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To cite this article: Ebenezer Durojaye & Robert Doya Nanima (2021) From *Muhammed and others* to *De Beer and others*: striking the balance between public health measures and human rights during Covid-19 era in South Africa, *Commonwealth Law Bulletin*, 47:1, 175-194, DOI: [10.1080/03050718.2020.1812100](https://doi.org/10.1080/03050718.2020.1812100)

To link to this article: <https://doi.org/10.1080/03050718.2020.1812100>



Published online: 01 Sep 2020.



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From *Muhammed and others* to *De Beer and others*: striking the balance between public health measures and human rights during Covid-19 era in South Africa

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This article evaluates the approach by the South African Courts concerning the constitutionality of the declaration of national disaster and the Covid-19 regulations. It sets the tone by evaluating the approach in Kenya in contrast with the South Africa position. A look at the rising tensions between human rights protection and public law informs this exercise. While Kenya uses a precautionary approach to uphold the constitutionality of the Curfew order, South Africa seems to oscillate between the proportionality and the rationality test. A call for clarity in the Court's reasoning on rationality is proposed.

1. Introduction

The world first got to know of coronavirus (Covid 19) in December 2019, when it rampaged the Chinese city of Wuhan causing many deaths. On 30 January 2020, the World Health Organisation (WHO) declared the outbreak of COVID-19 to be a Public Health Emergency of International Concern. About two months later, on 11 March 2020 the WHO recognised it as a pandemic. As at 15 May 2020, over 4 million people had been infected, with over 300,000 deaths.¹

The first reported case of Covid-19 in South Africa was made known on 5 March 2020, since then the pandemic has risen drastically with about 14,000 infected, 257 deaths and over 6000 recoveries as at 15 May 2020.² Thereafter, the government has adopted several measures to contain the pandemic. This has enabled it to have an integrated and coordinated disaster management mechanism that focuses on preventing and reducing the outbreak of the pandemic.

On 15 March 2020, the government declared a national state of disaster in terms of the Disaster Management Act,³ necessitating a national lockdown. Firstly, the government limited contact between persons who may be infected and

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¹European Centre for Disease Prevention and Control *COVID 19 situation update worldwide* (April 2020). <<http://www.ecdc.europa/en/gec>>. Accessed 22 June 2020. According to the World Health Organisation, Covid-19 is 'primarily transmitted from symptomatic people to others who are in close contact through respiratory droplets, by direct contact with infected persons, or by contact with contaminated objects and surfaces' See <<https://bit.ly/2EJS18o>>. Accessed 30 July 2020.

²Minster of Health Zweli Mkhize reports first case of Covid 19 <sacoronavirus.co.za>. Accessed 22 June 2020.

³Disaster Management Act 57 of 2002, Section 27.

South African citizens.⁴ As a result, all non-essential travels out of the Republic was prohibited.⁵ Also, all non-essential domestic travels, particularly by air, rail, taxis and bus was discouraged.⁶ Secondly, the government sought to minimise the risk of the spread of Covid-19 by limiting contact amongst groups of people.⁷ Effectively, the regulations prohibited gatherings of more than 100 people.⁸ All upcoming mass celebrations were prohibited and schools closed.⁹

Thirdly, the government strengthened its surveillance and testing systems.¹⁰ This was done through the identification of isolation and quarantine sites in each district and metro, and the improvement of capacity at all designated hospitals in all provinces.¹¹ The government also embarked on aggressive efforts toward increasing the capacity of existing contact tracing processes.¹²

More importantly, the government recognised various socioeconomic challenges such as the safety of children, loss of income by small business owners and informal traders, loss of jobs, and lack of adequate housing especially by the vulnerable population, including those who are homeless.¹³ It undertook to provide food and cash transfer and other palliatives to identified communities.¹⁴

While the lockdown was for an initial period of 3 weeks (25 March–16 April 2020), it was further extended to last until midnight on 30 April 2020. Thereafter, the government announced that the lockdown would be relaxed by allowing further activities to take place in phases. This has caused disquietude among some members of the population. Thus, many have threatened court actions to challenge the constitutionality of the lockdown. Two High Court decisions in *Muhammed Mohammed and others v The President of South Africa and others*¹⁵ and *Reyno De Beer and others v The Minister of Cooperative Governance and Traditional Affairs*¹⁶ are some of the few concluded cases to determine the constitutionality of the lockdown and the subsequent regulations in South Africa. It should be noted that at the time of writing this article, the Pretoria High Court had granted the

⁴Statement by President C. Ramaphosa on measures to combat Covid-19 epidemic (May 2020). <<https://bit.ly/35x79PB>>. Accessed 22 June 2020.

⁵Ibid.

⁶Government Gazette 43148, dated 25 March 2020, providing for the Disaster Management Act (57/2002): Regulations made in terms of Section 27(2) by the Minister of Cooperative Governance and Traditional Affairs.

⁷Statement by President C. Ramaphosa on measures to combat Covid-19 epidemic (May 2020). <<https://bit.ly/35x79PB>>. Accessed 22 June 2020.

⁸Ibid.

⁹Ibid.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid.

¹³Update by President C. Ramaphosa on measures to combat Covid-19 epidemic (May 2020). <<https://bit.ly/2SBI29e>>. Accessed 22 June 2020.

¹⁴SASSA provides food parcel relief (May 2020). <<https://bit.ly/3b6xBkg>>. Accessed 22 June 2020.

¹⁵*Mohamed and Others v President of the Republic of South Africa and Others* [2020] ZAGPPHC 120.

¹⁶*Reyno De Beer and others v The Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184 (2 June 2020).

