IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no.: 6118/2020

In the matter between:

BRITISH AMERICAN TOBACCO SOUTH AFRICA (PTY) LTD	First Applicant
JT INTERNATIONAL SOUTH AFRICA (PTY) LTD	Second Applicant
MELINDA FERGUSON	Third Applicant
KEOAGILE MOLOBI	Fourth Applicant
LIMPOPO TOBACCO PROCESSORS (PTY) LTD	Fifth Applicant
SOUTH AFRICAN TOBACCO TRANSFORMATION ALLIANCE NPC	Sixth Applicant
BLACK TOBACCO FARMERS ASSOCIATION	Seventh Applicant
SUIDER AFRIKA AGRI INISIATIEF NPC	Eighth Applicant
SOUTH AFRICAN INFORMAL TRADERS ALLIANCE	Ninth Applicant
LA TOSCANA INVESTMENTS CC, t/a J CALE TOBACCONISTS	Tenth Applicant

and

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
NATIONAL CORONAVIRUS COMMAND COUNCIL	Third Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 South Africa is in the grip of the worldwide Covid-19 pandemic. In order to deal with the pandemic, the first respondent ("the Minister") has declared a national disaster[1] and has made regulations ("the Regulations") in terms of the Disaster Management Act 57 of 2002 ("the Act").[2]

2 In some respects, the lockdown in this country resembles the lockdown in other countries. However, that is not the case when it comes to smoking. South Africa is the only country in the world that prohibits the sale of tobacco and vaping products to consumers during lockdown.[3] The prohibition is contained in Regulation 45.[4]

What this case is about

3 This case is not about <u>whether</u> it is prudent for adults to smoke during the pandemic.[5] It is about <u>who</u> should make the decision as regards whether it is

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1 Notice No. 313 of 15 March 2020: page 62.

2 The currently operative regulations are at pages 63, 99 and 1435 of the pleadings bundle.

3 At the time when the replying affidavit was filed, a similar prohibition existed in Botswana (replying affidavit para 49.5 page 1025) but this has subsequently been lifted (Joubert para 7 page 1840).

4 Page 113, as amendede by page 1437.

5 Dr Egbe misunderstands the issue at stake in the litigation when she says that quitting smoking is "a beneficial way to maintain good health, protect against and reduce total morbidity and mortality related to diseases" (Egbe para 24 page 1724). Even if this were correct, it would not follow that it is justified for the Minister to take that decision on behalf of adult smokers.

prudent for adults to smoke during the pandemic: the government or the smokers themselves?

4 Prior to the pandemic, the decision was left to adults to make for themselves. The sale of cigarettes was regulated but was not prohibited in South Africa, notwithstanding the WHO having warned of the health risks of smoking.

5 All of that has changed during the pandemic. Government has now taken it upon itself to make the decision on behalf of smokers by decreeing that they will be unable to purchase tobacco and vaping products lawfully. Since smokers and vapers have been deprived of a choice that they were entitled to make before the pandemic, government bears the burden of justifying its change of stance. The Minister accepts this.[6] Her justification is that it would place a strain on the public health system if smokers were permitted to continue smoking during the pandemic.

6 We submit that the Minister's justification is – to use a metaphor that is particularly apposite here – an exercise in smoke and mirrors. Even if a series of assumptions were to be made in favour of the Minister regarding the health risks of smoking in relation to Covid-19, the "benefits" on which the Minister relies would still be heavily outweighed by the harm caused by the prohibition. We shall show that, on the Minister's own version, the public-health "benefits" are miniscule when weighed against the massive harm caused to smokers, to participants in the tobacco supply chain and to the *fiscus*.

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6 Dlamini-Zuma para 301 page 578.

7 At the end of the day, therefore, this case is about the standard of justification that can be expected of government when it makes a decision that produces few benefits and immense harm. We submit that the Minister has fallen lamentably short of the relevant standard, whether that standard is imposed by the Constitution or by the principles of administrative law.

Overview of the application

8 The applicants are situated at every level of the supply chain for tobacco and vaping products. They include farmers,[7] processors,[8] manufacturers,[9] retailers[10] and consumers.[11]

9 The applicants bring this application not only in their own interest. They also bring it in the interests of a group of persons, as contemplated in section 38(c) of the Constitution. That group comprises the smoking and vaping consumers in South Africa, and various participants in the supply chain for smoking and vaping products. Moreover, the applicants bring this application in the public interest, as contemplated in section 38(e) of the Constitution.[12]

10 Our heads of argument will be organised as follows:

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7 The seventh and eighth applicants.

8 The fifth applicant.

9 The first and second applicants.

10 The ninth and tenth applicants.

11 The third and fourth applicants. More than 600 000 consumers have signed a petition calling for the prohibition on the sale of tobacco and vaping products to be lifted (McLean para 3 page 371).

12 Joubert paras 21 to 23 page 10.

10.1 We begin with the constitutional challenge. We demonstrate that Regulation 45 limits a battery of constitutional rights and that the Minister has failed to justify this limitation.

10.2 We deal then with the challenge based on the principles of administrative law. We submit that Regulation 45 is irregular and invalid for a variety of reasons.

The FITA case

11 In the *FITA* case, a challenge to Regulation 45 was recently dismissed by a Full Court of the Gauteng Division of the High Court.[13]

12 The *FITA* case did not involve a challenge based on the Bill of Rights and the judgment therefore did not address the constitutional issues.

13 When it comes to the administrative law challenge, we accept that there is some overlap between the present application and the *FITA* case. We shall identify the areas of overlap below and shall submit that the *FITA* judgment should not be followed because (*i*) a judgment of the Gauteng Division is not binding on this Division and (*ii*) the FITA is in any event clearly wrong.[14]

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13 Fair-Trade Independent Tobacco Association v President of the RSA (21268/2020, as yet unreported).

14 On the difference between (*i*) and (*ii*), see Wallis "Whose Decisis must we Stare?" (2018) 135 SALJ 1.

REGULATION 45 IS UNCONSTITUTIONAL

14 We begin with the constitutional challenge. Section 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") provides that administrative action may be reviewed if it is unconstitutional. If PAJA does not apply, then Regulation 45 would obviously be unconstitutional if it violates fundamental rights.

15 There was no constitutional attack on Regulation 45 in the *FITA* case. The *FITA* judgment therefore provides no authority on the constitutional issues canvassed below.

16 We submit that Regulation 45 violates the rights of every participant in the supply chain for tobacco and vaping products. We consider each of those participants in turn. We begin with the consumers of smoking and vaping products, because the purpose of Regulation 45 is to make them quit smoking.

The rights of smokers and vapers

17 The third and fourth applicants are smokers. They explain in their founding affidavits that Regulation 45 violates their constitutional rights in the respects set out below.[15] Although the Minister purports to deny this, her formulaic denial rings hollow.

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[15] Ferguson page 385 paras 10 to 23; Molobi page 400 paras 10 to 13.

The right to dignity

18 Section 10 of the Constitution provides that “everyone has inherent dignity”.

19 The right to dignity includes the right of adult persons to make their own choices and to regulate their own affairs. In other words, personal autonomy forms part of the right to dignity.[16] As Ngcobo J explained in *Barkhuizen*, “self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity”.[17]

20 The effect of Regulation 45 is that consumers are denied the choice as to whether or not they buy tobacco and vaping products during the lockdown. This naturally impacts on their right to choose to consume tobacco and vaping products. Consumers of tobacco and vaping products are thus denied the right to make their own choices.

21 The Minister denies that Regulation 45 limits the right to dignity. She contends that any effect on the right to dignity would be “incidental” since the main purpose of Regulation 45 is to regulate commercial activity.[18] This astonishing contention is at odds with the Minister’s entire justification for Regulation 45. Since the Minister says time and time again that the purpose of Regulation 45 is “to reduce

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16 Brisley v Drotsky 2002 (4) SA 1 (SCA) para 94.

17 Barkhuizen v Napier 2007 5 SA 323 (CC) para 57.

18 Dlamini-Zuma para 252 page 561.

the incidence of smoking",[19] it is difficult to understand how she could seriously maintain that any effect on smokers is "incidental".

22 We submit that the infringement of autonomy amounts to a limitation on the right to human dignity in section 10 of the Constitution. The Minister bears the onus of justifying this limitation. We shall submit below that she has not done so.

The right to privacy

23 Section 14 of the Constitution provides that everyone has the right to privacy. The Constitutional Court has described the right to privacy as "a right to be left alone".[20] As with dignity, it is closely linked to the principle of autonomy.

24 In *Prince*, the Constitutional Court held that "the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption".[21]

25 The same applies to tobacco and vaping. Regulation 45 denies consumers the right to purchase tobacco and vaping products for use in the privacy of their homes – behaviour in which consumers legitimately harbour an expectation of privacy. This constitutes an unjustifiable intrusion by the state into the private sphere, particularly in the context of the current lockdown where many persons have been confined to their places of residence. The Minister's affidavit makes

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19 See, for example, Dlamini-Zuma para 121 page 517, para 174 page 536 and para 228.1 page 553.

20 Minister of Justice v Prince 2018 6 SA 393 (CC) para 45.

21 Minister of Justice v Prince 2018 6 SA 393 (CC) para 58.

it plain that she imposed the prohibition with the purpose of limiting individuals' private behaviour.

26 Again, the Minister goes through the motions of denying that Regulation 45 limits the right to privacy. She contends that any effect on the right to privacy is "incidental" since the main purpose of Regulation 45 is to regulate commercial activity.[22] We have explained above why there is no merit in this extraordinary contention.

27 We submit that Regulation 45 violates the right to privacy of smokers and vapers. The Minister bears the onus of justifying this limitation. We shall submit below that she has not done so.

The right to bodily and psychological integrity

28 Section 12(2) of the Constitution, which forms part of the right to freedom and security of person, provides that "[e]veryone has the right to bodily and psychological integrity", which includes the right to "security in and control over their body".[23]

29 "Control" includes the protection of one's autonomy or bodily self-determination against interference and any law that limits this autonomy (and in particular the autonomy to take steps to manage one's own stress) constitutes an infringement of this right.

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22 Dlamini-Zuma para 252 page 561.

23 See generally AB v Minister of Social Development 2017 3 SA 570 (CC) para 66.

30 The pandemic and the consequential lockdown are stressful for many people. Denial of access to tobacco and vaping products creates frustration and increases irritability and stress, and this is likely to have a negative impact on people's emotional wellbeing. Adults have the autonomy to choose the products they use to cope with stress. In depriving consumers of the ability to use tobacco and vaping products that they find pleasurable and calming in stressful circumstances, the Minister has infringed their right to personal autonomy and bodily integrity.[24]

Justification: the legal principles

31 The Minister bears the onus when it comes to justifying the limitation of the constitutional rights of smokers and vapers. In doing so, the Minister has to satisfy the proportionality test in section 36(1) of the Constitution. The proportionality test places the bar at a much higher level than the rationality test that formed the subject matter of the *FITA* judgment.[25]

32 The point is that Parliament is subject to two different constraints when it enacts legislation: the first is that "there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose"; and the second is that Parliament "must not infringe any of the fundamental rights enshrined in Chapter 2 of the Constitution".[26] When it comes

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24 Ferguson paras 12 to 23 page 389.

25 This was acknowledged in the FITA judgment itself (see, for example, para 25 and para 50).

26 New National Party of South Africa v Government of the Republic of South Africa 1999 3 SA 191 (CC) paras 19 and 20.

to the second of these constraints, section 36(1) of the Constitution requires more than mere rationality. The Constitutional Court has summarised the test for justification in the context of section 36(1) as follows:[27]

> "It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.
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> Although section 36(1) differs in various respects from section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests…."

