

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

CASE NO.: HC-MD-CIV-MOT-GEN-2020/00136

In the matter between:

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| <b>NAMIBIAN EMPLOYERS' FEDERATION</b>  | <b>1<sup>ST</sup> APPLICANT</b> |
| <b>NAMIBIAN EMPLOYERS ASSOCIATION</b>  | <b>2<sup>ND</sup> APPLICANT</b> |
| <b>HUAB SAFARI RANCHES (PTY) LTD</b>   | <b>3<sup>RD</sup> APPLICANT</b> |
| <b>JOHN MEINERT PRINTING (PTY) LTD</b> | <b>4<sup>TH</sup> APPLICANT</b> |
| <b>FP DU TOIT TRANSPORT (PTY) LTD</b>  | <b>5<sup>TH</sup> APPLICANT</b> |
| <b>JET X COURIERS (PTY) LTD</b>        | <b>6<sup>TH</sup> APPLICANT</b> |
| <b>SKYCORE AVIATION (PTY) LTD</b>      | <b>7<sup>TH</sup> APPLICANT</b> |

and

|  |                                  |
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| <b>PRESIDENT OF THE REPUBLIC OF NAMIBIA</b>  | <b>1<sup>ST</sup> RESPONDENT</b> |
| <b>ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA</b>   | <b>2<sup>ND</sup> RESPONDENT</b> |
| <b>MINISTER OF LABOUR, INDUSTRIAL RELATIONS AND<br/>EMPLOYMENT CREATION OF THE REPUBLIC OF NAMIBIA</b> | <b>3<sup>RD</sup> RESPONDENT</b> |
| <b>MINISTER OF HEALTH AND SOCIAL SERVICES OF THE<br/>REPUBLIC OF NAMIBIA</b>                           | <b>4<sup>TH</sup> RESPONDENT</b> |
| <b>LABOUR COMMISSIONER OF THE REPUBLIC OF NAMIBIA</b>  | <b>5<sup>TH</sup> RESPONDENT</b> |
| <b>GOVERNMENT OF THE REPUBLIC OF NAMIBIA</b>   | <b>6<sup>TH</sup> RESPONDENT</b> |

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|---|-----------------------------|
| NATIONAL UNION OF NAMIBIAN WORKERS          | 7 <sup>TH</sup> RESPONDENT  |
| TRADE UNION CONGRESS OF NAMIBIA             | 8 <sup>TH</sup> RESPONDENT  |
| NAMIBIA NATIONAL LABOUR ORGANISATION        | 9 <sup>TH</sup> RESPONDENT  |
| NAMIBIA TRANSPORT AND ALLIED WORKERS UNION  | 10 <sup>TH</sup> RESPONDENT |
| MINE WORKERS UNION OF NAMIBIA<br>RESPONDENT | 11 <sup>TH</sup>            |

**Neutral Citation:** *Namibian Employers' Federation v President of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00136) [2020] NAHCMD 248 (23 June 2020)

Coram: **UEITELE J, MASUKU J AND PRINSLOO J**

Heard: 29 May 2020

Delivered: 23 June 2020

**Flynote:** Constitutional law – Interpretation of Constitution of a State - To be interpreted so as to enable it to play a creative and dynamic role in expression and achievement of ideals and aspirations of a nation but where regulations derogate from the rights of persons such regulations to be interpreted narrowly.

Constitutional law - State of Emergency regulations under Art 26(5) of the Namibian Constitution - Such regulations must be promulgated for the purpose of dealing with the situation which has given rise to the emergency, if not so the regulations will be *ultra vires*

Constitutional law - Art 26(5) of the Namibian Constitution empowering the President to make regulations for the purpose of dealing with the situation which has given rise to the emergency - No specific provision in Art 26(5) authorizing the President to delegate his powers - Nor is there any necessary implication of such right – Principles regulating powers to delegate restated.

**Summary:** On 30 January 2020 the World Health Organization declared the outbreak of COVID-19 a Public Health Emergency of International concern and a pandemic on 11 March 2020.

When the first cases were confirmed in Namibia on 14 March 2020, the Government of Namibia suspended air travel to and from Qatar, Ethiopia and Germany for 30 days. All public and private schools were closed for a month, and large gatherings were prohibited.

On 17 March 2020, the President, under Article 26(1) of the Namibian Constitution, read together with s 30(3) of the Disaster Risk Management Act 10 of 2012, on account of the outbreak of the Coronavirus disease (COVID -19) declared a State of Emergency.

After declaring a State of Emergency the President by Proclamation 9 of 2020 promulgated the State of Emergency Regulations (the *Regulations*). In terms of the *Regulations* the Khomas and Erongo Regions (including the tarred roads linking the Towns of Okahandja and Rehoboth to Windhoek) were placed under lockdown resulting in the restriction of people's movements, closure of schools, business and prohibition of big gatherings. Regulation 3(3) defined the period of lockdown as the period starting from 14h00 on Saturday 28 March 2020 and ending at 23h59 on 17 April 2020, inclusive of the first and the last day. The Regulations enacted a range of measures designed to slow the spread of the virus and "flatten the curve".

By 6 April 2020, the infections had risen to 16 cases and 3 recoveries and these results led to a review of the regulations. On 17 April 2020 the President issued Proclamation 13 of 2020 amending the earlier *Regulations*. In terms of the '*Amended Regulations*' the lockdown, movement, restrictions, closure of businesses and associated regulations were extended to the entire nation. In addition to extending the lockdown to the entire country the Amended Regulations extended the period of lockdown from 17 April 2020 to 04 May 2020.