Minister of Cooperative Governance and Traditional Affairs leave to appeal to the Supreme Court of Appeal.¹⁷

This article seeks to evaluate the approach by the South African Courts in dealing with the constitutionality of the declaration of national disaster and the Covid-19 regulations. It sets the tone by giving the approach of the Courts in other jurisdictions before engaging the South African position. Thereafter an evaluation of the decisions in *Muhammed* and *De Beer* is done to show South Africa's approach. At its core, the article makes sense of how the courts in all jurisdictions have dealt with three aspects. First, how they have balanced human rights and Public Health, secondly; how they have identified possible tensions that may arise in this balancing and thirdly; proposals on how to resolve them. By design, this article visits two high court decisions from East Africa- Kenya to be exact. A look at emerging jurisprudence shows that the reported cases from other East African countries like Uganda reveal that most of the reported cases have not contested the government's restrictions but rather sought to seek an order to carry on businesses like having corporate meetings.¹⁸ Kenya, however, has had litigation that has contested the constitutionality of the lockdown restrictions and their implementation. In principle, this is at par with the South African litigation that concerns the constitutionality of the declaration of the state of disaster and the regulations thereunder. To this end, the article evaluates the Kenyan decisions in *Law Society of Kenya v Inspector General of National Police Service*¹⁹ and *Joan Akoth and another v Micheal Owuor Osodo and others*.²⁰ This creates a juxtaposition of the position adopted by the South African courts. *Muhammed and De Beer*. Before an evaluation of the Kenyan experience is done, the contribution sets the scene on the balancing of rights and public health interventions.

2. Setting the scene: a balancing of rights and public health interventions

South Africa's Constitution of 1996 provides for a Bill of Rights that is expected to inform decisions by the courts.²¹ Besides, South Africa is a party to international human rights instruments that provide for various civil, political, socio-economic and cultural rights.²² This includes recognition of thematic human

¹⁷*The Minister of Cooperative Governance and Traditional Affairs v Reyno De Beer and others* [2020] ZAGPPHC 280 (30 June 2020).

¹⁸See decisions available at <ulii.org>. Accessed 31 July 2020. These include *Re: British American Tobacco (Uganda) Limited* [2020] UGHCCD 133, *Re: Stanbic Uganda Holdings Limited* [2020] UGHCCD 134, *Re: Uganda Institute of Banking and Financial Services* [2020] UGHCCD 152.

¹⁹*Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties)* [2020] eKLR.

²⁰*Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others; Law Society of Kenya & another* [2020] eKLR .

²¹The Constitution of the Republic of South Africa, 1996, Chapter 2.

²²The International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (ICCPR), The International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, African Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, (1982).

rights instruments that provide for the rights of religious groups, children, women, immigrants and other marginalised individuals.²³

Following the outbreak of the pandemic, South Africa alongside other countries has been called upon to avoid the suspension of the enjoyment of rights by its organs, but rather ensure that the rights are enjoyed albeit in a limited manner.²⁴ To appreciate this concept in the context of decisions, there is a need look at the bigger international picture concerning the balancing of rights.

Under international human rights law (IHIL), human rights may either be subjected to limitations or derogations.²⁵ This contribution takes a stand by design to emphasise the context of limitations because (as will be shown) this formed the conversation in *Muhammed Mohammed and others*. It will also be shown that in *De Beer*, the emphasis was on the rationality test. Concerning the right to religion, the International Covenant on Civil and Political Rights (ICCPR) engages limitations to the rights or the use of derogations under the derogations' clause.²⁶ Concerning the right to religion and the consequential limitations, the subsequent analysis is imperative. The ICCPR provides:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.²⁷

Emerging jurisprudence has emanated from the Human Rights Committee distinguishes between the freedom of thought, conscience, religion or belief on the one hand, and the freedom to manifest religion or belief on the other.²⁸ In addition, the jurisprudence does not allow any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice.²⁹ However, the General Comment on the Right to religion allows for restrictions on the freedom to manifest religion or belief on two grounds.³⁰ First, where the limitations are prescribed by law and secondly, where it is necessary to protect public safety, order, health or morals, or the fundamental rights

²³Convention on the Rights of Persons with Disabilities, (2007) 2515 UNTS 3, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000) *entered into force* Nov. 25, 2005. See also African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

²⁴Human Rights Watch 'Human Rights Dimensions of COVID-19 Response,' <<https://bit.ly/34MRRGn>>. Accessed 1 April 2020. See also Committee on Economic, Social and Cultural Rights (2020) 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights' E/C.12/2020/1.

²⁵A Zidar 'WHO International Health Regulations and human rights: from allusions to inclusion' (2015) 19(4) *The International Journal of Human Rights* 505–526, 506.

²⁶The ICCPR (n 22).

²⁷*Ibid.*, Article 18.

²⁸General Comment 24 on Article 18 of the ICCPR, CCPR/C/21/Rev.1/Add.6, para 3.

²⁹*Ibid.*, para 3.

³⁰*Ibid.*, para 8.

and freedoms of others.³¹ In *Victor Liven v Kazakhstan*, the Human Rights Committee reiterated two principles on the use of limitations under Article 18(3). First, the limitations have to be interpreted strictly, within the prescribed purpose, directly related to and proportionate to the specific predicated need. Secondly, the interpretation should be against the backdrop of ensuring that the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26.³² To this end, where the limitation includes a criminal sanction like imprisonment or a fine, the State has to show that this limitation is proportional to the legitimate purpose it seeks to serve.³³ The State should show the court that there is an objective standard that the limitation has to surpass following a subjective evaluation of the limitation and its purpose.

Another right that is closely related to the right to manifest one's religion is the right to freedom of expression.³⁴ The restrictions on the enjoyment of this right may be used to ensure that there is respect for the rights of others or to protect national security, public order, public health or morals.³⁵ As such, the expression in the form of manifestation of one's religion may be limited under the ICCPR if it is provided for by law, and it is necessary for the respect of the rights or reputations of others.³⁶

In its General Comment 34, the Human Rights Committee states that Article 19(3) of the ICCPR requires specific conditions for the imposition of the restrictions thereunder; (1) strict conformity to the tests of necessity and proportionality, (2) coupled with the purpose informing their prescription, and (3) directly related to the specific purpose.³⁷ The State has to justify such limitations to demonstrate the necessity of the restrictive measures for a particular purpose.³⁸

In addition to the ICCPR, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) provide specific conditions on the limitation of rights during emergencies.³⁹ They speak to both interpretative principles about limitation

³¹Ibid., para 8. See the ICCPR (n 22), Article 18(3).

³²*Victor Liven v Kazakhstan* CCPR Communication No. 2131/2012, para 9.3.

³³Ibid., para 9.4.

³⁴Articles 17, 18, 19, 21, 22 and 25 of the ICCPR expressly permit some form of restriction or limitation. For instance, freedom from discrimination under article 2 of the ICCPR, freedom from cruel, inhuman or degrading treatment under article 7 of the ICCPR may be limited. In addition, the right of children to special protection (article 24 of the ICCPR and article 3 of the CRC) and freedom from arbitrary interference with home, family, correspondence or reputation privacy (article 17 of the ICCPR) may also be limited.

