DMA should provide the necessary guidance in then.

To effectively manage the surveillance of people and virus spreading during the next health disaster, these all these factors will need to be taken into consideration as a whole before deciding on the most appropriate way forward.

People with disabilities

Around 12%, but perhaps as much as 20% of South Africa's population falls on a spectrum of disabilities¹⁷⁵ – from immobility or partial immobility, to restricted communication, sensory deprivation and psychosocial and neurological complications.¹⁷⁶ We did not need a pandemic to realise that the needs and rights of persons with disabilities are not taken seriously enough, despite strong international¹⁷⁷ and national¹⁷⁸ laws. The disadvantages faced by this diverse group in all spheres of life was of course exacerbated during the various stages of lockdown. This despite the fact that the United Nations reported at the beginning of the pandemic, that, worldwide, persons with disabilities 'are disproportionately impacted by the COVID-19 outbreak', and government or non-government responses must not undermine the fundamental human rights of persons with disabilities (overtly or otherwise), as indicated in international commitments.¹⁷⁹ The South African Government's

¹⁷⁵ National Department of Health. (2019). South African Demographic and Health Survey 2016: Report. Pretoria: National Department of Health. URL: <https://dhsprogram.com/pubs/pdf/FR337/FR337.pdf>.

¹⁷⁶ <https://www.dailymaverick.co.za/article/2021-07-05-vulnerable-but-overlooked-the-covid-19-vaccine-plight-of-people-with-disabilities-in-south-africa/>

¹⁷⁷ South Africa has been a signatory to the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD) since 2007.

¹⁷⁸ The Constitution of the republic of South Africa, 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. It should be noted that despite activism by various disability rights groups South Africa does not have separate legislation dealing with disability. See also the White Paper on the Rights of Persons with Disabilities (DSD 2016).

¹⁷⁹ United Nations. 2020. COVID-19 Outbreak and Persons with Disabilities. URL:

response to the dire situation faced by many persons with disabilities, and especially the poor and women, did not adequately provide for the rights and needs of this large but significantly marginalised group.

Covid-19 also had a profound effect on persons with disabilities in South Africa, impacting their rights and wellbeing.¹⁸⁰ Reports from the initial four months of the pandemic (which is outside the scope of this second report), indicated that people with disabilities were generally being overlooked by disaster relief measures.¹⁸¹ Their needs were also not addressed in pandemic directives, that focused more on controlling the spread of the virus rather than focusing on what impact on specific groups.¹⁸² People with disabilities are also not specifically catered for in the National Disaster Management Framework, as their specific needs and circumstances are ignored.

Studies have found that during the pandemic disabled people were at higher risk of food insecurity.¹⁸³ Mask-wearing is also challenging for people living with arthritis, Parkinson's disease, dementia or Alzheimer's, people living on the autism spectrum and people with speech issues.¹⁸⁴ Disabled children who could not access special facilities and schools regressed.¹⁸⁵ People with hearing impairments could no longer read lips with the masks on.

With the vaccine roll-out, many people with disability who have, for instance, weakened immune systems, have not been prioritized for vaccination. The fear of contracting the virus from their caregivers who also were not prioritized for vaccination increased mental distress.¹⁸⁶ Some care givers relied on public transport to get to work and struggled to get to work at the beginning. Later the changing of caregivers to relieve the on on-duty was a risk every time. Not all caregivers could get access to permits in the beginning.¹⁸⁷

People were also cut off from physiotherapy and rehabilitation services, as well as being isolated from friends due to the fear of the risk of contracting the virus.¹⁸⁸ Some people have been cut off from their

<https://www.un.org/development/desa/disabilities/covid-19.html>.

¹⁸⁰ {Hart, 2022 #1488}.

¹⁸¹ <https://www.dailymaverick.co.za/article/2021-07-05-vulnerable-but-overlooked-the-covid-19-vaccine-plight-of-people-with-disabilities-in-south-africa/> {Ned, 2020 #1489} for instance reports that at the beginning of the pandemic disabled people could not access food parcels as they could not access distribution points.