33 It is necessary to emphasise that the Minister bears the onus of establishing <u>the facts</u> on which she relies for justification in terms of section 36(1) of the

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[27] S v Manamela and another (Minister of Justice Intervening) 2000 3 SA 1 (CC) paras 32 and 33.

See also Brummer v Minster for Social Development 2009 6 SA 323 (CC) para 59:

> "… regard must be had to, among other factors, the nature of the right limited; the purpose of the limitation, including its importance; the nature and extent of the limitation; the efficacy of the limitation, that is, the relationship between the limitation and its purpose; and whether the purpose of the limitation could reasonably be achieved through other means that are less restrictive of the right in question. Each of these factors must be weighed up but ultimately the exercise is one of proportionality which involves the assessment of competing interests."

Constitution. In other words, "where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends".[28] This means that "[w]here the state fails to produce data and there are cogent objective factors pointing in the opposite direction the state will have failed to establish that the limitation is reasonable and justifiable".[29]

34 The Minister says that the prohibition in Regulation 45 is intended to "protect human life and health and to reduce the potential strain on the health care system".[30] The Minister relies on both (*a*) the behavioural aspects of smoking and (*b*) health concerns unrelated to the behavioural aspects of smoking. We address each of those aspects in turn.

Justification: the behavioural aspects of smoking

35 Insofar as the Minister's concern is that smoking and vaping increase the risk that people may develop Covid-19 as a result of the repeated hand-to-mouth action associated with smoking and vaping, this concern could be addressed in a less restrictive manner by way of awareness campaigns regarding hygiene and hand washing. That is, after all, why the government has implemented

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28 Minister of Home Affairs v NICRO 2005 3 SA 280 (CC) para 36. See also Moise v Greater Germiston Transitional Local Council 2001 1 SA 491 (CC) para 18 ("… to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court") and Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 2 SA 168 (CC) para 84 ("where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law – usually the organ of state responsible for its administration – must put material regarding such considerations before the court").

29 Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 2 SA 168 (CC) para 84

30 Dlamini-Zuma para 48 page 477.

widespread education and awareness campaigns to educate the public to take measures to reduce the spread of the virus. For example, the government has not prohibited the sale of cold drinks merely because they are capable of being shared from the same bottle or can; it has rather educated consumers not to share bottles or cans.

36 The Minister accepts that measures such as these "will go some way to alleviating the risks of such conduct".[31] However, she adopts the position that risky behaviour in the form of cigarette-sharing would increase if the prohibition were to be lifted.[32] The correct position is the exact reverse: the prohibition has added to the incidence of risky behaviour because it encourages the growth of an illicit market for cigarettes at exorbitant prices.[33]

Justification: the risk of contracting a more severe form of Covid-19

37 The Minister's real concern is that smoking increases the risk that a person may contract a more severe form of Covid-19. She refers to scientific literature in her answering affidavit, the "preponderance" of which is said to show that "the use of tobacco products may increase the risk of transmission of Covid-19, but does increase the risk of developing a more severe form of the disease".[34]

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31 Dlamini-Zuma para 236 page 557.

32 Dlamini-Zuma para 236 page 557.

33 Replying affidavit para 38 page 1021.

34 Dlamini-Zuma para 51 page 477.

38 In her rejoinder affidavit, the Minister places no reliance on the risk of infection[35] but continues to assert that "smokers are more likely to develop severe disease with Covid-19, compared to non-smokers".[36] The Minister says that this "increases the strain on the public health system, by increasing the number of people who will need access to scarce resources such as hospital beds, ICU beds and ventilators".[37]

39 Dr Morjaria disputes much of the medical evidence on which the Minister relies. In summary, he says the following:

39.1 The current evidence does not support the claim that there is an increased risk of Covid-19 infection among smokers.[38]

39.2 There is consistent evidence from a number of studies suggesting that current smokers have a lower risk of infection and/or of developing Covid-19 at a level of severity that requires hospitalisation.[39]

39.3 The current evidence does not demonstrate that the severity of Covid-19 outcomes is greater in current smokers than non-smokers.[40] The

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35 The Minister's own expert states that the findings in the literature on the risk of infection for Covid-19 are "mixed" (London para 5.4 page 1442) and that the evidence is "less strong" (London para 50 page 1463).

36 Dlamini-Zuma para 84 page 1429.

37 Dlamini-Zuma para 38458 page 1429.

38 Morjaria para 12(c) page 1099; Morjaria para 7(a) page 1879.

39 Morjaria para 12(d) page 1099.

40 Morjaria para 12(e) page 1099.

scientific evidence on the question whether smoking increases Covid-19 disease progression is "mixed and inconclusive".[41]

39.4 The Minister's concern that the health system in South Africa may be overrun if the sale of cigarettes is allowed, is not supported by the experience of other countries. Based on Dr Morjaria's own personal experience in working in Covid-19 dedicated wards in the UK, hospitals are not receiving large percentages of patients that are smokers, much less smokers who are not presenting with one or more of the recognised risk factors for Covid-19 disease progression. The data suggests instead that smokers are only a small proportion of patients requiring hospitalisation. The vast majority of individuals will only get mild disease and it is only a small minority that need significant medical input and healthcare utilisation including the use of ventilators.[42]

40 The job of an expert witness is to be impartial and unbiased. In *PriceWaterhouseCoopers*,[43] Wallis JA quoted from two foreign judgments that summarised the duties of an expert witness as including the following:

> "An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise . . . An expert witness in the High Court should never assume the role of advocate."[44]

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41 Morjaria para 7(c) page 1880.

42 Morjaria para 12(j) page 1100.

43 PriceWaterhouseCoopers Inc v National Potato Co-operative Limited [2015] 2 All SA 403 (SCA) paras 98 and 99.

44 The Ikarian Reefer [1993] 2 Lloyds Rep 86 (QB) at 81-82.

> "An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:
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> - accepts to perform his or her mandate in a restricted manner;
> - presents a product influenced as to form or content by the exigencies of litigation;
> - shows a lack of independence or a bias;
> - has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
> - advocates the position of the party that retained his or her services; or
> - selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services."[45]

41 We submit that Dr Morjaria's evidence comports with these principles. He concludes that "the evidence on the question of current smoking and Covid-19 disease progression and severity remains mixed and inconclusive".[46] That is a fair summary of the scientific literature that is before the Court.

42 In contrast, the Minister's medical experts do not always appear to understand that their duty is to assist the Court, not to assist the Minister. In several respects, we submit that their evidence does not provide an objective summary of the scientific literature or a fair response to Dr Morjaria. We give a few examples:

42.1 Dr Egbe says that a study by Pranata *et al* concluded that "… the majority of subgroups showed a trend towards increased risk in current

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45 Widdrington (Estate of) v Wightman 2011 QCCS 1788 (CanLII)

46 Morjaria para 7(d) page 1880.

smokers".[47] However, Dr Egbe did not explain that the study by Pranata *et al* found:[48]

- that "smoking **was not** associated with the risk of mortality (OR 1.30, 95% CI 0.87 1.95; P = 0.20; I2 0%, P = 0.55), ICU care (OR 0.63, 95% CI 0.11–3.54; P = 0.60; I2 0%, P = 0.50) and disease progression (OR 2.98, 95% CI 0.12–76.54; *P* = 0.51; *I*2 71%, *P* = 0.06)"; and

- that for current smokers, "[s]ubgroup analysis showed that being a current smoker **was not** associated with risk of mortality (OR 1.93, 95% CI 0.87–4.26; P = 0.10; I2 0%, P =0.80), severity (OR 1.56, 95% CI 0.91–2.69; P = 0.10; I2 7 %, P = 0.37) or ICU care (OR 0.27, 95% CI 0.01–5.62; P = 0.40)."

42.2 Against the background of these findings by Pranata *et al*, Dr Morjaria questions how Dr Egbe can 'credibly assert that "all the meta-analyses conducted to date (except Lippi et al) to investigate the relationship between smoking and COVID-19 disease progression . . . have found a positive association."'[49]

42.3 Prof London refers to four scientific papers and states that none of them "cast any doubt" on the association between smoking and upregulation

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47 Egbe para 21 page 1723.

48 Morjaria para 32 page 1891 (emphasis added in Dr Morjaria's affidavit).

49 Morjaria para 33 page 1891.

of ACE-2.[50] However, Dr Morjaria points out that one of the papers cited by Prof London casts doubt on this very association.[51]

42.4 Prof London cites Bella-Chavola *et al* for the proposition that "smoking was associated with increased risk of COVID-19 pneumonia in older Mexican adults".[52] However, Prof London fails to mention that the paper found that smoking was <u>not</u> a risk factor for COVID-19 related ICU admission or invasive ventilation.[53]

42.5 Prof London criticises Dr Morjaria's reference to his own clinical experience in treating Covid-19 patients on the basis that "anecdote is not a basis for inference".[54] Remarkably, Prof London then proceeds to rely on a newspaper article that gives anecdotal accounts of smokers extolling the benefits of quitting.[55]

42.6 Prof London states that "all" the pre-print papers cited in Dr Morjaria's first affidavit are "still yet to be peer reviewed."[56] That statement is clearly incorrect because, as Prof London accepts,[57] one of those papers – by Williamson et al – has been published in the prestigious peer-reviewed journal, *Nature*. That paper concludes that the risk associated with dying

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50 London para 98 page 1483.

51 Morjaria para 54 page 1897.

52 London para 17.2 page 1450.

53 Morjaria para 60 page 1900.

54 London para 22 page 1452.

55 London paras 26 to 29 page 1453.

56 London para 38 page 1457.

57 London para 93 page 1481.

from COVID-19 as a result of current smoking is statistically insignificant, i.e., statistically indistinguishable from zero.[58]

43 We accordingly submit that Dr Morjaria's evidence should be preferred as regards the association between smoking and disease progression in relation to Covid-19.

Justification: the effect of quitting on Covid-19 disease progression

44 Even if this Court were to take a different view of the matter, it would be insufficient for the Minister to establish that there is an association between smoking and disease progression in relation to Covid-19. If the Court were to find that such an association is established on the papers, the Minister would still have to go further and establish that a cessation of smoking during lockdown will reverse or lessen the disease progression of Covid-19. The reason is obvious: if there is an association between smoking and disease progression in relation to Covid-19 but if that association continues even if a person quits smoking, then Regulation 45 would not achieve its stated purpose.

45 The point is that the dangers from cigarette smoking result from long-term chronic use. Even if this Court were to find on the papers that the smoking population is more susceptible to certain Covid-19 risks, that susceptibility would be a function of years or decades of prior smoking. The Minister bears the onus of showing

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58 Morjaria para 61 page 1900.

that this susceptibility would be reversed if there were to be a temporary cessation of smoking during the pandemic.

46 The Minister does not appear to appreciate this.[59] Certainly she makes little attempt to discharge the onus. Her evidence on this critical issue may be summarised as follows:

46.1 The issue is not addressed at all in the WHO literature on which the Minister relies.[60]

46.2 Dr Nyamande and Prof London do not address this issue in their answering affidavits. They deal with the general health benefits attendant on quitting, but pointedly do not say that this will assist in relation to Covid-19.