³⁵The ICCPR (n 22), Article 19.

³⁶Ibid., Article 19(3).

³⁷Human Rights Committee, *General Comment* No. 34 on Article 19, CCPR/C/GC/34, para 22.

³⁸Ibid., para 28. In the Human Rights Committee Communication *Mukong v Cameroon* 458/1991, the HRC underscored that a detention will be considered arbitrary if it is devoid of a legal basis, discriminatory, or completely disproportionate to the legitimate aim to be achieved.

³⁹Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc E/CN.4/1985/4, Annex (1985), <https://bit.ly/2VitFbH> (accessed 4 April 2020).

clauses⁴⁰ and the use of derogations during a period of emergency.⁴¹ While the Siracusa Principles contain 14 principles, this contribution emphasises those concerning public health emergencies and interventions.⁴² According to the Siracusa Principles:

Public health may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.⁴³

In addition the Siracusa Principles state:

Due regard shall be had to the International Health Regulations of the World Health Organization.⁴⁴

This is an indication that public health may be used to limit other rights (including the right to religion) to deal with serious threats to the population for preventive and treatment purposes. While this wording offers some key insights on the limitations, the extent of the restrictions is not clearly stated. As such, one is left wondering whether it is a subjective or objective assessment by a government engaging the restrictions. It is argued that this leads one to apply the limitations in Article 18(3) of the ICCPR based on a legitimate objective, strictly necessary in a democratic society. Some scholars have argued that the State should use the least restrictive and intrusive means available that is neither arbitrary, unreasonable, nor discriminatory.⁴⁵ The questions of subjectivity or objectivity in the adopted approach still do arise.

In the wake of recent epidemics and pandemics like Ebola, Spanish flu, Avian Flu, the use of restrictive public health measures has been the adopted norm by various States.⁴⁶ These drastic national measures affect the enjoyment of civil and political rights like the right to freedom of movement and the right to life in the context of livelihood. Most socio-economic rights are not spared like the right to food and nutrition, access to health care, and education.

These public health interventions have led to an increase in domestic violence, agitation over the enjoyment of personal rights like the right to manifesting one's religion and the freedom of expression. Other socio-economic bottlenecks like high costs of living, unemployment and evictions also do arise. These challenges that follow the use of limitations create a tension between the enjoyment of the

⁴⁰Ibid., Part I.

⁴¹Ibid., Part II.

⁴²Ibid., Principles 1–14.

⁴³Ibid., Principle 25.

⁴⁴Ibid., Principle 26.

⁴⁵LO Gostin 'When terrorism threatens health: how far are limitations on personal and economic liberties justified' (2003) 55 Florida Law Review 1105–1170, 1105.

⁴⁶S Diego, S Maxwell 'Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles' <<https://bit.ly/2RNG714>>. Accessed 4 April 2020.

other rights and the continued application of public health measures.⁴⁷ As observed from some human rights principles stated above, states may be allowed to take steps and measures to limit rights in order to address public health emergency. However, in doing this there is a need to strike the balance between the measures taken and their implications for enjoyment of rights. It is thus instructive to evaluate whether and probably how the Court dealt with these tensions that arise from the use of limitations in the context of the right to religion.

3. An evaluation of Kenya's approach

Following Kenya identification of its first case of Covid-19 on 13 March 2020, it adopted a various measures to mitigate the spread of the pandemic. The main measure was the imposition of a night curfew under the Public Order Act.⁴⁸ Five key aspects speak to the nature of the order. It applies to the entire territory of the Republic of Application from 7:00 pm to 5:00 am from the 27 March 2020.⁴⁹ It is argued that this was a partial curfew subject to the specific hours. The order restricted public gatherings, processions and movements during the period of the curfew. The movement would only be allowed where one was in possession of a permit from a designated police officer.⁵⁰ The group of persons that was exempted from the restriction included service providers, personnel and workers identified in the schedule to the Order.

Other measures included restrictions on travel from countries with cases of Corona virus.⁵¹ Only Kenyan citizens and any foreigners with valid residence permits will be allowed into the country as long as they quarantined in a government designated quarantine facility or other facilities at their cost.⁵² The government and businesses shifted to working remotely except for essential services.⁵³ All congressional meetings, gatherings were banned.⁵⁴ At the time of passing the curfew order, Kenya had two cases of Covid-19.⁵⁵ As at 4 August 2020, Kenya's positive identification of Covid-19 cases stood at 22,597 confirmed cases with 382 deaths.⁵⁶ The subsequent section evaluates the judicial approach to the constitutionality and implementation of the Covid-19 Curfew Order.

⁴⁷S Diego, S Maxwell 'Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles' <<https://bit.ly/2RNG714>>. Accessed 4 April 2020.

⁴⁸This was referred to as the Public Order (State Curfew) Order, Legal Notice No. 36 of 2020.

⁴⁹Ibid., Rules 2 and 3. At the writing of this article the order had been extended for an additional 30 days from 27 July 2020. See <<https://bit.ly/3i62ZmY>>. Accessed 5 August 2020.

⁵⁰Ibid., Rules 4 and 5.

⁵¹See press statement <<https://bit.ly/2Ddw2q9>>. Accessed 5 August 2020.

⁵²Ibid.

⁵³Ibid.

⁵⁴Ibid.

⁵⁵Ibid.

⁵⁶World Health Organisation, Dashboard Kenya Covid-19 <<https://bit.ly/39XMiaH>>. Accessed 5 August 2020.

3.1. *Law society of Kenya v inspector general of national police service and others*

In the case of *Law Society of Kenya v Inspector General of National Police Service and Others (LSK)*, the petitioner sought an order to nullify the Curfew Order passed under the Public Order Act (POA) on the ground that it was unconstitutional as far as the enabling act dealt with fighting crime other than dealing with emergencies. It was argued that the emergencies were provided for in the Public Health Act (PHA) and any order for a curfew to deal with the pandemic had to be enacted under the provisions of this law. This contribution emphasises on the court's reasoning on the constitutionality of the curfew on the one hand and the constitutionality of the implementation of the order on the other hand.