¹⁸² {Hart, 2022 #1488} 7.

¹⁸³ {Schwartz, 2019 #1491}.

¹⁸⁴ <https://www.dailymaverick.co.za/article/2021-06-20-people-living-with-disabilities-struggle-to-overcome-severe-disruptions-to-life-and-health-caused-by-the-pandemic/>

¹⁸⁵ <https://www.dailymaverick.co.za/article/2021-06-20-people-living-with-disabilities-struggle-to-overcome-severe-disruptions-to-life-and-health-caused-by-the-pandemic/>

¹⁸⁶ <https://www.dailymaverick.co.za/article/2021-07-05-vulnerable-but-overlooked-the-covid-19-vaccine-plight-of-people-with-disabilities-in-south-africa/>

¹⁸⁷ {Ned, 2020 #1489} 5.

¹⁸⁸ <https://www.dailymaverick.co.za/article/2021-07-05-vulnerable-but-overlooked-the-covid-19-vaccine-plight-of-people-with-disabilities-in-south-africa/>

caregivers who are not necessarily regarded as healthcare workers.¹⁸⁹

The Disaster Management Act makes no mention of persons with disabilities or disability-inclusive approaches to managing disasters. Furthermore, the inclusion of persons with disabilities as a specific vulnerable group under section 3.5 of the Implementation Matrix 2015-2030 of the White Paper on the Rights of Persons with Disabilities¹⁹⁰ has as yet not occurred. It is clear that at the onset of the pandemic South Africa was ill-prepared to accommodate and support persons with disabilities in terms of law and policy.

A survey conducted presents some of the economic and social well-being experiences and perceptions of people with disabilities during the pandemic. 1 857 respondents voluntarily participated in an online survey undertaken during July and August 2021. The majority of the participants were black South Africans (83%). Types of functional difficulties included vision, hearing, mobility, communication, self-care, concentration, and memory challenges. Respondents also reported upper-body immobility, lack of use of their hands, and experiences of anxiety or fear, stress, and depression. The study specifically aimed to reach individuals in order to hear their unique voices. Key findings included

1. inaccessible communications relating to Covid-19.
2. financial and employment challenges.
3. the experience of 'abnormal' events such as food insecurity.
4. increased inadequate access to transport and other essential services, and
5. the negative psychosocial impact of the pandemic.

The results of the study indicate that it is 'crucial for government to take an intersectional- and disability-inclusive approach in mitigating the impact of disasters and should be aware of the impacts of their mitigation regulations on vulnerable members of society', including PWD. Regulations focused mainly on hard science when controlling the spread of the virus and scant attention was paid to whether these regulations would have unintended impacts on certain groups, in this case persons with disabilities.

Recommendation: NDMF should consider how the needs of people with disabilities will be included to make sure that their specific needs and circumstances are considered when there is a disaster.

Based on the findings, many of them related to the human rights of PWD. the following recommendations were made:

1. **communication in all media formats must be improved to encompass the diversity of disability types.**

¹⁸⁹ <https://www.dailymaverick.co.za/article/2021-06-20-people-living-with-disabilities-struggle-to-overcome-severe-disruptions-to-life-and-health-caused-by-the-pandemic/>

¹⁹⁰ White Paper on the Rights of Persons with Disabilities, 2016. Government Gazette No. 39792; Government Notice No. 230, 9 March 2016. URL: https://www.gov.za/sites/default/files/gcis_document/201603/39792gon230.pdf.

2. disaster management and emergency planning laws and processes must be urgently worked on to become disability inclusive.
3. disability-inclusive baseline data is required over and above data on those who are social grant recipients.
4. there must be inclusive service provision across sectors.