46.3 In his rejoinder affidavit, Prof London accepts that there is no scientific data to show that quitting smoking will reduce disease severity in relation to Covid-19.[61] He suggests tentatively that "quitting smoking may reverse the receptor upregulation that is thought to be the mechanism by which smoking increases the risk for severe Covid-19 disease".[62] However, Prof London accepts that this would only be the case "if the link between upregulation of ACE-2 receptors and increased risk for severe Covid-19

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59 The Minister overlooks this in paragraph 103 of her answering affidavit (page 507), when she states that it "ought to be sufficient" to establish a "clear association between cigarette smoking and poor outcomes in Covid-19".

60 Pages 641 to 649 and page 1867.

61 London para 96.2 page 1482. See also London para 11.5 page 1447.

62 London para 30 page 1454.

is accepted".[63] Dr Morjaria has shown that this link is "speculative"[64] because:

- there is no peer-reviewed evidence establishing the clinical significance of upregulation of ACE-2 in relation to Covid-19 risks; [65] and

- the literature cited by Prof London suggests that downregulation of ACE-2 associated with quitting smoking is not immediate and is observed in smokers who had quit for at least a year.[66]

46.4 That leaves Dr Egbe as the only expert to address this issue head-on for the Minister. However, Dr Egbe is not a medical doctor.[67] Moreover, Dr Egbe candidly concedes that "there is not yet enough data to assess whether and/or to what extent the chance of infection or disease progression decreases when a person quits smoking".[68] The furthest Dr Egbe can go is to suggest that it is "logical" to believe that stopping smoking would "give [smokers'] lungs a fighting chance against the disease".[69] In her rejoinder affidavit, Dr Egbe confirms that there are no scientific studies to show that quitting smoking will affect the disease

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63 London para 96.3.2 page 1483.

64 Morjaria para 57 page 1899.

65 Morjaria para 7(h) page 1882.

66 Morjaria para 7(h) page 1882.

67 Dr Egbe has degrees in Education and a PhD in Psychology (see page 867).

68 Egbe para 37 page 848.

69 Egbe para 40 page 849.

progression of Covid-19 but repeats her curious refrain that the cessation of smoking "would give a smoker's lungs the fighting chance to beat any disease, more so a disease like Covid-19 which predominantly affects the respiratory system".[70]

47 This unscientific statement ("a fighting chance") by someone who is not even a medical doctor represents the Minister's entire case on the justification for prohibiting the sale of tobacco and vaping products. We submit that it does not come close to discharging the onus. While Dr Egbe is correct that quitting smoking provides general health benefits, she has not put up any evidence to show that those benefits would alter any outcomes with respect to Covid-19 disease progression.

48 Dr Morjaria's affidavits show that the available evidence does not establish that quitting smoking will reduce the risk of infection or disease severity in the case of Covid-19:

48.1 In his first affidavit, Dr Morjaria says that quitting smoking provides some immediate and short-term benefits but there is no evidence that those benefits would alter any outcomes with respect to Covid-19 infection or disease progression. Quitting smoking over the temporary period of the lockdown in South Africa is also unlikely to impact on any underlying co-morbidities caused by smoking that are risk factors for Covid-19 disease progression. The Minister's claim that the ban will reduce the risks of

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70 Egbe para 8 page 1715.

smokers contracting Covid-19 or progressing to a more severe form of the disease is therefore not demonstrable.[71]

48.2 In his second affidavit, Dr Morjaria concludes that "there is no evidence that short-term quitting has clinical significance for Covid-19 severity and outcomes".[72] In other words, while quitting smoking provides some immediate benefits, "there is no evidence that these benefits would alter any outcomes with respect to Covid-19 infection or disease progression".[73]

48.3 Dr Morjaria's evidence on this critical issue has not been meaningfully disputed by the Minister's experts.

49 If smoking cessation does not confer a benefit with regards to Covid-19 disease progression (as opposed to general improvements to health), it means that the objective of the prohibition will not be achieved. The Minister has therefore failed to justify the limitation of constitutional rights. In other words, the constitutional rights of smokers are being limited in circumstances where there is no evidence to establish that a cessation of smoking would undo the Covid-related health risks on which the Minister relies.

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71 Morjaria paras 16 and 17 page 1102.

72 Morjaria para 7(h) page 1882.

73 Morjaria para 7(i) page 1882. See also para 57 page 1899.

Justification: Regulation 45 does not materially reduce the number of smokers

50 If the Minister could overcome these hurdles, then she would face another hurdle in relation to justification under section 36(1) of the Constitution. It is this: the Minister has to show that Regulation 45 is effective when it comes to reducing the number of smokers. If Regulation 45 does not materially reduce the number of smokers, then it would not achieve its stated purpose. This would mean that there is no relationship between the limitation and its purpose, within the meaning of section 36(1)(d) of the Constitution.

51 The judgment of the Constitutional Court in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) is of particular relevance in this regard. It had to do with statutory provisions that criminalised sexual behaviour with children below a certain age. Khampepe J held that the provisions limited a series of constitutional rights. When the state sought to justify this limitation on the basis that the criminal sanction prevented the occurrence of unwanted pregnancies and sexually transmitted diseases, Khampepe J rejected this argument in terms that merit quotation in full:

> "[87] However, this is insufficient to justify sections 15 and 16 of the Sexual Offences Act as constitutionally valid. What the respondents need to demonstrate is that the existence and enforcement of the impugned provisions can reasonably be expected to control the aforementioned risks. The Minister, however, has not tendered any evidence, expert or otherwise, to corroborate these claims. Thus, we have before us no evidence at all to demonstrate that adolescents may be deterred by sections 15 and 16 from engaging in sexual conduct and thus avoid the risks associated with engaging in sexual activity at a young age. Rather, the evidence we do have before us is to the contrary. It shows that the impugned provisions increase the likelihood of adolescents participating in unsafe sexual behaviour and therefore actually increase the materialisation of the associated risks.

> [88] In the ordinary case it may well be that the state may, without more, rely on the nominal deterrent effect that the criminalisation of particular conduct may have. But where there is expert evidence indicating that the statute under challenge will not have the desired deterrent effect, more is required from the state if the relevant criminal prohibitions are to survive.
>
> [89] The expert report clearly demonstrates that the impugned provisions cultivate a society in which adolescents are precluded from having open and frank discussions about sexual conduct with their parents and caregivers. Rather than deterring early sexual intimacy, the provisions merely drive it underground, far from the guidance that might otherwise be provided by parents, guardians and other members of society." (our underlining)

52 It follows from *Teddy Bear Clinic* that the Minister has to put up evidence to show that Regulation 45 is effective when it comes to reducing the number of smokers. For the reasons that follow, the Minister has not done so.

53 We start with the Walbeek Report, on which the applicants relied in their founding affidavit:

53.1 The Walbeek Report was conducted during the period 29 April to 11 May 2020 in relation to more than 12 000 smokers.[74]

53.2 At the time of completing the survey, 16% of smokers had quit smoking successfully.[75]

53.3 The executive summary to the Report says that "around 90% of survey respondents had purchased cigarettes during the lockdown".[76] However,

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74 Walbeek Report: page 181.

75 Walbeek Report: page 188.

76 Walbeek Report: page 181 (our underlining).

the main body of the Report says that "around 90% of survey respondents, who did not quit smoking, indicated that they have purchased cigarettes during the lockdown".[77] This means that, of the total survey respondents, 16% had quit smoking and 8.4% (i.e. 10% of 84%) had not purchased cigarettes during the lockdown. Differently stated, 75.6% of survey respondents had purchased cigarettes during the lockdown.

53.4 Even the Genesis Report accepts on behalf of the Minister that "76% would be a high proportion".[78]

54 The Minister purports to be critical of these conclusions in the Walbeek Report. However, the RBB Report explains why some of her criticisms are misdirected.[79] Moreover, two of the Minister's own experts (Dr Ross and Dr Egbe) cite portions of the Walbeek Report with approval. It is difficult to understand how the Minister can say that the Walbeek Report should be disregarded in circumstances where her own experts rely on it.

55 Aside from taking potshots at the Walbeek Report, what evidence has the Minister put up to show that Regulation 45 will be effective in reducing the number of smokers? The answer is as follows:

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77 Walbeek Report: page 190.

78 Genesis Report para 24 page 767.

79 RBB Report paras 22 to 47 page 1335.

55.1 The Minister relies on the HSRC Study, which was annexed to her answering affidavit along with an affidavit from Reddy:[80]

55.1.1 The HSRC Study was conducted during the period from 27 March 2020 to 24 April 2020.[81] This was during Alert Level 5 over the first four weeks of the lockdown period.

55.1.2 The statement in the HSRC Study that 11.8% of smokers were able to buy cigarettes during this period has little value because, as the Genesis Report accepts, most smokers would have stockpiled cigarettes when the lockdown was first announced.[82] At that time it was anticipated that the lockdown would endure for the three week period which was announced. Even when the lockdown was extended, it was only extended by another two weeks. It is therefore hardly surprising that smokers would not have been required to buy cigarettes illicitly during Alert Level 5. The difficulties faced by smokers really commenced on 1 May 2020, at the commencement of Alert Level 4, when the ban on the sale of cigarettes was extended.

55.1.3 The RBB Report offers several reasons for being critical of the results of the HSRC study.[83]

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80 The Study is at page 810ff.

81 HSRC Study: page 810.

82 Page 768 para 26.2.

83 RBB Report paras 36 to 44 page 1337.

55.1.4 But in any event, the number of 88% that is trumpeted in the HSRC Report cannot possibly be correct because (as we show below) the evidence of Dr Ross is that the total number of cigarettes sold will only decrease by about 20% as a result of the prohibition. If 88% of smokers do not purchase cigarettes during lockdown, then the decrease in the number of cigarettes sold would be much greater than 20%. The conclusion in the HSRC Study is therefore out of alignment with the evidence of Dr Ross.

55.2 The Minister refers in her answering affidavit to a survey by M4Jam.[84] This survey was not annexed to any of the answering affidavits. Undeterred and without any application for condonation, the Minister simply put up the M4Jam survey as part of her rejoinder affidavits.[85] This survey has little probative value because M4Jam is a crowd-sourcing data platform, not a market research company.[86] The author of the survey herself describes it as "an informal and non-scientific survey" and cautions that "the information contained therein is not intended as a substitute for any formal research conducted by any third party".[87] The RBB Report explains why the finding in the M4Jam survey that 51% of survey respondents were continuing to smoke some two months after the

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84 Dlamini-Zuma para 141 page 527. See also Genesis Report: page 768 footnotes 30 and 31.

85 Page 1804ff.

86 Midgley para 5 page 1802.

87 Midgley para 11 page 1803.

ban was introduced, is likely to understate the proportion of the overall smoking population that has stopped smoking.[88]

55.3 The Genesis Report says that a "non-trivial" proportion of smokers have stopped smoking but does not perform any independent research to compute what that proportion is.[89]

55.4 Prof London says that the extent of the reduction in smoking is "difficult to determine".[90]

55.5 Dr Egbe relies on the Walbeek Report to conclude that at least 16% of smokers (i.e. between 800 000 and 1 million people) have quit smoking.[91]

55.6 It is left to Dr Ross to deal with this issue most fully on behalf of the Minister. When she does so, Dr Ross effectively torpedoes the Minister's case for justification:

55.6.1 Dr Ross says that Regulation 45 will reduce smoking because smokers will be unable to afford the prices of cigarettes that are sold unlawfully during lockdown. In other words, the decrease in smoking will be a consequence of an increase in the price of

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88 RBB paras 26 to 37, page 1948.

89 Genesis Report para 28 page 769.

90 London para 59 page 968.

91 Egbe para 41 page 850

illicit cigarettes;[92] it will not be a consequence of adherence to the law.