In the resolution of the issue on the constitutionality of the Curfew Order, the Court believed that the PHA was duly mandated to be used in the management of emergencies but it did not operate in isolation.⁵⁷ It drew attention to section 16 of the PHA that allowed the application of other laws in the implementation of the law provided they were consistent with it. As such, as long as the application of the POA did not conflict with the provisions of the PHA, the former would complement the application of the latter. While this solved the problem of the constitutionality of the order, it did not solve the problem of its implementation that was marred with various human rights violations by the law enforcement officers.

The Court was alive to the principle that the object of the curfew order sought to achieve was not measurable.⁵⁸ This was informed by the absence of national data and statistics that the country would use to inform its decision. If anything the decision to institute a curfew was due to the data and statistics from the World Health Organisation (WHO) and the other countries that had been rampaged by the coronavirus.⁵⁹ The Court argued despite the absence of national statistics, neither did the respondents explain the rationale for the curfew nor the petitioners seek an interference with the discretion of the petitioner in implementing the curfew.⁶⁰ On this basis, the Court opted for a precautionary rule in light of the deadly effects of Covid-19 and the lack of national statistics in Kenya at the time of reporting the case.

The Court reiterated the precautionary rule that stated in instances of emergency, it is the duty of the State to take protective measures without having to wait for the reality and seriousness of these risks to be fully demonstrated or manifested. As this approach takes into account the actual risk to public health especially where there is uncertainty concerning the existence or extent of risks to the health of consumers.⁶¹ This is an indication that the weight of the decision lies on the discretion of the Court upon an evaluation of the facts. The Court reiterated that the precautionary approach is important as it offers insights into the use of primary prevention in public health practice.⁶² It appears that in the exercise of

⁵⁷LSK, para 112.

⁵⁸LSK, para 129.

⁵⁹Coronavirus <<https://bit.ly/2EJS18o>>. Accessed 30 July 2020.

⁶⁰LSK, para 129.

⁶¹LSK, para 130. See also *Republic v Minister and 3 others Exparte Langat and 27 Others (Exparte Langat)* [2018] eKLR, para 126, 128.

⁶²LSK, para 131; *Exparte Langat* para 129.

the precautionary principle there is need to ensure that the restrictive measures that are identified are both objective and non-discriminatory. Based on the precautionary principle, the Court found no fault on the part of the government for enforcing the precautionary and restrictive measures to mitigate the spread of the coronavirus. It however, advised that the curfew order required retooling and remodelling to achieve the objective of ensuring public health other than fighting crime.⁶³

Before moving away from this case, the Court's approach to balancing human rights and public health, dealing with possible tension that arose and engaging the possible solutions; needs to be hinted on. Concerning the balancing of human rights and public health, it is argued that the Court validated the use of the POA as the parent act that informed the enactment of the Curfew Order as a complementary measure to the application of the PHA on matters of emergencies.

The Court identified various tensions in the balancing of the rights and issues of public health. This included a balancing of the literal rule and the purposive rule of statutory interpretation in addressing the constitutionality of a law; the tension between a constitutionally or statutorily sound law and its illegal implementation and balancing between the proportionality and the precautionary rule. It is clear from the foregoing that in the resolution of the tensions, the Court examined the constitutionality of the law establishing the curfew as informed by rules of statutory interpretation, and had recourse to a precautionary approach in the wake of a disastrous emergency. Besides, the Court called for public health measures to be practically applied to avoid excesses or abuses of the rights of an individual.

3.2. *Joan Akoth Ajuang and another v Micheal Owuor Osodo and others*

In a similar case of *Joan Akoth Ajuang and another v Micheal Owuor Osodo and Others (Okoth)*, the petitioners contested the rushed burial of their loved one by the respondents who were sub-government and government officers. They argued that they rushed the burial without according the deceased the cultural norms of the Luo community in Kenya. The petitioners argued that deceased had a right to human dignity, and the surviving relative too, had a right to enjoy their culture and this extended to exercising their cultural norms and beliefs concerning the burial and sendoff of the deceased.

The petitioner sought orders that the Court finds that the respondents; (1) violated the right to the human dignity of the deceased under the Luo culture, national and international law; (2) the deceased be exhumed, an autopsy carried out to ascertain the cause of death and reburied- all at the cost of the Ministry on health and (3) the cost to be borne by the respondents.⁶⁴

The Court conceptualised the right to human dignity of a deceased by giving examples where the deceased's wishes were respected in aspects like testamentary disposition. It hastened to add that while a deceased may not have any proprietary rights, he does not cease to be a human upon death.⁶⁵ to this end, the deceased

⁶³LSK, para 132–133.

⁶⁴*Joan Akoth Ajuang and another v Micheal Owuor Osodo and Others* Siaya High Court Constitutional Petition 1 of 2020, para 1(a)-(f).

⁶⁵*Okoth*, para 173.

remained a human being who was entitled to human dignity despite his passing.⁶⁶ Consequently, the surviving relatives retained the right to participate in their culture as underscored in articles 44(1) and (2) of the Constitution. The Court reiterated the deceased's right to a linguistic group with a right to enjoy culture, use a language and to form, join and maintain the cultural and linguistic association with others.⁶⁷

The other question was whether these rights would be enjoyed during the Covid-19 outbreak. The Court established that the WHO Guidelines on the Management and Handling of Dead Bodies allowed a family and friends to view the body following their customs.⁶⁸ Besides, a person preparing the deceased had to wear gloves to avoid physical contact and any clothes used during the preparation had to be removed and washed immediately.⁶⁹ It was also established that a minimum number of persons would be involved and would observe at a minimum distance of 1 metre from the body.⁷⁰ It was further established that the Public Health (Prevention, Control and Suppression of Covid-19) Rules,⁷¹ required burial between the hours of 0900 am and 1500 pm with an attendance of not more than 15 persons.⁷² An evaluation of the national and WHO regulations is an indication that the rushed burial of the deceased at night in a shallow grave was not saved by the WHO regulations or the national Covid-19 Rules. The extent to which the court would grant the remedies now, we turn.