Corruption

Changed procurement practices under the DMA

Under a state of disaster goods and services can be procured without following the normal processes required in the Public Finance Management Act 1 of 1999 and the Local Government: Municipality Finance Management Act 56 of 2003. This opened up the possibilities for inflation of prices, fraud and corruption.¹⁹¹

[add more information]

The Digital Vibes scandal

In September 2021, the South African public was apprised of a report by the Special Investigation Unit (SIU)¹⁹² implicating the Minister of Health and other officials in the National Department of Health in the irregular appointment of a company, Digital Vibes, for the provision of services in respect of a Covid 19 media campaign, financial misconduct, and fraudulent transactions. The report's detailed account of how the Minister, his family and officials in his department benefitted financially from the transactions came at a time when Covid-19 related corrupt activities were rife, causing the President and even the African Union to publicly condemn the ruthless and cynical exploitation of a disaster situation for personal gain. For more detail see interim report. The publication of the SIU report caused the Minister of Health to resign from his position and criminal investigations into the conduct of certain staff members were still ongoing at the time of writing.

However, another alarming incident relating to alleged corrupt transactions involving personal protection equipment was the execution-style murder in August 2021 of Babita Deokaran, the chief director of financial accounting in the Gauteng Department of Health who was gunned down when she dropped her child off at school. Following her death, it was confirmed that she had been a witness in an SIU investigation into the R332-million corrupt PPE deals in the department.¹⁹³ At the time of writing the incident was still under investigation.

This mafia-style killing is not an isolated incident in South Africa. Assassinations have become a

¹⁹¹ {Munzhedzi, 2021 #1494}.

¹⁹² Available at <https://s3.documentcloud.org/documents/21071320/presidential-report30-june-2021-digital-vibes.pdf> (accessed on 28 October 2021).

¹⁹³ Available at <https://www.dailymaverick.co.za/article/2021-08-24-whistle-blower-slain-after-dropping-her-child-at-school-siu-confirms-babita-deokaran-was-a-witness-in-the-r332m-ppe-scandal/> (accessed on 31 October 2021).

constant feature of South African politics over the last two decades and there is evidence that between 2000 and 2020 1,822 assassinations have taken place of which 404 (22%) were politically motivated.¹⁹⁴ Successful investigations and prosecutions in this department are dismally low which can be ascribed, more often than not, to the interlinkages between political patronage networks, organized crime and law enforcement agencies.¹⁹⁵

Case law

The De Beer case

The widely discussed – and criticized - De Beer judgment by the High Court, which featured in the initial country report, was appealed by the government in May 2021 and decided in July 2021. The High Court ruling was overturned by the Supreme Court of Appeal¹⁹⁶ on several grounds which in large part dealt with the misalignment between the scope and content of the pleadings and the High Court’s approach to the matter and the jurisprudential shortcomings of the constitutional litigation placed before the court. In order not to stray from the focus of the initial report on this matter, the current report will be confined to the rationality issue of the constitutional challenge. Apart from the jurisprudential importance of this issue highlighted in many cases regarding the constitutionality of the government’s Covid-19 measures, the ruling of the Supreme Court of Appeal also provides guidance on how litigants should approach constitutional challenges against government measures. Addressing this matter, the Court commenced by stating as follows:

‘Constitutional questions ought to be approached by litigants and courts alike with the appropriate degree of care. The Constitutional Court has repeatedly warned that constitutional attacks on the validity of legislation must be pleaded explicitly and with specificity to enable the State to know what case it has to meet and to adduce the evidence necessary to do so’.¹⁹⁷

Applying this standard, the Court was critical of what it called the applicants’ (in the High Court, respondents in the appeal case) fleeting and unspecific references to violations of the Bill of Rights caused by the government’s regulations¹⁹⁸ without mentioning each specific regulation sought to be impugned, the constitutional right that was alleged to be violated, and how the regulation allegedly

¹⁹⁴ Available at <https://www.dailymaverick.co.za/article/2021-10-26-targeting-of-three-women-for-assassination-shows-how-violence-is-shaping-electoral-politics/> (accessed on 31 October 2022).

¹⁹⁵ See for instance G Ardé *War Party: How the ANC’s political killings are breaking South Africa* (2020); C Dolley *To the wolves: how traitor cops crafted South Africa’s underworld* (2021).