55.6.2 Dr Ross distinguishes between smoking prevalence (i.e. the percentage of adult South Africans who smoke) and smoking intensity (i.e. the number of cigarettes consumed by a smoker per day).[93]

55.6.3 As regards smoking intensity: Dr Ross says that 26 billion cigarettes were sold annually before the ban.[94] Applying a price elasticity of -0.345,[95] Dr Ross concludes that 21 billion cigarettes will be sold annually during the ban.[96] That is a reduction of approximately 20%.

55.6.4 As regards smoking prevalence: Dr Ross performs a price elasticity exercise and says that there will be a "10% to 15% quit rate" (which, she points out, is close to the number of 16% in the Walbeek Report).[97] Since there are 8 million smokers in South Africa, Dr Ross concludes as follows:

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92 Ross para 5 page 976.

93 Ross para 5 page 976.

94 Ross para 19.2 page 980.

95 According to Ross, this is the correct price elasticity: see para 9 page 977.

96 Ross para 19.2 page 980.

97 Ross para 10 page 978.

> "if 10% to 15% of them quit smoking due to the ban, this represents 0.8 to 1.2 million quitters".[98]

56 We submit that the evidence of Dr Ross on behalf of the Minister is utterly destructive of the Minister's case when it comes to establishing the effectiveness of the prohibition in Regulation 45:

56.1 The evidence of Dr Ross means that any reduction in smoking will occur not because smokers adhere to the law, but rather because they cannot afford the inflated prices of cigarettes sold unlawfully. It is bizarre for the Minister to claim that her prohibition in Regulation 45 is effective because most smokers will attempt to contravene the law but some of them will be unable to afford the prices of illicit cigarettes. Remarkably, that is the Minister's case. In constitutional terms, it is perverse because it relies on unlawful conduct (i.e. illicit sales at a price premium) in order to achieve the intended outcome (i.e. a reduction in smoking).[99]

56.2 The evidence of Dr Ross is that sales of cigarettes will decrease by approximately 20% as a result of the prohibition. This is a strikingly small decrease, and entirely out of line with the statement in the HSRC Study that 88% of smokers have been unable to buy cigarettes during the early stage of lockdown. But in any event, this number is irrelevant because the Minister does not say that there is any public health benefit if smokers

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98 Ross para 11 page 978.

99 The Genesis Report embraces this by stating that the illicit trade is "from an economic perspective … a relevant consideration in the mitigation of economic harm" (page 761 para 6.2.2). The Genesis Report brands this as "an ironic feature of the impact of the ban" (page 765 para 15).

continue to smoke but smoke fewer cigarettes than before. According to the Minister, the public health benefit only arises if smokers quit smoking altogether.

56.3 When it comes to that critical issue, the evidence of Dr Ross is that the number of people who will quit smoking during the lockdown is between 800 000 and 1 200 000 (i.e. 10% to 15% of smokers). This is a strikingly small proportion.

57 We therefore submit that the Minister's own evidence show that Regulation 45 will not achieve its stated purpose, which is "to reduce the incidence of smoking".[100] According to the Minister's own evidence, only 10% to 15% of smokers will quit smoking (and then only because they cannot afford the price of cigarettes sold illicitly).

Justification: the harm exceeds the benefit

58 If the Court were to take a different view of the matter and were to find that a 10% to 15% reduction in the number of smokers is sufficient for Regulation 45 to achieve its stated purpose, then the Minister would still have to show that the benefits of Regulation 45 exceed the harm that it causes. Unless the Minister is able to show this, the limitation of constitutional rights will not be reasonable and justifiable because section 36(1) requires the Court "to weigh the extent of the

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100 Dlamini-Zuma para 121 page 517.

limitation of the right against the purpose for which the legislation was enacted".[101]

59 According to the Minister, the benefit of Regulation 45 is that it will free up ICU beds and ventilators by preventing smokers from contracting a more serious form of Covid-19. In order to quantify that benefit, we shall have regard to paragraph 132.3 of the Minister's answering affidavit[102] and shall assume for the sake of argument that the numbers in that paragraph are correct. Once this assumption is made, it yields the following outcome according to the Minister's own numbers:

59.1 The Minister says that, if 1% of the 8 million smokers in South Africa were to contract Covid-19 and if 5% of that number were to need ICU, this would translate to about 4 000 smokers needing ICU beds and ventilators.[103]

59.2 The Minister's estimate that 5% of persons who contract Covid-19 will require ICU seems too high. The Minister's own expert, Dr Egbe, says that, of those who contract Covid-19, 5% will need hospitalization and only 1% will need ICU admissions and possibly mechanical ventilators.[104]

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101 Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 1 SA 545 (CC) para 54.

See, for example, National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 (CC) para 37, where the Constitutional Court found that "[t]here is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation."

102 Page 521. For the same calculations, see Reddy para 20.3.3 page 781 and the HSRC Study page 812.

103 Dlamini-Zuma para 132.3 page 521.

104 Egbe para 103 page 1762.

We shall nevertheless assume in the Minister's favour that her estimate of 5% is correct.

59.3 We know from Dr Ross's evidence that the number of people who will quit smoking as a result of the prohibition is between 800 000 and 1 200 000. For the sake of simplicity, we shall take a mid-range value of 1 million quitters. Since Dr Ross estimates that 1 million smokers will quit smoking, the Minister's calculations must be performed on the number of 1 million smokers rather than on the number of 8 million smokers referred to in paragraph 132.3 of the Minister's answering affidavit. The reason is obvious: those smokers who continue to smoke during the pandemic will continue to be exposed to the risk of disease severity on which the Minister relies.[105]

59.4 The Minister says that, if 1% of 8 million smokers were to contract Covid-19, this would translate to 4 000 smokers needing ICU beds and ventilators. It follows that, if 1 million smokers were to quit (as Dr Ross says), this would mean that 500 fewer ICU beds and ventilators (i.e. one eighth of 4 000) would be required as compared to what the position would have been had there been no prohibition on smoking. In other words, the prohibition on selling tobacco and vaping products will "free

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105 Dr Reddy correctly makes this point in her rejoinder affidavit (Reddy para 21 page 1831). Dr Ross is therefore wrong to say that the replying affidavit "conflates the number of smokers with the number of quitters" (Ross para 7 page 1795).

up" 500 ICU beds and ventilators that would otherwise have been required for smokers over the entire period of the pandemic.[106]

59.5 However, those 500 smokers would not all have required ICU beds and ventilators at the same time.[107] If one assumes an average period of 12 days in ICU,[108] a total period of one year for the pandemic and an even spread across the year, it means that at any one time there will be 16.4 fewer patients in ICU[109] than would have been the case had there been no prohibition on smoking. If the pandemic lasts for six months, the number doubles to 33 ICU beds that are no longer required at any point in time due to the ban on smoking.[110]

59.6 There are approximately 3 300 ICU beds in South Africa. A freeing up of 16 ICU beds equates to 0.5% of the total ICU beds in the country.[111]

59.7 The Minister has not put up any evidence to establish that a reduction of 16 ICU patients (or 33 ICU patients, for that matter) at any one time

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106 Dr Reddy does a similar mathematical exercise in her rejoinder affidavit. Since Dr Reddy uses a number of 1 200 000 quitters (rather than 1 000 000 quitters, which is the number we have used), she concludes that there will be a "saving" of 600 ICU beds (rather than 500 ICU beds): Reddy para 21 page 1831.

107 Although Dr Egbe purports to dispute this by referring to "the scenes of overwhelmed hospitals around the world as a result of Covid-19 admissions" (Egbe para 105 page 1763), it cannot be seriously suggested that every person requiring ICU admission during the pandemic would present at the same time. See further Morjaria para 66 page 1901.

108 Morjaria para 86 page 1133. This evidence is not disputed by the respondents.

Twelve days is the midpoint of 10 and 14 days, which is the average stay in ICU at Dr Morjaria's unit.

109 i.e. 500 divided by 365/12 = 16.4. See RBB para 89 page 1970.

110 i.e. 500 divided by 183/12 = 32.8.

111 RBB para 90 page 1971.

throughout the entire country would mean that the public health system would be able to cope in circumstances were it not otherwise have been able to cope.

60 In short, the Minister's version is that the prohibition on smoking is likely to free up approximately 16 ICU beds at any one time across the entire country. This extraordinarily small number does not begin to justify the massive harm that is caused by Regulation 45:

60.1 The harm includes the billions of rand that are lost to the fiscus by virtue of the fact that illicit cigarette sales are burgeoning.[112] The applicants estimated that the loss of excise duty to the *fiscus* is approximately R35 million per day.[113] In response, the Genesis Report says that the loss to the *fiscus* in the form of excise duties was R2.2 billion during the period from 27 March 2020 to 22 May 2020.[114] That is a loss of almost R38 million per day according to the Minister's own expert.[115] The foregone billions of rands could have been used to combat the effects of the pandemic (for example, by erecting field hospitals).

60.2 The harm includes the damage caused to the various participants in the supply chain for smoking and vaping products. Some of them will go out

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112 The Minister accepts that Regulation 45 means that the fiscus loses VAT and the excise duties on illicit (no duty paid) tobacco products sold: see Dlamini-Zuma para 232 page 555.

113 Joubert page 29 para 83; Abramjee page 347 para 14.

114 Genesis report para 19 page 765.

115 R2.2 billion divided by 58 = R37 931 034.

of business. Those that do not go out of business will suffer losses and may have to retrench employees.[116]

60.3 The harm includes the fact that illicit cigarettes contain harmful substances not found in licit cigarettes.[117]

60.4 The harm includes the fact that, as Dr Morjaria points out,[118] forced cessation may have adverse impacts on smokers. Moreover, there is some evidence to show that former smokers have a worse Covid-19 experience than current smokers.[119]

61 Since the harm caused by Regulation 45 outweighs the benefits according to the Minister's own numbers, the limitation of constitutional rights is not justified.

62 What makes the Minister's justification even more perplexing is that, in the current version of the Regulations, she has permitted minibus taxis to carry passengers at 100% of licensed capacity for short-haul journeys.[120] The risk of the public health system being overwhelmed is much greater if commuters sit cheek by jowl in taxis than if smokers are permitted to continue smoking.[121]

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116 RBB Report paras 49 to 77 page 1341.

117 Roos page 430 paras 21 and 22.

118 Morjaria para 87 page 1133.

119 Morjaria para 87 page 1133.

120 Regulation 43(3)(b). The amendment is missing from Annexure NCZ22 page 1435 because even-numbered pages have not been included.

121 Joubert para 50 page 1851.

Summation

63 For all the reasons set out above, we submit that the Minister has not discharged the onus of showing that the violation of the constitutional rights of smokers is justified in terms of section 36(1) of the Constitution. In summary:

63.1 The constitutional rights that are limited by Regulation 45 go to the very heart of our democratic order. They are a cluster of rights that protect the values of personal autonomy. Those rights are gutted by Regulation 45.

63.2 The Minister has sought to justify this on the basis that Regulation 45 will prevent smokers from contracting a more severe form of Covid-19 and will thereby prevent the public health system from being overrun. But the harm caused by Regulation 45 is much greater than the alleged benefit – or, in colloquial terms, the cure is worse than the disease. On the Minister's own sums, the benefit of Regulation 45 is that at any one time there may be 16 fewer patients requiring hospitalisation in ICU than would otherwise have been the case. This pales into insignificance when weighed against the harm.

63.3 In short, "the disadvantages of the ban outweigh the advantages".[122] The Minister has therefore failed to justify the limitation of constitutional rights in terms of section 36(1) of the Constitution.

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122 Walbeek report: page 207.