The Court still used a precautionary approach as laid out in *Exparte Langat* and discussed above. While it recognised the deceased's right to human dignity and the surviving relatives' right to culture, it reiterated the dangers in exhuming the deceased, conducting an autopsy and having a decent burial. The Court called for the use of precaution especially where there was uncertainty concerning the health risks of some actions.⁷³

It is also clear from the foregoing case that the Court balanced the constitutional rights of the deceased and the living and public health by establishing the existence of the right to the human dignity of the deceased and the right to culture and evaluating the extent of their enjoyment under the WHO Guidelines and the national Covid-19 Rules. The tensions that are evident in the balancing these rights related to the extent of enjoyment of the right, the extent of enjoyment of the remedy in line with the dangers in exhuming the deceased. The resolution remains in the application of the precautionary principle to avert unknown dangers of Covid-19 and the deceased. It is now imperative to establish in light of Kenya's precautionary approach to Covid-19 cases, how South Africa has engaged its decisions.

⁶⁶*Okoth*, para 173.

⁶⁷*Okoth*, para 178–179.

⁶⁸*Okoth*, para 193.

⁶⁹*Okoth*, para 193.

⁷⁰*Okoth*, para 193.

⁷¹Public Health (Prevention, Control and Suppression of Covid-19) Rules, Legal Notice 49 of 2020, see also *Okoth*, para 194.

⁷²Public Health (Prevention, Control and Suppression of Covid-19) Rules, Legal Notice 49 of 2020, Rule 8. *Okoth*, para 194.

⁷³*Okoth*, para 201, 248, 259 and 278.

4. An evaluation of South Africa's approach

4.1. *Muhammed v President of South Africa*

The Applicants, who are devout Muslims, together with others brought an urgent application before the High Court in Pretoria to challenge the constitutionality of some of the Regulations made under the Disaster Management Act, which tend to limit some of their fundamental rights. They alleged that the Regulations have prevented them from exercising their religious life, including their daily prayers. They also claimed that their rights to liberty, dignity and freedom of association are impugned by the Regulations. The Applicants claimed that daily prayers are important tenets of Islam and that inability to congregate for prayers would lead to sin thereby undermining their right to religion. It was further alleged that the Regulations seemed to criminalise an otherwise daily compulsory religious practice thereby forcing them to make a 'Hobson's choice'⁷⁴ between disobeying what they regard as a fundamental tenet of their belief' and adhering to the law.⁷⁵

The Applicants claimed that this case goes beyond the right to association as guaranteed in section 31 of the South African Constitution, but intercepts with other rights such as the right to practice one's religion, the right to freedom of association, freedom of movement, freedom, the right to life and the right to dignity.⁷⁶ They further claimed that since the government can grant certain exceptions for some activities, it should be able to do the same for purposes of congregational worship as well.

The Applicants proposed that prayers should be allowed in mosques subject to a limited number of people. They therefore, asked that Regulation 11B(i) and (ii), read with the definition of the word 'gathering' in the Regulations issued under Section 27 of the Disaster Management Act was too broad and excessive, a threat to human rights and therefore be declared unconstitutional. The Applicants further asked for an order directing the Minister in charge to make an exception for Muslims to congregate for prayers subject to supervision.

In response to the Applicants, the Respondents claimed that the measures taken by the government to limit the enjoyment of rights were necessary and under section 36 of the Constitution, They noted that in a public health emergency as evidenced by the devastating effects of Covid-19, the Court must strike the balance between allowing free movement and assembly with the inherent danger of being exposed to the pandemic.

In its judgement, the Court held that the Regulations made subject to the provision of the Disaster Management Act were aimed at ensuring that the government minimize the devastating impact of Covid-19 on the lives of the people. While some of the measures taken might seem burdensome and inconvenient for the people, they remain the most viable options open to the government in the face of threats to health and lives posed by the pandemic. While the Court noted that some of the measures taken by the government may indeed interfere with the human rights of the people, this interference is justified under section 36 of the

⁷⁴The so-called 'take it or leave it' principle.

⁷⁵For instance; praying in congregation at mosque. In this they admit that their view is not the majority view of Muslims.

⁷⁶These rights are all guaranteed in the Constitution 1996's Bill of Rights.

Constitution. According to the Court, given the danger posed by the pandemic to lives and health of the people ‘the regulations must strike a delicate balance between limiting social contact and possibly allowing the virus to spread on the one hand and meeting the short- and long-terms needs of people within South Africa on the other’.⁷⁷ In achieving this balance, the Court referred to the Constitutional Court’s decision in *Home Affairs v NICRO* where it was affirmed that the limitation analysis:

[C]alls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data.⁷⁸

On this basis, the Court held that the limitations on rights imposed by the Regulations are reasonable and justifiable under the Constitution. The Court further held that in the spirit of *Ubuntu* (humanness), which requires that we must consider the interests of others much as ours, the Applicants ought to be more concerned with the likely consequences of their actions and requests for the population as a whole. The Court affirmed that allowing for congregational prayers at this crucial time would not be in the interest of the public. It noted that in the spirit of *Ubuntu*, virtually everyone in the country has been called upon to make one sacrifice or another to stem the spread of the pandemic.⁷⁹ Therefore, the Applicants are no exception and could not claim to have been more inconvenienced than others.

In rejecting the Applicants’ application, the Court reasoned that the steps taken by the government under the Regulations and the Disaster Management Act were necessary and important in stemming the spread of Covid-19. Therefore, they are justifiable and reasonable in the circumstances and in accordance with the Constitution. It suffices to note that in balancing the rights of the applicants and the public health interventions, the Court correctly identified the right to freedom of religion. However, for the sake of mitigating the spread of the pandemic, the court uses the limitation clause to find that the regulations were reasonable and justified in ensuring that the right to religion had to be limited. The tension was evident in the enjoyment of the right to religion and the need to ensure public health. The resolution was in the use of the limitation clause to find that the limitation was rationally connected to the purpose they sought to achieve.

4.2. De Beer and others v minister of cooperative governance and traditional affairs

This application was brought for a declaration that the national state of disaster, the promulgated regulations be declared unconstitutional, unlawful

⁷⁷*Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC), para 37.

⁷⁸*Ibid.*

⁷⁹*Ibid.* para 75.

and invalid.⁸⁰ In the alternative, the applicants also sought an order that all gatherings be declared lawful and allowed subject to certain conditions.⁸¹ They further sought an order that all businesses, services and shops be allowed to operate subject to reasonable precautions like using masks, gloves and sanitisers.⁸² It should be noted that while in *Muhammed*, the applicants recognised the rationality and reasonableness in the use of the Covid-19 Regulations, they sought an exception to the application of the rules. In *De Beer*, the applicant contested the rationality and reasonableness of the Covid-19 regulations arguing that the same was invalid.⁸³ Also, in *Muhammed*, the judge disagreed with the applicants' assertion that the regulations were reasonable and justified and stated that it was the duty of every good meaning South African to make sacrifices for the greater good.⁸⁴ Just like in *LSK*, the main issues revolved around the constitutionality of the lockdown on one hand and its implementation on the other hand. The issues were whether (1) the declaration of the national state of disaster was unconstitutional, (2) whether the regulations were unconstitutional.