¹⁹⁶ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Others*, Supreme Court of Appeal, Case no 538/2020 (1 July 2021).

¹⁹⁷ *Ibid* para 95.

¹⁹⁸ *Ibid* para 98.

infringed the right in question.¹⁹⁹ Hence, the case put forward by the applicants “was wholly inadequate”, with “no cognisable case to answer” and lacking “sufficient specificity, clarity and supporting admissible evidence so that the functionary or repository of power knows the case that has to be met”.²⁰⁰

The pleadings in respect of the rationality issue suffered from the same defects. As the Court pointed out, the founding affidavit failed to disclose a cause of action based on the alleged irrationality of the regulations nor was any cognizable attack raised.²⁰¹ It is this issue that lies at the heart of the criticism leveled against the High Court’s treatment of the rationality test, which was dealt with in the interim report, and which the Supreme Court of Appeal also relied upon to find against the High Court judgment, even if it is assumed that a rationality attack was properly before the court, which the High Court seems to have believed. In such an instance, the Supreme Court of Appeal pointed out, the High Court was duty bound to assess each of the regulations against the purpose for which it was adopted and to determine whether a rational link between the measure and its objective to curb the spread of the virus could be established. Instead, the High Court strayed into the proportionality test when it embarked upon a comparative exercise to determine whether some other measure might achieve a better result than the measure in question.²⁰² See interim report for more details on this issue.

The Tourism Fund case

This matter involved the creation of a Tourism Relief Fund to mitigate the impact of the Covid pandemic on small businesses in the tourism industry. Acting under the DMA the minister issued a direction providing for a race-based distribution of funds by resorting to section 10(1)(e) of the Broad-Based Black Economic Empowerment Act 53 of 2003. This provision obliges government to determine criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment. This was unsuccessfully challenged before the High Court in 2020. See interim report for more details.

The matter went on appeal in 2021 and the High Court ruling was overturned by the Supreme Court of Appeal.²⁰³ The government’s case was based on the submission that it was bound by statute to apply the eligibility criteria provided for in the BBBEE Act in distributing the relief funds and that for this reason the government’s decisions in this regard were not susceptible to a legal challenge by the applicants. This caused the matter to be determined on the correctness or otherwise of the Minister’s interpretation of the BBBEE Act.

Relevant for the Court’s analysis in this regard was the difference in objectives for which the DMA and

¹⁹⁹ Ibid para 99.

²⁰⁰ Ibid para 100.

²⁰¹ Ibid para 102.

²⁰² Ibid paras 104 – 106.

²⁰³ *Afriforum NPC v Minister of Tourism and Others; Solidarity Trade Union v Minister of Small Business Development and Others* (499/2020; 498/2020) [2021] ZASCA 121 (22 September 2021).

the BBBEE Act, respectively, were enacted. Since it was clear that the two pieces of legislation pursued different objectives, the well-established principle that a power given for a specific purpose may not be used to secure another (ulterior) objective, applies.²⁰⁴ In other words, grants determined to further a DMA objective cannot be used to further a BBBEE Act objective.²⁰⁵ Citing constitutional court precedents, the Supreme Court of Appeal concluded that:²⁰⁶

When a person exercising public power has committed themselves unequivocally to a basis for their authority to exercise that power, they stand or fall by that choice. They are, generally speaking, not free to rely on some other source of empowerment which may enable them to do what they have purported to do.

The Minister therefore erroneously believed that she was bound to apply the eligibility requirements of the BBBEE Act to the DMA-based Tourism Fund, which, according to the Supreme Court of Appeal constituted a “material error”, and which caused the Minister to fail to apply her mind to the criteria she was called upon to apply under the DMA.²⁰⁷ Following the ruling of the Supreme Court of Appeal, the government indicated its intention to appeal the matter to the Constitutional Court.