The rights of tobacconists and tobacco farmers

64 We turn next to address the rights of citizens who are tobacco farmers and tobacconists. Regulation 45 deprives them of their right to choose a trade, occupation or profession in terms of section 22 of the Constitution.

65 Section 22 of the Constitution provides as follows:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

66 In *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC), the Constitutional Court held that the right to choose one's trade includes the right to practise it. Any law which prevents a citizen from practising a trade, limits this right. Such a limitation is unconstitutional and invalid unless it can be justified in terms of section 36.

67 Citizens who are tobacco farmers and tobacconists have been deprived of their right to choose their trade:

67.1 Tobacconists who sell <u>only</u> tobacco and vaping products are unable to trade.[123] Many informal traders have been forced to close their shops or stalls.[124]

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123 Dreyer page 452 para 9.

124 Mokgoja page 446 para 10.

67.2 Regulation 45 means that tobacco farmers have no buyers for their tobacco.[125] They will in all likelihood go out of business.[126] Although the Minister says breezily that exports are permitted,[127] the founding affidavit explained why exports are not feasible[128] and the Minister did not deny this in her answering affidavit.[129] Even the Genesis Report said that it was not known whether a spot market for immediate exports would be viable.[130] The recent amendment to Regulation 45 has made no difference in this regard.[131]

68 The Minister disputes that there is a violation of the right to choose a trade:[132]

68.1 The Minister says that Regulation 45 is temporary and that trade may be resumed after the Covid-19 pandemic ends.[133] However, it is by no means clear when the prohibition will end – the Minister's own affidavit appears to contemplate that it may continue for a year.[134]

68.2 The Minister says that Regulation 45 impacts on persons who have already chosen their trade; it does not impact on persons intending to

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125 Tembe page 422 para 13.

126 Tembe page 422 para 16; Roos page 427 paras 10 to 13.

127 Dlamini-Zuma para 220 page 551.

128 Joubert para 73 page 26.

129 Dlamini-Zuma para 341 page 588.

130 Genesis Report para 14.2 page 764.

131 Van Staden paras 5 to17 page 1872.

132 Dlamini-Zuma para 222 page 552.

133 Dlamini-Zuma para 217 and 218 page 549.

134 Dlamini-Zuma para 159 page 531.

commence that trade.[135] But the right in section 22 applies also to persons who are already practising a trade. The Constitutional Court made this clear in *Diamond Producers*:[136]

> "Clearly, then, a law prohibiting certain persons from entering into a specific trade, or providing that certain persons may no longer continue to practise that trade, would limit the choice element of section 22; in these cases there is a *legal barrier* to choice. This would be the case where, for instance, a licence is necessary to conduct a particular trade, and that licence is withdrawn." (our underlining)

68.3 The Constitutional Court stated in *Diamond Producers* that "one may also conceive of legislative provisions that, while not explicitly ruling out a group of person from choosing a particular trade, does so in effect, by making the practice of the trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited".[137] That is precisely what Regulation 45 does.

69 The Minister bears the onus of justifying this limitation by applying the test in section 36 of the Constitution. She has not done so for the reasons set out in paragraphs 35 to 63 above.

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135 Dlamini-Zuma para 219 page 550.

136 South African Diamond Producers Organisation v Minister of Minerals and Energy 2017 6 SA 331 (CC) para 68.

137 Para 68.

Arbitrary deprivation of property

70 The arguments in this section apply to manufacturers (BATSA), distributors (JTI) and other participants in the supply chain for tobacco and vaping products. All of them are suffering an arbitrary deprivation of their property by virtue of Regulation 45.

71 Section 25(1) of the Constitution provides that "no law may permit arbitrary deprivation of property".

72 A deprivation of property occurs whenever an aspect of the right to use, enjoy or exploit property is substantially interfered with, limited or removed.[138] That is the case here:

72.1 Tobacco farmers are unable to sell much of their recently-harvested crop, and they are unable to utilise their farms (in which they have invested substantial capital over the years) in a productive manner.

72.2 Manufacturers are not able to use their factories and equipment (i.e. their capital assets) at full capacity for the manufacturing of tobacco products. They are also unable to sell much of the product that they have produced.

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[138] National Credit Regulator v Opperman 2013 (2) SA 1 (CC) para 66. See also Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC) para 34; Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 (1) SA 293 (CC) para 41.

The Constitutional Court has held that the ability to alienate one's property is an incident of ownership and that interference with the freedom to alienate constitutes a deprivation (Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC) para 33).

72.3 Wholesalers and retailers are unable to sell their stock-in-hand of tobacco and vaping products. For those wholesalers who trade exclusively in tobacco and vaping products, they, like the manufacturers, are unable to utilise their facilities in a productive manner.

72.4 All of these industry participants are unable to alienate much of their property (i.e. the tobacco or the tobacco and vaping products that they have produced, manufactured or purchased), and to realise the value in that property for commercial gain. In addition, manufacturers and wholesalers are unable to employ their capital assets to turn a profit (or even break-even). This is a significant limitation on the use, enjoyment and exploitation of these persons' property.

73 The Minister disputes this. She contends that a temporary interference cannot give rise to a deprivation of property.[139] This contention is wrong. It was shown to be wrong in *Mkontwana*,[140] where the Constitutional Court held that section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 gave rise to a deprivation of property even though it imposed a restriction an alienating immovable property that could be removed by the paying of arrear consumption charges.

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139 Dlamini-Zuma para 246 page 560.

140 Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC) para 33. See also Jordaan v Tshwane Metropolitan Municipality 2017 (6) SA 287 (CC) paras 58 to 68.

74 Regulation 45 thus constitutes a deprivation of property within the meaning of section 25(1) of the Constitution.

75 In *FNB*, the Constitutional Court held that "deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair".[141] The Constitutional Court held that the question whether sufficient reason exists to justify a deprivation entails a multi-faceted assessment.[142]

76 Subsequent judgments of the Constitutional Court indicate that the test requires that there must be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe, that it be proportionate.[143] A proportionality analysis assesses the purpose of the law, the nature of the property involved, the extent of the deprivation and whether there are less restrictive means available to achieve the purpose in question.[144]

77 The point is that, the stronger the property interest and the more extensive the deprivation in question, the more compelling the State's purpose has to be in

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141 First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) FNB at para 100. See also Reflect-All 1025 CC v MEC For Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC) at para 39.

142 First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) para 100

143 Reflect-All (supra) para 48; Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape 2015 6 SA 125 (CC) para 80

144 Ibid

order to justify a deprivation.[145] Where the deprivation is extensive, the test for non-arbitrariness does not merely have regard to considerations of rationality but also has regard to whether "the means chosen are disproportionate to the purpose", with reference to the availability of "less restrictive means".[146]

78 In the present case, the test is at the proportionality end of the spectrum because the deprivation of property is very severe. Once this test is applied, there is insufficient reason to justify the deprivation of property that is attendant on Regulation 45. The massive damage to property-owners is not justified by the health risk relied on by the Minister. We refer to what we have stated in paragraphs 58 to 63 above.

Conclusion

79 For all the reasons set out above, we submit Regulation 45 should be declared unconstitutional in terms of section 172(1) of the Constitution.

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145 National Credit Regulator v Opperman 2013 (2) SA 1 (CC) para 68.

146 Opperman (supra) para 71

REGULATION 45 IS UNLAWFUL

80 We turn next to address the judicial review. For the reasons that follow, we submit that Regulation 45 is unlawful in terms of the principles of administrative law.

The application of PAJA

81 No court has held that the making of delegated legislation does not constitute "administrative action" within the meaning of PAJA:

81.1 In *New Clicks*, [147] five judges of the Constitutional Court held that all of the regulations at issue in that case fell within the ambit of PAJA.[148]

81.2 In *Cable City,* the Supreme Court of Appeal held that the making of regulations constitutes administrative action and is thus reviewable under PAJA.[149]

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147 Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC).

148 Chaskalson CJ (with whom O'Regan J agreed) held that the making of regulations generally constitutes "administrative action" within the meaning of PAJA.

Ncgobo J (with whom Langa DCJ and van der Westhuizen J agreed) held that PAJA applied to the specific power to make regulations conferred by the provisions of the Medicines and Related Substances Act 101 of 1965 that were in issue in *New Clicks*.

Sachs J held that PAJA was not generally applicable to the regulatory scheme at issue in *New Clicks*, but only to the particular regulations fixing an appropriate dispensing fee.

Moseneke J (with whom Madala, Mokgoro, Skeweyiya and Yacoob JJ agreed) held that it was unnecessary to decide whether PAJA applied to ministerial regulation-making.

149 City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) para 10. See, also, Security Industry Alliance v Private Security Industry Regulatory Authority 2015 (1) SA 169 (SCA) paras 15-16 and Medirite (Pty) Ltd v South African Pharmacy Council [2015] ZASCA 27 para 9, where the Supreme Court of Appeal concluded that rule-making powers amount to administrative action.

81.3 In *Mostert*,[150] the Supreme Court of Appeal stated that the position may have been formulated too strongly in *Cable City*[151] and that "the final word on regulation-making and the applicability of PAJA to it may … not have been spoken".[152]

82 We submit that the making of the Regulations amounts to administrative action in terms of PAJA. The Regulations have a "direct, external legal effect" and they "adversely affect rights".[153] The Regulations plainly have the potential adversely to affect the rights of businesses and consumers.

83 The Minister disputes this. She contends that the making of the Regulations falls outside of the reach of PAJA because this constitutes executive action.[154] Her contention is incorrect:

83.1 The definition of "administrative action" in PAJA excludes "the executive powers or functions of the National Executive", including the powers or functions listed in paragraph (*aa*).

83.2 The Constitutional Court has held that "[a] power that is more closely related to the formulation of policy is likely to be executive in nature and,

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150 Mostert NO v Registrar of Pension Funds 2018 (2) SA 53 (SCA) paras 8 to 10.

151 City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) para 10.

152 Para 10.

153 Section 1 of PAJA. These phrases must be understood in terms of their judicial interpretation in Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA) para 23, which was endorsed by the Constitutional Court in AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency 2014 (1) SA 604 (CC) para 60.

154 Dlamini-Zuma para 291 page 574.

conversely, one closely related to its application is likely to be administrative".[155]

83.3 The fact that a power involves the formulation of policy does not necessarily mean that it is executive in nature. The relevant question is whether the power takes the form of the implementation of legislation; if it does, then it constitutes administrative action. The Constitutional Court explained this in *Ed-U-College*:[156]

> "Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road or rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action." (our underlining)

83.4 When the Minister made the Regulations in terms of section 27 of the Act, she was implementing legislation. Indeed the power to make regulations could only be conferred by legislation. That is why Chaskalson CJ held in *New Clicks* that "the implementation of legislation, which includes the

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155 Minister of Defence and Military Veterans v Motau 2014 (5) SA 69 (CC) para 38.

156 Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) Inc 2001 (2) SA 1 (CC) at para 18. See also Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA) at para 27: "There will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect – but the execution of policy is not equivalent to its formulation".

making of regulations in terms of an empowering provision, is … not excluded from the definition of administrative action".[157]

84 We therefore submit that PAJA applies to the making of the Regulations.[158] However, it would make little difference to the outcome if PAJA does not apply because it is common cause that the principle of legality would then apply.[159] We shall indicate below that the principle of legality is sufficiently capacious to accommodate all of the applicants' review grounds.[160] The debate regarding the application of PAJA is therefore largely academic.

Regulation 45 is ultra vires

85 Section 27(2) of the Act provides that the Minister may make regulations regarding the following matters:

> "(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
>
> …
>
> (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster".