The court found that the procedure to be followed before a declaration was made required that the national disaster management centre had an obligation to assess the magnitude and severity of the disaster.⁸⁵ This would be followed by the publication of the declaration of the National State of Disaster by notice in the gazette.⁸⁶ The Court found that the Minister's reliance on the magnitude and severity of the disaster, the declaration of the outbreak as a pandemic by the World Health Organisation informed the rational declaration of the state of disaster. Other reasons that the Court relied on included the classification of the outbreak as a pandemic by one Dr Tau, the need to align existing measures by government departments and the recognition of existing special circumstances calling for the making of this declaration.⁸⁷ The Court reiterated that while the declaration of the state of disaster was constitutionally valid, it gave the Minister lots of powers to make regulations to extensively affect the rights of people.⁸⁸

The point of departure from Kenya's precautionary approach was in the use of the rationality approach. The Court found that the rationality test evaluated the relationships between the means employed and whether it was rationally connected to the outcome or the achieved purpose.⁸⁹ The Court clarified that the rationality test was not about what other means would be used to arrive and the desired means but rather whether the current means used was rationally connected

⁸⁰*Reyno Da Wid De Beer and two Others v the Minister of Cooperative Governance and Traditional Affairs (De Beer)* Gauteng High Court Constitutional Application 21542 of 2020, para 3.1.

⁸¹*De Beer*, para 3.1.

⁸²*De Beer*, para 3.1.

⁸³*De Beer*, paras 3.5–3.6.

⁸⁴*Muhammed*, paras 75, 77.

⁸⁵*De Beer*, para 4.1–4.6.

⁸⁶*De Beer*, para 4.7.

⁸⁷*De Beer*, para 4.10.

⁸⁸*De Beer*, para 4.13.

⁸⁹*De Beer*, para 6.2–6.4.

to the purpose for which the power was conferred. The Court then engaged a subjective evaluation of each regulation and whether it was rational in achieving the desired outcome.

The subjective evaluation established that number of regulations did not meet the rationality test. The court gave an example of the irrationality and the unreasonableness in restricting movement yet upon the demise of a Covid-19 subject, the same regulations allowed up to 50 people from any part of the country to attend the burial of the deceased.⁹⁰ It was argued that this led to the stripping of the human dignity of erstwhile hardworking people who engaged with a few people daily in a bid to fend for their families.⁹¹ The only provisions, where rationality was linked to the purpose related to the closure of educational institutions, the prohibition against evictions, initiation practices and the closure of night clubs and fitness centres.⁹²

The government has appealed against this judgment and it will be interesting to know the outcome of the appeal. While some commentators have hailed the decision as significant, others have cautioned about its likely implications as it could amount to judicial overreach.⁹³

Moreover, it is possible for the measures adopted to be reasonable but their implementation may be excessive and injurious to the people. There have been instances, where security agents charged with implementing the lockdown resorted to excessive use of force to ensure compliance.⁹⁴ Also, States are beginning to use technology and other methods as a form of contact tracing for Covid-19, thereby infringing the right to privacy.⁹⁵ In some countries, new laws are to be considered to give more powers to the government about containing future pandemics. In Nigeria, a Bill before the legislature known as the 'Infectious Diseases Control Bill' includes provisions that will allow the government to forcibly vaccinate individuals and quarantine anyone suspected to have contracted an infectious disease.⁹⁶

⁹⁰*De Beer*, para 7.1–7.2.

⁹¹*De Beer*, paras 7.2–7.4, 7.9, 7.11 to 7.12. As such.

⁹²*De Beer*, para 7.14. Save for Regulations 36, 38, 39 (2)(d) and (e) and 41, the rest of the regulations were declared unconstitutional. The declaration of invalidity was suspended for such a time until the Minister reviewed, amended and published the regulations in the Gazette. See para 9.

⁹³See for instance, P De Vos 'Lockdown regulation judgment is flawed, but so is government's "means justifies the ends" defence' *Daily Maverick* 4 June 2020 <<https://www.dailymaverick.co.za/opinionista/2020-06-04-lockdown-regulation-judgment-is-flawed-but-so-is-governments-means-justifies-the-ends-defence>>. Accessed 22 June 2020. see also, P Balthazar 'A disturbing example of judicial overreach' *Daily Maverick* 3 June 2020 <<https://www.dailymaverick.co.za/opinionista/2020-06-03-a-disturbing-example-of-judicial-overreach/>>. Accessed 18 June 2020.

⁹⁴K Koko, 'Metro cop, security guard arrested after Vosloorus man killed in lockdown shooting' *The Star Newspaper* (March 30, 2020). <<http://www.iol.co.za>>. Accessed 22 June 2020.

⁹⁵The World Embraces Contact-Tracing Technology to Fight Covid-19 (May 2020). <<https://bloom.bg/3cKugsT>>. Accessed 22 June 2020.

⁹⁶See J. Kwen, 'Why criticism swells around Infectious Diseases Control Bill' *May Business Day Newspaper* 10 My 2020. See also Infectious Diseases Bill conceived in

Commentators have cautioned that measures being adopted by States to curb the spread of Covid-19 should be viewed with caution as they are susceptible to abuse.⁹⁷ In a more radical view, others have argued that under no circumstance should human rights be compromised for the sake of protecting public health.⁹⁸ Indeed, some international and regional human rights bodies have expressed concerns with the measures being adopted by States to curb the spread of the pandemic. For instance, the CESCRC has warned that efforts by States to combat Covid 19 must not undermine the enjoyment of socioeconomic rights.⁹⁹ Also, the African Commission on Human and Peoples' Rights has noted that while measures such as lockdown may be expedient in curbing the spread of Covid-19, their application must be consistent with human rights guaranteed in the ACHPR.¹⁰⁰ It is interesting to note that the Court never made any reference to international norms on this issue, despite the provision of the Constitution, which requires the courts to consider international law while interpreting the Bill of Rights.¹⁰¹

If there is no check on the use of powers to curtail the pandemic, this might result in an authoritarian executive with wide powers capable of threatening the enjoyment of human rights. Such a situation requires a vigilant and vibrant judiciary to ensure that people's rights are not trampled upon with impunity all in the name of containing a public health emergency. As rightly observed by the US Supreme Court in *Jacobson* case, the application of adopted measures by the State to limit rights must not lead to injustice, oppression or absurd consequences.¹⁰²

5. Tension between public health and human rights

All the cases discussed here clearly bring to the fore again the potential tension that arises from a balancing of public health responses to a pandemic on one hand and enjoyment of human rights on the other. This tension has existed for many years and requires a delicate balance.¹⁰³ It is argued that public health policies

public interest – Reps ... to be subjected to public hearing before final passage (May 2020). <<https://www.nils.gov.ng/news/view/485>>. Accessed 22 June 2020.