The suspension of alcohol sales case

Among the range of measures government adopted in response to the Covid-19 pandemic the suspension of alcohol sales was arguably one of the most controversial measures. The justification for this intervention was mainly based on the argument that the consumption of alcohol (read: *irresponsible* consumption of alcohol), especially over weekends, contributed to road accident and physical violence casualties which increased the pressure on the already overburdened medical facilities. The counter-argument by the alcohol beverages industry was that the government is not only losing out on billions of tax revenues, but the measure has caused job losses of staggering proportions in a country with extraordinary high levels of unemployment. Furthermore, it is a matter of common knowledge that the measure was water on the mill for illicit alcohol traders whose profit margins soared as a result of the lockdown measures.²⁰⁸

Aggrieved by the alcohol sales suspension, South African Breweries applied to the Western Cape High Court in July 2021 for relief to have the Minister’s decision reviewed and set aside.²⁰⁹ The basis of the relief was that the Minister acted *ultra vires* her powers under section 27 of the DMA when adopting the regulation suspending or limiting the sale of alcohol. Following established case law, the Court classified the Minister’s regulation-making power as administrative action in terms of the Promotion

²⁰⁴ Ibid para 46.

²⁰⁵ Ibid para 48.

²⁰⁶ Ibid para 49.

²⁰⁷ Ibid para 54.

²⁰⁸ See for instance <https://www.iol.co.za/weekend-argus/news/illicit-alcohol-trade-boom-as-industry-loses-billions-due-to-latest-alcohol-ban-b27d4da0-cf20-4baa-81c2-25e22c5c5fea> (accessed on 30 October 2021).

²⁰⁹ *South African Breweries (Pty) Ltd v Minister of Cooperative Governance and Traditional Affairs and Another* [2021] 4 All SA 189 (WCC).

of Administrative Justice (PAJA) Act 3 of 2000, to which the ultra virus rule applies, and not, as the Minister claims, an exercise of executive powers which would cause her decision not to be reviewable under PAJA.²¹⁰

In essence, the applicant's case was that the provision in section 27(2)(i) of the DMA, which authorizes the "suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area" does not empower the Minister to prohibit altogether the sale etc of alcohol, which is what the impugned regulation 29 does by using the term 'prohibit' as opposed to 'suspend' or 'limit'. Furthermore, regulation 29 contained no end date which means that the prohibition is indefinite, while, in contrast, a suspension or limitation is a temporary measure. As such regulation 29 was also in conflict with a cabinet decision to impose the alcohol sales ban for a two-week period only. This latter point was disallowed by the court since the applicant failed to raise the matter at the time of submitting their founding affidavit.²¹¹

Turning to the ultra vires argument, the court rejected the interpretation the applicant assigned to the wording of regulation 29 read with section 27(2)(i) of the DMA. The court reasoned that²¹²:

Parliament has specifically, by means of [section 27\(2\)\(i\)](#), given the power to the Minister to make regulations regarding the sale, distribution and transportation of alcoholic beverages in a national state of disaster. Whilst I agree that [regulation 29\(1\)](#) in its present form does not 'limit' the sale, dispensing or transportation of alcoholic beverages, it surely 'suspends' these activities. Section 27(2)(i) plainly gives the Minister the power to either 'limit' or 'suspend'. With this particular regulation, the Minister exercised her discretion, given the existing circumstances, not to simply limit as she did in the previous iterations of the regulations, where the sale and distribution of alcoholic beverages had been limited to certain hours of the day and certain days of the week (or in certain instances where on-site consumption had not been allowed).

Following the ordinary rules of interpretation, as in the above instance, the court also rejected the applicant's 'no time limit' argument as follows²¹³:

It is clear from a common understanding of the DMA, which only operates during a limited time under a state of national disaster, and for a period not longer than three months (unless extended by notice in the *Gazette*), that [regulation 29](#) cannot possibly be interpreted to mean that the sale, distribution and transportation of alcoholic beverages will remain in place for an indefinite period. The only sensible interpretation is that [regulation 29](#) 'suspends' the sale, distribution and transportation of alcoholic beverages for a specific period.

²¹⁰ Ibid para 24.

²¹¹ Ibid para 57.

²¹² Ibid para 62.

²¹³ Ibid para 64.

Conclusions and recommendation