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157 Para 126.

158 This Court did not make a finding regarding the application of PAJA in Esau v Minister of Cooperative Governance and Traditional Affairs (5807/2020) paras 115 to 124.

Although the Full Court in FITA found that the challenge was based on the principle of legality rather than on PAJA (para 15), that appears to have been a consequence of the manner in which the applicant chose to present its case.

159 Dlamini-Zuma para 292 page 574.

160 See, for example, Pharmaceutical Manufacturers Association of South Africa : In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

Inclusio unius est exclusio alterius

86 The Act expressly empowers the making of regulations that limit the sale of alcohol. However, it does not expressly empower the making of regulations that limit the sale of any other goods.

87 Section 27(2)(n) must be interpreted so as not to include the making of regulations that limit the sale of products other than alcohol. This is in accordance with the maxim *inclusio unius est exclusio alterius* (i.e. "the express inclusion of the one implies the exclusion of the other").

88 The Constitutional Court has recently stated that the maxim *inclusio unius est exclusio alterius* is "a principle of common sense".[161] In the present circumstances, the common sense is compelling: if section 27(2)(n) were to be interpreted as conferring on the Minister a free-floating power to prohibit the sale of any goods, then section 27(2)(i) would be redundant.

89 The Minister disputes this on the basis that the Act confers wide powers on her.[162] But this does not meet the applicants' point at all. The point is that, as a matter of logic, it would have been unnecessary for Parliament to single out alcoholic beverages in section 27(2)(i) if the Minister could limit the sale of any goods under the catch-all in section 27(2)(n). The Minister has done nothing to extricate herself from that logical conundrum.

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161 Competition Commission v Pickfords Removals SA (Pty) Ltd [2020] ZACC 14 para 50 (judgment of 24 June 2020, as yet unreported).

162 Dlamini-Zuma para 263 page 565.

90 We respectfully submit that the same applies to the *FITA* judgment. Although the Full Court rejected the application of the *inclusio unius est exclusio alterius* maxim,[163] its only explanation for this was that the legislature could not have foreseen all possible disasters when it enacted the Act. We submit, with respect, that this is no answer to the question why Parliament would have singled out alcoholic beverages in section 27(2)(i) if it intended the Minister to have the power to limit the sale of <u>any</u> goods under section 27(2)(n).

91 On this ground alone, we submit that Regulation 45 is *ultra vires*.

<u>The Minister has no power to override legislation</u>

92 If this Court were to take a different view of the matter and were to find that section 27(2) applies to products other than alcohol, then Regulation 45 would still be *ultra vires* for the reasons that follow.

93 Parliament has regulated the sale of tobacco products in the Tobacco Products Control Act 83 of 1993 ("the Tobacco Products Control Act"). Its stated purpose is "to regulate the sale and advertising of tobacco products". Section 4 of the Tobacco Products Control Act provides for various circumstances in which tobacco products may <u>not</u> be sold. In all other circumstances, the sale of tobacco products is permitted by the Tobacco Products Control Act. Section 3 makes this clear. Moreover, section 6 provides that the Minister <u>of Health</u> may make regulations to deal with the matters listed in that section.

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163 Para 82 of the FITA judgment.

94 Regulation 45 is inconsistent with the Tobacco Products Control Act. That is because it purports to prohibit the sale of tobacco products in all circumstances – including in circumstances where the sale of tobacco products is permitted by the Tobacco Products Control Act.

95 Regulation 45 was purportedly made in terms of section 27(2) of the Disaster Management Act. However, section 27(2) does not confer on the Minister the power to make regulations that are inconsistent with legislation:

95.1 In *Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) ("*Western Cape I*"), the Constitutional Court considered the validity of delegated law-making in the context of the interim Constitution. Chaskalson P stated as follows:

> "In a modern state detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country, and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body…." (para 51, our underlining)

> "In para 51 of this judgment I pointed out why it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the Executive the power to amend or repeal acts of Parliament is quite different. To hold that such power exists by necessary implication from the terms of the Constitution could be subversive of the 'manner and form' provisions

> of sections 59, 60 and 61. Those provisions are not merely directory. They prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both Houses in the exercise of the legislative authority vested in Parliament under the Constitution, and also establish machinery for breaking deadlocks. .... Sections 59, 60 and 61 of the Constitution are part of an entrenched and supreme Constitution. They can only be departed from where the Constitution permits this expressly ... or by necessary implication.' (para 62, our underlining)

95.2 In *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA* 2000 (1) SA 661 (CC) ("*Western Cape II*"), the Constitutional Court recognised that the principles in *Western Cape I* continue to apply to the 2004 Constitution.

95.3 The *Western Cape* judgments establish that the delegation of a power to amend an Act of Parliament is subversive of the manner-and-form provisions in the Constitution, and is therefore generally not permissible.[164] The manner-and-form provisions in the Constitution "prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both Houses in the exercise of the legislative authority vested in Parliament under the Constitution".[165] If those manner-and-form provisions were to be circumvented, it would allow "control over legislation to pass from Parliament to the Executive".[166]

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164 See also South African Reserve Bank v Shuttleworth 2015 5 SA 146 (CC) paras 65 to 67 (majority) and paras 102 to 111 (minority).

165 Western Cape I at para 62

166 Western Cape I at para 63

96 Section 27(2)(n) would therefore be unconstitutional if it purported to confer on the Minister the power to make regulations that have the effect of amending an Act of Parliament. Section 27(2)(n) should be interpreted in a manner that preserves its constitutionality.[167] In other words, section 27(2)(n) should be interpreted as not empowering the Minister to make regulations that would override an Act of Parliament.

97 This interpretive principle is reinforced by section 26(2)(b) of the Act, which refers to the augmenting of existing legislation by regulations made in terms of section 27(2). The ordinary meaning of "to augment" is "to add to".[168] Section 26(2)(b) therefore means that regulations may add to existing legislation; it does not authorise the making of regulations that subtract from existing legislation. This is further reinforced by the fact that the Minister declared a national state of disaster in terms of section 27(1)(b) rather than in terms of section 27(1)(a) of the Act.[169]

98 The Minister has responded to this by saying that section 27(2)(i) of the Act empowers her to regulate the sale of alcoholic beverages in a manner that may override provincial or national legislation.[170] However, section 27(2)(i) may be subject to constitutional challenge for this very reason in an appropriate case regarding alcohol. The point for present purposes is a different one: it is that there

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167 Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC) para 23.

168 In Esau v Minister of Cooperative Governance and Traditional Affairs (5807/2020) para 201, this Court held that "to augment means to widen and give more value to".

169 Notice No. 313 of 15 March 2020: page 62.

170 Dlamini-Zuma para 269 page 567. The Minister's reference to section 27(2)(g) appears to be an error.

is no express power in section 27(2) to override the Tobacco Products Control Act, and section 27(2) should not be interpreted as containing such a power by implication.

99 We accordingly submit that section 27(2)(n) of the Disaster Management Act does not confer on the Minister the power to make regulations that prohibit the sale of tobacco products in a manner that is inconsistent with the Tobacco Products Control Act. Since that is what Regulation 45 purports to do, it is *ultra vires*.

The Minister has no power to prohibit

100 Finally, the Minister's power to make regulations under section 27(2) of the Act does not include the power to prohibit.

101 In *R v Williams* 1914 AD 460, Solomon ACJ stated as follows:[171]

> 'Now it is important to observe that the matter which is entrusted to the Provincial Council in terms of the Financial Relations Act is not "horse racing and betting," but the "regulation of horse racing and betting." It was contended by the *Attorney-General* in the court below that the power to "regulate" included the power to "prohibit," but the argument has very properly not been insisted upon in this Court. For the decisions of the Privy Council, which unfortunately do not appear to have been brought to the notice of the judges sitting in the Provincial Division, make it clear that a power to regulate does not include the power to prohibit. In the case of the *Municipal Corporation of City of Toronto v Virgo* (1896, A.C., p. 93) Lord DAVEY, in delivering the judgement of the Privy Council, says: "Their Lordships think that there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." And in the later case of *Attorney-General for Ontario v*

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171 At 465, our underlining.

> *Attorney-General for the Dominion* (1896 A.C p. 363) Lord WATSON approved of and adopted this statement of the law.'

102 This principle has been consistently approved by our courts.[172] It means that, even if this Court were to reject all our arguments above, section 27(2) of the Act does not empower the Minister to prohibit the sale of tobacco products. Since this is what Regulation 45 does, it is *ultra vires*.

103 An easy way to see this is to consider the power of the Minister of Health to make regulations under section 6 of the Tobacco Products Control Act. Nobody would suggest that this empowers the Minister of Health to prohibit the sale of all tobacco products. If the Minister of Health could not make regulations to place an outright prohibition on the sale of tobacco products, then the Minister of Co-operative Governance and Traditional Affairs has no greater power under section 27(2) of the Act.

Summation

104 We submit that Regulation 45 should be reviewed and set aside on the basis that:

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172 See, for example, Landelike Lisensieraad, Krugersdorp v Cassim 1961 (3) SA 126 (A) at 129G-130A; Padongelukkefonds v Prinsloo [1999] 2 All SA 431 (SCA) at 435 ("Die Minister se bevoegdheid kragtens artikel 6(1) van die Wet is 'n suiwer regulerende bevoegdheid. 'n Verbod wat volgens so 'n bevoegdheid opgelê word, is ongeldig."); Telkom SA SOC Ltd v City of Cape Town [2019] 4 All SA 682 (SCA) para 49 ("… a well-established principle of our law that, where a power to regulate is given, it may not be used to prohibit, either in whole or in substantial measure the activity in question.")

104.1 the Minister was not authorised to prohibit the sale of tobacco and vaping products, within the meaning of section 6(2)(a)(i) of PAJA; alternatively

104.2 the prohibition on the sale of tobacco and vaping product is not authorised by law and is unlawful in terms of the principle of legality.

Regulation 45 is not "necessary"

The legal principles

105 If the Court were to take a different view of the matter and were to find that section 27(2)(n) of the Act authorises the making of regulations that prohibit the sale of goods other than alcohol, then the exercise of the Minister's power to prohibit the sale of such goods would be subject to a series of administrative-law limitations:

105.1 Prohibiting the sale of those goods must be "necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster", within the meaning of section 27(2)(n) of the Act (our underlining).

105.2 Prohibiting the sale of those goods must be "necessary" for one or more of the purposes prescribed in section 27(3). The only purposes that could conceivably be relevant are "assisting and protecting the public" (section 27(3)(a)) or "dealing with the destructive and other effects of the disaster" (section 27(3)(e)). When she declared a national disaster, the Minister

herself recognised that she could make regulations "only to the extent that it is necessary for" the purposes listed in section 27(3).[173]

105.3 Prohibiting the sale of tobacco and vaping products must be reasonable within the meaning of section 6(2)(h) of PAJA.

105.4 Prohibiting the sale of tobacco and vaping products must be rational in terms of the principle of legality.

106 We shall focus below on the requirement of necessity. Suitably modified principles would apply to the requirements of reasonableness and rationality, and much of what is stated in paragraphs 34 to 63 above would be relevant to those requirements.[174]

The meaning of "necessary"

107 Section 27 of the Act means that, in order to be lawful, the prohibition on the sale of tobacco and vaping products must be:

- necessary to prevent an escalation of the disaster or to contain the effects of the disaster; and

- necessary to protect the public.

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173 Notice 313 of 15 March 2020: page 62 para (2).

174 We note that the FITA judgment was primarily concerned with a challenge based on rationality. We deal with what the judgment had to say regarding necessity in paragraph 111 below.