⁹⁷F Vicente and R Benítez 'Hercules Leaves (But Does Not Abandon) the Forum of Principle: Courts, Judicial Review, and COVID-19' International Journal of Constitutional Law Blog <<http://www.iconnectblog.com/hercules-leaves-but-does-not-abandon-the-forum-of-principle-courts-judicial-review-and-covid-19/>>. Accessed 22 June 2020.

⁹⁸GJ Annas 'Blinded by Bioterrorism: Public health and Liberty in the 21st Century' (2003) 3(5) Health Matrix 33–56, 33.

⁹⁹Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, E/C.12/2020/16 April 2020.

¹⁰⁰African Commission on Human and Peoples' Rights Press Statement on human rights based effective response to the novel COVID-19 virus in Africa <<https://www.achpr.org/pressrelease/detail?id=483>>. Accessed 22 June 2020.

¹⁰¹Constitution (n 21), Section 39.

¹⁰²Anonymous 'Toward a Twenty-First Century *Jacobson v Massachusetts*' (2008) 121(7) Harvard Law Review 1820–1841, 1820.

¹⁰³REG Upshur 'Principles for the justification of public health intervention' (2002) 93(2) Canadian Journal of Public Health 101–103 generally.

and actions should always be subjected to scrutiny, as they are potential threats to the enjoyment of rights.¹⁰⁴ This is because public health aims to protect the community or public at the expense of safeguarding individuals' rights. An outbreak of epidemics and pandemics poses grave threats to the lives and well-being of the people.

The right to health is guaranteed in many international and regional human rights instruments, including the International Covenant on Economic, Social and Cultural Rights¹⁰⁵ and the ACHPR.¹⁰⁶ The Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 14 has noted that the enjoyment of the right to health is dependent on other rights such as privacy, liberty, dignity, non-discrimination and life.¹⁰⁷ The Committee further notes that States are obligated to respect, protect and fulfil the right to health. This requires States to restrain from interfering with the enjoyment of these rights, ensure that third parties do not interfere with the enjoyment of this right and adopt legislative and other measures towards the realisation of the right. As part of the obligations of States to realise the right to health, the Committee notes that States must take effective measures to address the epidemic and infectious diseases.¹⁰⁸

A public health emergency such as Covid-19 poses serious threats to the people and can undermine not only the enjoyment of the right to health but also lead to catastrophic consequences for society. Thus, addressing it requires decisive measures from the government, which may tend to limit the enjoyment of one's fundamental rights.¹⁰⁹ This is sometimes justified by the principle of social compact or paramount necessity. For instance, in *Jacobson v Massachusetts*,¹¹⁰ the conviction of Jacobson for refusing vaccination against smallpox was upheld on the basis that a State has the right to protect itself against an epidemic that threatens the safety of its members. Jacobson's argument that his right to liberty would be violated if forcibly vaccinated was rejected by the Court based on paramount necessity.

In recent times, the limitation of rights in times of public emergency has been recognized in human rights instruments such as article 4 of the International Covenant on Civil and Political Rights (ICCPR).¹¹¹ More importantly, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)¹¹² have

¹⁰⁴JM Mann, S Gruskin and GJ Annas (eds) *Health and Human Rights.: A reader* (Routledge, New York, 1999), pp. 11–18.

¹⁰⁵International covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3, Article 12.

¹⁰⁶African Charter on the Rights and Welfare of the Child, Article 22 (11 July 1990) CAB/LEG/24.9/49 (1990), Article 16.

¹⁰⁷CESCR General Comment No. 14: The right to Highest Attainable Standard of health (Art. 12), CESCR Document E/C. 12/2000/4 (May 2000). <<https://bit.ly/3e0hp6f>>. Accessed 22 June 2020.

¹⁰⁸*Ibid.*, para 16.

¹⁰⁹See LO Gostin 'Public Health Law: Power, duty, Restraint' (University of California Press and Milbank memorial Fund 2000), 21.

¹¹⁰*Jacobson v Massachusetts* 197 US 11 (1905) SC.

¹¹¹The ICCPR, (n 22).

¹¹²Siracusa Principles (n 39).

been adopted to deal specifically with limitation and derogation of rights. The limitation of rights is permitted where it is ‘... 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’.¹¹³

Furthermore, the Siracusa Principles advise on the need to balance human rights and public health restrictions. In principle, public health interventions may be adopted to limit certain rights to enable a State to contain threats to the health of the population, prevent disease or injury and provide care for the sick and the injured.¹¹⁴ As such, an application of the Siracusa Principles aids the balancing of restrictions and human rights in the containment of a pandemic.

In all the cases, the tensions are between ensuring human dignity and other constitutional rights on one hand, and public health on the other. Kenya approaches the balancing of human rights and public health by using a precautionary approach. This limits the court’s evaluation engagement of solution that offer adequate remedies to human rights violations. For instance in *LSK*, the court is greatly concerning with qualifying the curfew order, while in *Joan Okoth*, it empathises with the human rights violations to human dignity and culture but engages caution that defeats the enjoyment of the culture through ordering burial according to the Luo custom.

In South Africa, there is an identified trend in the engagement with the tensions that arise. In the *Mohammed* case, the tension which the Court addresses the right to exercise one’s liberty and religion in the face of the surging Covid –19 pandemic. In a bid to strike a balance between allowing the applicants to exercise their right to religion and the implications of this for the applicants and public at large, it finds that the right has to be limited to avert the spread of the coronavirus. This trend changes in the *De Beer Case* where the Court finds fault in the engagement of the rationality test, leading to a finding of constitutional invalidity for various regulations.

Besides the change in trend is also evident in the Court findings on the presence or absence of justifications. In *Muhammed*, the Court justifies the imposition of the lockdown as a means to curb the spread of Covid-19. The transition to the findings that the lockdown undermines human rights guaranteed in the Constitution, is after the evaluation of the regulations over time. It is clear that subject to the rationality test, various regulations do not pass the constitutional muster for want of rationality and reasonability.

As such, *De Beer* presents a shift from *Minister of Home Affairs v NICRO* which is followed in *Muhammed*. For purposes of context, In *Minister of Home Affairs v NICRO*, the Court stated:

A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily flow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient

¹¹³Ibid.

¹¹⁴Ibid. Principle 25.

importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may.¹¹⁵

In that case, the Constitutional Court did emphasise that in justifying the limitation of rights, the party relying on section 36 must lay all material facts and policy documents before the court to assist it in coming to an informed decision as to the legality of the limitation. However, it noted that in some situations, it might be impossible for parties to place all material facts before the court. It added that in such a situation it would still be ‘able to uphold a claim of justification based on common sense and judicial knowledge’.¹¹⁶ The Court admitted that the ultimate limitation of rights analysis requires balancing to be made. In this regard, the Constitutional Court noted:

In this process, different and sometimes conflicting interests and values may have to be taken into account. Context is all important and sufficient material should always be placed before a court dealing with such matters to enable it to weigh up and evaluate the competing values and interests in their proper context.¹¹⁷

In adopting the position of the Constitutional Court in the *NICRO* case, the Court suggests that the measures adopted by the government in response to COVID-19 are essential to contain the pandemic although they limit the enjoyments of rights.

The use of a case by case basis to evaluate the effectiveness of measures adopted by the government to limit human rights is taken in *De Beer*, where an evaluation of the regulations presents a finding on the extent of rationality. It is for this reason that in *De Beer*, the Court upholds the challenge to the constitutionality of the lockdown imposed by the government in the wake of COVID-19 pandemic. It is argued that the finding that some of the regulations adopted in furtherance of the state of emergency were unconstitutional and unlawful. In declaring the regulations permitting the lockdown unconstitutional, the Court noted that the measures were too stringent, interfered with the enjoyment of rights and could not be said to be proportionate.¹¹⁸ According to the Court,

The regulations promulgated in respect of Levels 4 and 3 in terms of the Section 27(2) of the Disaster Management Act by the Minister in a substantial number of instances are not rationally connected to the objectives of slowing the rate of infection or limiting the spread thereof.¹¹⁹

While on its face this decision seems progressive, it is still argued that the Court’s reasoning is somewhat problematic. The Court, without proper

¹¹⁵*Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC).

¹¹⁶*Ibid.* para 36

¹¹⁷*Ibid.* para 37.

¹¹⁸*De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 (2 June 2020).

¹¹⁹*Ibid.* para 9.3

explanation or analysis, declared some of the regulations unconstitutional. It is debatable for the Court to hold that there is no rational connection between the measures adopted by the government and the spread of COVID-19. It is on record that the restriction of movement using lockdowns has been adopted in most parts of the world as a vital tool to contain the pandemic and flatten the curve. Indeed, the World Health Organisation has affirmed the effectiveness of lockdown in slowing the spread of COVID-19.¹²⁰

In addition, the High Court of Pretoria granted the Minister of Cooperative Governance and Traditional Affairs leave to appeal to the Supreme Court of Appeal (the *COGTA* case).¹²¹ The leave to appeal was narrowed down to the ‘blanket’ declarations of invalidity.¹²² This referred to declaration of invalidity of the regulations promulgated in terms of section 27(2) of the Disaster Management Act 57 of 2002 which have not been expressly identified in the judgment in *De Beer*.¹²³ It is argued that following the tenor of the Court in *De Beer*, It is highly possible that the Supreme Court of Appeal will evaluate the bounds of both the rationality test and the proportionality test under section 36 of the Constitution 1996. It is interesting that the Court noted that other than the generalised grounds that Minister relied on for leave to appeal, there was no attack on the findings of irrationality concerning individual regulations.¹²⁴ While the Court granted the Minister leave to appeal, it advised that the Minister was still able to amend, review and publish the regulations. However, the recent publication of the level 3 Guidelines might have cured some of the defects in the level 4 guidelines as the country was opened up to more economic activities.

7. Conclusion

While Kenya takes on a precautionary test, South Africa’s jurisprudence seems to take on the rationality test- a practice that is evolving in its jurisprudence. This will be informed by the Supreme Court of the Appeal’s decision in *COGTA*. In the interim, the use of the rationality test unpacks the context of the regulations concerning the link between the rationale and the object sought. The exercise of the State’s powers to contain a pandemic will always raise concerns. A State’s decisive measures to save lives and curb the spread of a pandemic have to be weighed against an individuals’ rights. An attempt to strike this balance is not always an easy task. Notwithstanding, the court as the last hope for disadvantaged groups must retain its independence and role as a watchdog of the other arms of government. Where the measures adopted by a State are reasonable and justifiable, it might not be expedient for the court to interfere. However, excessive

¹²⁰The Guardian ‘Coronavirus: WHO warns against further lifting of lockdown in England <://www.theguardian.com/world/2020/jun/14/who-cautions-against-further-lifting-lockdown-england>. Accessed 22 June 2020.

¹²¹*The Minister of Cooperative Governance and Traditional Affairs v Reyno De Beer and others* [2020] ZAGPPHC 280 (30 June 2020).

¹²²*Ibid.*, para 11.

¹²³*Ibid.*, para 12.

¹²⁴*COGTA*, para 6.2. The regulations expressly mentioned in paragraphs 7.1–7.10 of the *De Beer* case were regulations 33(1)(e), 34, 35(1), 35(3), 39(2)(e), 39(2)(m) and 48(2).

implementation measures that threaten individuals' rights, make it prudent for the court to act. Moreover, the legislature must remain vigilant in playing oversight role over the executive to prevent the executive from becoming a 'monster.' It is safe to state that where the Court engages a rationality test, it ought to give specific reasons for holding that a particular regulation is irrational, especially in the wake of the fact that is known globally that social distancing sanitation mitigates the spread of the coronavirus.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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