108 The test of necessity places the bar at a higher level than rationality or reasonableness, since it means that there must be no other way of achieving the purpose that is sought to be achieved. In other words, it must be the case that Regulation 45 is essential to achieve the purposes set out in section 27(2) and section 27(3) of the Act. Conduct that is reasonable may nevertheless not be necessary.

109 Sachs J made this point in *Coetzee*[175] in the context of the limitation clause in the interim Constitution, when he held that "the element of necessity … tightens up the scrutiny in respect of what would be reasonable and justifiable" since "the burden of persuasion is a higher one".[176] In other words, "the requirement that the limitation should be not only reasonable but necessary would call for a higher degree of justification".[177]

110 The Constitutional Court made a similar point in *Pheko*[178] in the context of section 55 of the Act. Section 55 sets out the powers of a municipality to deal with a local disaster in similar terms to section 27. Nkabinde J held that this provision must be "interpreted narrowly"[179] since a "wide construction may adversely affect rights in section 26 [of the Constitution]".[180] She made it plain that "the Municipality's powers following upon the declaration of a local state of

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175 Coetzee v Government of the RSA 1995 4 SA 631 (CC).

176 Para 56.

177 Para 60.

178 Pheko v Ekurhuleni Metropolitan Municipality 2012 2 SA 598 (CC).

179 Para 37.

180 Para 37.

disaster must be exercised only to the extent that it is strictly necessary for the purposes set out in s 55(3)."[181]

111 The Full Court took a different view in *FITA*, when it held that the test was "reasonably necessary" rather than "strictly necessary".[182] The Full Court stated that the necessity requirement "is met once it is shown that there is a rational connection between the ban on tobacco sales and curbing the scourge of the Covid-19 virus in an attempt to prevent a strain on the country's healthcare facilities".[183] We respectfully submit that this finding is wrong since it collapses the requirement of necessity into the requirement of rationality. If Parliament had intended the test to be one of rationality, it would not have used the word "necessary". Since all law must be rational in terms of the constitutional principle of legality, the interpretation adopted by the Full Court in *FITA* means that the requirement of necessity in section 27(3) is rendered superfluous.

The test is objective

112 Whether conduct is necessary for purposes of section 27 involves an objective enquiry. It is for the Court to determine whether the conduct is necessary. If it is not, then it is no answer for the Minister to say that she believed that the conduct was necessary.

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181 Para 42, our underlining. In para 87 of the FITA judgment, the Full Court distinguished Pheko on the basis that it had to do with a local state of disaster. But the wording of section 55 mirrors the wording of section 27. We respectfully submit the word "necessary" cannot have one meaning in section 55 and a different meaning in section 27.

182 Para 87 of the FITA judgment.

183 Para 85 of the FITA judgment.

113 The situation is similar to *SARFU*.[184] Here the Constitutional Court was dealing with section 1(1) of the Commissions Act 8 of 1947, which empowers the President to make the provisions of the Act applicable to a commission of enquiry in circumstances where he has "appointed a commission … for the purpose of investigating a matter of public concern". Chaskalson P interpreted this provision as follows:[185]

> "In determining whether the subject-matter of the commission's investigation is indeed a 'matter of public concern', the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion."

114 Harms JA made a similar finding in *New Clicks*.[186] At issue in this case was section 22G(2)(b) of the Medicines and Related Substances Control Act 101 of 1965, which empowers the Minister to make regulations "on an appropriate dispensing fee". Harms JA interpreted this provision as follows:

> "The section requires the dispensing fee to be "appropriate". What is appropriate was not left to the discretion of the Minister, and also not to that of the committee. In this regard there is a clear break from the approach adopted in matters such as security legislation during the pre-constitutional era. There, the jurisdictional fact was quite often the opinion of one or other functionary and, provided the functionary held the opinion, courts were rather hamstrung. Here the jurisdictional fact is not someone's opinion but an objective fact, namely a dispensing fee that

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184 President of the Republic of South Africa v South African Rugby Football Union 2000 1 SA 1 (CC).

185 Para 171.

186 Pharmaceutical Society of SA v Minister of Health and Another; New Clicks SA (Pty) Ltd v Tshabalala-Msimang NO [2005] 1 All SA 326 (SCA) para 75. On appeal, a majority of the Constitutional Court held that the regulations did not fix an "appropriate" dispensing fee: Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC).

> must be "appropriate". Whether it is appropriate, can be tested judicially. If the fee does not pass this threshold requirement, the regulation is *pro tanto* void because it has no legal basis or justification." (our underlining)

115 A similar finding was made in *Democratic Alliance*.[187] Here the relevant legislation provided that a person appointed as a Director of Public Prosecutions "must … be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned". The Constitutional Court held that "the requirement is an objective jurisdictional fact".[188]

116 The requirement in section 27 of the Act that regulations must be "necessary", therefore refers to a jurisdictional fact of the type described by Corbett JA in *SA Defence & Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34H–35D:

> "Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If the court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power …. On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite

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187 Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC)

188 Para 20.

> fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter…."

Regulation 45 does not satisfy the test

117 We turn now to apply these legal principles to Regulation 45. For the reasons that follow, we submit that Regulation 45 is not necessary to achieve any of the purposes listed in section 27(2) and section 27(3) of the Act.

118 The starting point is to understand what objective is sought to be achieved by Regulation 45. The Minister's answer is unequivocal: Regulation 45 is intended to "protect human life and health and to reduce the potential strain on the health care system".[189] The Minister correctly accepts that she cannot rely on the general health effects of smoking and that she has to limit her case to the health risks caused by smoking during the Covid-19 pandemic.[190] That is why the Minister refers to scientific literature dealing with the pandemic, the "preponderance" of which is said to show that "the use of tobacco products may increase the risk of transmission of Covid-19, but does increase the risk of developing a more severe form of the disease".[191] The Minister acknowledges that the scientific knowledge on this issue "is still evolving"[192] and accepts that the medical literature is not "absolutely conclusive".[193] However, she says that

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189 Dlamini-Zuma para 48 page 477.

190 Dlamini-Zuma para 301 page 578. In contrast, Dr Ross misunderstands this in her attempt to rely on financial benefits of smoking cessation that are entirely unrelated to the pandemic (Ross para 9.2 page 1798).

191 Dlamini-Zuma para 51 page 477.

192 Dlamini-Zuma para 50 page 477.

193 Dlamini-Zuma para 84 page 495.

the medical literature provided a sufficient basis for her to "rationally conclude that smoking presents heightened Covd-19 risks".[194]

119 The Minister has misconceived the legal test. As we have explained above, section 27 of the Act means that it is insufficient for the Minister to say that she had a rational basis for concluding that Regulation 45 is necessary. The question is whether Regulation 45 is objectively necessary to achieve the purposes listed in section 27(2) and section 27(3) of the Act. The Minister is therefore wrong to say that "which side's science is better is not the question for decision in this matter".[195] If the science does not support the prohibition, then the prohibition would not be necessary within the meaning of section 27.[196]

120 What, then, does the "science" show?

120.1 The Minister says that "the use of tobacco products may increase the risk of transmission of Covid-19".[197] She is more emphatic when it comes to disease progression: she says that "the evolving medical literature … shows that smokers are more likely to develop serious diseases with Covid-19, compared to non-smokers".[198] In other words, the Minister

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194 Dlamini-Zuma para 89 page 497.

195 Dlamini-Zuma para 88 page 496.

196 Although the Full Court in FITA declined to decide which side's medical evidence was correct, it did so on the basis that this was "not countenanced by the principle of legality", which required no more than the existence of a rational connection (para 41).

197 Dlamini-Zuma para 51 page 478, our underlining.

198 Dlamini-Zuma para 118 page 517.

says that “the severity of Covide-19 outcomes is greater in smokers than non-smokers”.[199]

120.2 This is disputed by Dr Morjaria. As we have already indicated, Dr Morjaria says the following:

120.2.1 The scientific literature does not support the claim that there is an increased risk of Covid-19 infection among smokers.[200]

120.2.2 There is consistent evidence from a number of studies suggesting that current smokers have a lower risk of infection and of developing Covid-19 at a level of severity that requires hospitalisation.[201]

120.2.3 The current scientific evidence does not demonstrate that the severity of Covid-19 outcomes is greater in current smokers than non-smokers.[202]

120.2.4 It is not yet clear why there is this apparent lower level of hospitalisation for smokers, but it remains the case that high levels of smokers are not being seen amongst patients that are hospitalised with Covid-19.[203]

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199 Dlamin-Zuma para 54 page 478.

200 Morjaria para 12(c) page 1099; Morjaria para 7(a) page 1879.

201 Morjaria para 12(d) page 1099.

202 Morjaria para 12(e) page 1099; Morjaria para 7(c) page 1879.

203 Morjaria para 12(j) page 1100.

120.3 The Minister was therefore correct to concede in her answering affidavit that the scientific literature is not "absolutely conclusive" when it comes to establishing a link between smoking and the risk of contracting a more serious form of Covid-19.[204] But that concession is fatal to the Minister's case: once the concession is made, it cannot be said that it is necessary to prohibit the sale of tobacco and vaping products in order to prevent smokers from contracting a more severe form of Covid-19. It is not enough for the Minister to establish that prohibiting smoking may assist in combating Covid-19; it has to be necessary to do so.

120.4 The problems for the Minister do not end there. Even if it were to be assumed for the sake of argument that there is a causal link between smoking and the risk of contracting a more severe form of Covid-19, the Minister would still have to show that quitting smoking during the pandemic will reverse or reduce that risk.[205] The Minister has not come close to showing that this is the case. As we have explained above, the only expert who addresses this issue for the Minister is Dr Egbe and she candidly concedes that "there is not yet enough data to assess whether and/or to what extent the chance of infection or disease progression decreases when a person quits smoking".[206] Since the Minister's own expert concedes that there is no evidence to show that smoking cessation

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204 Dlamini-Zuma para 84 page 495.

205 The Minister overlooks this entirely in paragraph 103 of her answering affidavit (page 507), when she states that it "ought to be sufficient" for her to establish a "clear association between cigarette smoking and poor outcomes in Covid-19".

206 Egbe para 37 page 848

will confer a benefit with regards to Covid-19 disease progression (as opposed to general improvements to health), it cannot be said to be necessary for the Minister to prohibit the sale of tobacco and vaping products.

120.5 In short: the Minister's case is that Regulation 45 is intended to reduce the risk that smokers may contract a more severe form of Covid-19 in circumstances where the Minister's own expert concedes that there is no data to show that the disease progression of Covid-19 will decrease if a smoker were to quit smoking. This means that Regulation 45 is not necessary for any of the purposes in section 27 of the Act.

120.6 Although the Minister makes much of the need to adopt a "cautious approach",[207] that is not consistent with the test of necessity in section 27 of the Act. If the scientific evidence does not establish conclusively that the position is X, then it is not "necessary" to adopt a cautious approach in favour of X.

120.7 Dr Morjaria explains that there is evidence from a number of datasets suggesting that former smokers (i.e. smokers who have quit during lockdown) have poorer Covid-19 outcomes than current smokers. As counterintuitive as it may sound, it is biologically plausible that nicotine in tobacco may protect against severe disease and lung injury associated with Covid-19.[208] Regulation 45 may therefore have the perverse result

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207 Dlamini-Zuma para 57 page 479, para 105 page 508 and para 119 page 517.

208 Morjaria para 12(g) page 1099.

of making smokers worse off, not better off. For this reason as well, Regulation 45 is not necessary to achieve the purposes in section 27 of the Act.

121 Even if all of these difficulties could be overcome, the Minister faces another difficulty. The Minister says that the purpose of Regulation 45 is "to reduce the incidence of smoking and so free up critical resources needed to respond to severe cases of Covid-19".[209] But that purpose could not be achieved unless the prohibition causes a substantial number of smokers to quit. We have indicated in paragraph 56 above that, according to the Minister's own experts, Regulation 45 will not lead to a substantial reduction in smokers because the overwhelming majority of smokers will purchase illicit cigarettes. It is not necessary for the Minister to prohibit the sale of tobacco and vaping products in order to reduce smoking in circumstances where the prohibition does not, in fact, cause a significant number of smokers to quit. Moreover, it is not necessary for the Minister to prohibit the sale of tobacco and vaping products in order to "free up" approximately 16 ICU beds at any one time across entire the country.[210]

Summation

122 We submit that Regulation 45 should be reviewed and set aside on the basis that:

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209 Dlamini-Zuma para 121 page 517.

210 See paragraph 59 above.

122.1 it is not authorised by law, within the meaning of section 6(2)(a)(i) of PAJA;

122.2 a mandatory and material condition prescribed by the Act was not complied with, within the meaning of section 6(2)(b) of PAJA;

122.3 *alternatively* it is unlawful in terms of the principle of legality.

Procedural unfairness and procedural irrationality

123 We turn next to address procedural unfairness and procedural irrationality.

<u>The tobacco industry and smokers were not invited to make representations</u>

124 The tobacco industry and the consumers of tobacco and vaping products were never invited to comment on a proposed extension of the prohibition on the sale of tobacco and vaping products in Alert Level 3, or to make submissions as regards why the prohibition should not be extended into Alert Level 3.

125 The Minister accepts this. She says lamely that "before making Regulation 45 [she] considered all the main issues relevant to the continuation of the prohibition on local sales of [tobacco and vaping products] during the Alert Level 3 period".[211] But this is no answer to the complaint that the tobacco industry and smokers were never afforded an opportunity to make representations to the Minister on

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211 Dlamini-Zuma para 296 page 576.

the “issues” that she was considering. This failure on the part of the Minister was particularly egregious for three reasons:

125.1 *First*: the Minister never afforded BATSA an opportunity to make submissions regarding the scientific literature that she was “considering”. The Minister concedes that BATSA and other interested parties have never been told what those studies are and have never been afforded an opportunity to make submissions regarding those studies.[212] This is grossly unfair in circumstances where, according to the Minister herself, the scientific knowledge is still evolving.

125.2 *Second*: interested parties were never afforded an opportunity to respond to the submissions received by the Minister from the National Council against Smoking, the SA Thoracic Society, the College of Public Health Medicine and the Heart and Stroke Foundation of SA.[213] The Minister placed great store on these submissions but never bothered to give other parties an opportunity to respond to them.

125.3 *Third*: although the sale of alcohol had been banned under Alert Level 4, the liquor industry was afforded an opportunity to engage with government and succeeded in having the prohibition on the sale of alcohol lifted in Alert Level 3. In other words, the government undertook

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212 Dlamini-Zuma para 362.3 page 598.

213 Dlamini-Zuma para 68 to 71 page 482.

a significant amount of consultation with the liquor industry but afforded no equivalent opportunity to the tobacco industry.[214]

126 What is the legal consequence of this failure on the part of the Minister to afford interested parties an opportunity to make representations? The answer depends on whether PAJA does or does not apply.

The position if PAJA applies

127 If PAJA applies, then the making of Regulation 45 would be reviewable in terms of section 6(2)(c) of PAJA.

128 That is because there was no compliance with the requirements of section 4 or section 3 of PAJA when Regulation 45 was made. It is common cause that the Minister did not follow a notice-and-comment procedure or any other appropriate procedure.

The position if PAJA does not apply

129 If PAJA does not apply, then the principle of procedural rationality would apply as a component of legality review. The principle means that the process followed by the decision-maker (no less than the decision itself) must be rational. In other words, the requirement of rationality "applies not only to the decision, but also to the process in terms of which that decision was arrived at".[215]

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214 Joubert para 55 page 53.

215 Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC) at para 61. See also NERSA v PG Group (Pty) Ltd 2019 (10) BCLR 1185 (CC) paras 48 and 49.

130 Procedural rationality involves "testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power".[216]

131 We accept that procedural rationality does not mean that the decision-maker must always afford a hearing to an affected party.[217] However, there will be occasions where it is indeed irrational to make a decision without hearing from affected persons. *Albutt* was such a case:[218]

131.1 Under the Constitution, the President has the power to pardon offenders. In 2007, President Mbeki announced a special dispensation for applicants who sought pardon on the basis that they had been convicted of politically-motivated offences but who had not applied for amnesty to the TRC. President Mbeki did not afford a right to victims of crime to participate in the process before a decision was made regarding pardon.

131.2 Ngcobo CJ held that this was irrational:[219]

> "Once it is accepted, as it must be, that the twin objectives of the special dispensation process are nation-building and national reconciliation and that the participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that the exclusion of the victims from the special

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216 Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC) at para 64.

217 Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC) at para 65. The same point is made in para 60 of the FITA judgment.

218 Albutt v Centre for the Study of Violence and Reconciliation 2010 3 SA 293 (CC).

219 Paras and 69.

> dispensation process is rationally related to the achievement of the objectives of the special dispensation process.
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> In my view, the address of former President Mbeki to Parliament itself evidenced and indeed recognised that, given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational. On this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational."

131.3 In other words, "the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based".[220]

132 In *Earthlife Africa*,[221] this Court applied *Albutt* in order to find as follows:

> "In the present matter NERSA must have been aware that there were sectors of the public with either special expertise or a special interest regarding the issue of whether it was appropriate for extra generation capacity to be set aside for procurement through nuclear power. In addition, in taking the decision, NERSA was under a statutory duty to act in the public interest and in a justifiable and transparent manner whenever the exercise of their discretion was required but also to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. These requirements were clearly not met by NERSA in taking its far reaching decision to concur in the Minister's sec 34 determination. It has failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons I consider that NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone."

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220 Para 72.

221 Earthlife Africa v Minister of Energy 2017 (5) SA 226 (WCC) para 50.

133 The same principle applies here. The Minister accepts that the scientific literature on the link between smoking and Covid-19 is evolving. In a situation of such flux, it was irrational for her not to afford BATSA and other interested parties an opportunity to comment on the scientific literature she intended to rely on for perpetuating the prohibition on the sale of tobacco and vaping products. Had the Minister done so, BATSA would have placed before her the existing scientific material on which it relies in this application.

134 The present case therefore satisfies the three-stage test for procedural irrationality in *Democratic Alliance*.[222] That is because (*i*) the scientific material relied on by BATSA is relevant; (*ii*) the Minister's failure to have regard to that material was not rationally related to the purpose for which the power was conferred; and (*iii*) ignoring that material colours the entire process with irrationality.

Summation

135 We submit that Regulation 45 should be reviewed and set aside on the basis that it was made in a manner that was procedurally unfair within the meaning of section 6(2)(c) of PAJA, *alternatively* on the basis that it was procedurally irrational in terms of the principle of legality.

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222 Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC) at para 39.

The Minister did not make Regulation 45 "after consulting the responsible Cabinet member"

136 Section 27(2) of the Act vests the power to make regulations in the Minister "after consulting the responsible Cabinet member".

137 The preamble to the Regulations recites that the Minister made the Regulations "after consultation with the relevant Cabinet members" (our underlining).

138 The founding affidavit called on the Minister to identify which Cabinet members she consulted with before making Regulation 45 and to put up a record of that consultation.[223] The Minister has declined to do so in her answering affidavit[224] or in her rejoinder affidavit.[225]

139 This means that there is no evidence before the Court to show that the Minister consulted with any cabinet member before she made Regulation 45. There is accordingly no evidence that the jurisdictional requirement in section 27(2) has been satisfied.

140 The reasoning of the Pretoria High Court in *HASA v Minister of Health* is directly in point:[226]

> "[9] The main attack was that the Minister allegedly did not first consult with the National Health Council as is required in section 90(1) of the NHA, before promulgating the Regulations, which requirement is mandatory ....

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223 Joubert para 132 page 44.

224 Dlamini-Zuma para 358 page 596.

225 Dlamini-Zuma para 75 page 1426.

226 2011 (10) BCLR 1047 (GNP).

[10] There is nothing *ex facie* the Regulations or any other aspect of the drafting history of the Regulations to indicate that the Minister in fact consulted with either the National Health Council or with the Advisory Committee with regard to the Regulations.

[11] In its founding affidavit HASA drew attention to the fact that it had submitted a request under PAJA for the record of the National Health Council and the record of the Department of Health pertaining to the promulgation of the Regulations and the consultations that took place between the Minister and the National Health Council prior to the promulgation of the Regulations. These requests under PAJA were refused by the respondents.

[12] Despite the fact that HASA drew express attention to the absence of any such minutes or proof of consultations and, further, despite the express challenge directed at the Regulations on the ground of non-compliance with the material provisions of the NHA, the respondents failed to include in the Record, filed in terms of the provisions of Rule 53, any documents or minutes evidencing consultations having occurred prior to the promulgation of the Regulations and also failed in the answering affidavit to advance any proof bar the *ipse dixit* of Dr. Chetty, the present acting Director-General of the DOH, in the answering affidavit to the effect that consultation took place.

[17] The presence or absence of consultation is a jurisdictional fact the presence or absence of which is objectively justiciable by a court....

[18] For that purpose, there must be some evidence placed before the court to demonstrate that consultation in fact occurred and that it occurred as contemplated in the NHA and, more particularly, that it occurred prior to the promulgation of the Regulations."

141 We accordingly submit that Regulation 45 should be reviewed and set aside on the basis that:

141.1 a mandatory and material condition prescribed by the Act was not complied with, within the meaning of section 6(2)(b) of PAJA;

141.2 *alternatively* Regulation 45 is unlawful in terms of the principle of legality.

Conclusion

142 For all of the reasons set out above, we submit that Regulation 45 should be reviewed and set aside.

RELIEF SOUGHT

143 The applicants ask for the relief in prayers 1, 2 and 3 of the notice of motion.

144 We make the following brief submissions regarding these prayers:

144.1 *As regards prayer 1*: there is no dispute between the parties that the matter is urgent.

144.2 *As regards prayer 2*: this refers to the Regulations as amended by Government Notice No 608 of 28 May 2020. Any order of this Court should now also refer to the amendments contained in Government Notice No 763 of 12 July 2020.[227]

144.3 *As regards prayer 3*: the respondents contend that, if the applicants were to be successful, each party should pay its own costs.[228] This flies in the face of the general rule that a party who is successful in litigation against the state is entitled to its costs.[229] The applicants ask for their costs, including the costs of two counsel and the qualifying expenses of their two expert witnesses.

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227 Annexure NCZ22 page 1435.

228 Dlamini-Zuma para 367.3 page 599.

229 Biowatch Trust v Registrar of Genetic Resources 2009 6 SA 232 (CC) paras 22 and 43; Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing 2015 (4) BCLR 396 (CC

145 If the Court were minded to dismiss the application, then the respondents have not asked for costs against the applicants.[230] That concession is properly made in accordance with the *Biowatch* rule.[231]

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28 July 2020

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230 Dlamini-Zuma para 367.2 page 599.

231 Although the Full Court made a costs order against the applicant in the FITA case, it found that the Biowatch rule did not apply because this was not a constitutional case (see para 12 of the judgment in the application for leave to appeal).