On 28 April 2020, the President issued Proclamation No16 titled 'State Of Emergency - Covid-19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution' (the *Suspension Regulations*). Amongst the laws that were suspended by Proclamation 16 are certain provisions of the Labour Act 11 of 2007. Regulation 19 of the *Suspension Regulations* makes it an offence for an employer to terminate employment, force an employee to take leave, reduce the remuneration of an employee or refuse to reinstate an employee under specific circumstances. Further to this, the President issued Proclamation 18 on 4 May 2020 to suspend the operation of further laws.

The applicants, aggrieved by regulation 14 of the *Regulations*, and by regulation 19 (1) (a); 19(1)(b); 19(1)(c); 19(2); 19(4); 19(6); 19(8); and 25 of the *Suspension Regulations*, regulation 12(1)(a); 12(1)(b); 12(2); 12(5); and regulation 16 of the *Further Suspension Regulations*; as well as regulation 15 of *Stage 2 Regulations*, approached this court on an urgent basis seeking an order declaring these regulations void and unconstitutional.

The applicants based their reasoning on the following: that the regulations are retrospective in nature; that the President acted *ultra vires* Art 26(5) when he promulgated regulation 19 of the *Regulations* and regulation 12 of the *Suspension Regulations*; and that the President impermissibly delegated constitutional powers to ministers.

The respondents opposed the application. They however did not dispute the urgency. They however deny that the applicants are aggrieved persons as envisaged under Article 25 of the Namibian Constitution and base this denial on the contention that the applicants can still comply with their lawful obligations or achieve their lawful goals as envisaged in their respective constitutions.

The respondents dispute the applicants' complaints and argue that, at the time of the declaration of the State of Emergency and publication of the Regulations, just like the rest of the world, Namibia experienced much uncertainty about the nature, spread and

effect of the COVID -19 virus disease and that at the time, it was necessary for the President to act with caution.

Further, that due to the uncertainties, the absence of the luxury of time for assessment or procrastination and the overriding importance of immediate action necessitated the President to take such action as the uncertainties of the situation demanded and to do so with the caution that the situation required. According to the respondents, this called for measures that were primarily aimed at preventing the spread of the disease, hence, the promulgation of the said regulations.

*Held*, that the applicants are aggrieved persons as contemplated in Article 25 of the Namibian Constitution.

*Held*, because the President did not file any affidavit explaining his reasons for invoking the provisions of Article 26 and delegated the responsibility to explain his reasons and thinking to the Minister of Labour and the Attorney- General, respectively, the reasons put forward by the delegates is inadmissible hearsay.

*Held*, that the powers provided for in Article 26 are enormous and may serve, where appropriate, to suspend the exercise and enjoyment of some fundamental rights prescribed by the Constitution. For this reason, there would be no person better placed to account for how the powers were exercised and why, than the repository of the power, the President himself.

*Held*, that the *ultra vires* principle applies where the repository of the public power performs a function outside of the scope of the power conferred.

*Held*, that for the power conferred on the President by Art 26(5)(b) to be legally exercised, the regulations that the President makes must be for a specified period; and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the state of emergency.

*Held further that:* the impugned regulations do not deal with the control or curtailment of the spread of the COVID-19 virus.

*Held further that:* the impugned regulations are not reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency and to that extent the President breached the principle of legality.

*Held further that:* the delegation of the power by the President to ministers to issue directives for supplementing and amplifying any of the provisions of the regulations constitutes impermissible delegation of the President's powers.

*Held further that:* the delegation of the approval of the ministers' directives to the Attorney- General constitutes impermissible delegation of the President's powers.

*Held further that* once the President invokes the provisions of Article 26(5) the declaration must be placed before the National Assembly for approval within thirty (30) days of the making of the declaration.

*Held further that:* regulation 14 of the *Regulations*, and regulation: 19 (1) (a); 19(1)(b); 19(1)(c); 19(2); 19(4); 19(6); 19(8); and regulation 25 of the *Suspension Regulations*, regulation 12(1)(a); 12(1)(b); 12(2); 12(5) and regulation 16 of the '*Further Suspension Regulations*', as well as regulation 15 of *Stage 2 Regulations* are therefore unconstitutional and thus invalid.

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## ORDER

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1. The applicants' non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 73(4) of the Rules of Court.

2. The following regulations, namely:
  - 2.1 regulation 12(1)(a);
  - 2.2 regulation 12(1)(b);
  - 2.3 regulation 12(2);
  - 2.4 regulation 12(5); and
  - 2.5 regulation 16 in as far as it relates to the impugned provisions of Proclamation No 18 contained in the “State of Emergency – Covid-19: Further Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations”, Proclamation No 18 of 2020 are unconstitutional and thus invalid.
  
3. The following regulations, namely:
  - 3.1. regulation 19(1)(a);
  - 3.2. regulation 19(1)(b);
  - 3.3. regulation 19(1)(c);
  - 3.4. regulation 19(2);
  - 3.5. regulation 19(4);
  - 3.6. regulation 19(6);
  - 3.7. regulation 19(8); and
  - 3.8. regulation 25, in as far as it relates to the impugned provisions of Proclamation No 16 contained in the “State of Emergency Covid-19 Regulations, Proclamation No 16 of 2020” are unconstitutional and thus invalid.
  
4. Regulation 14 contained in the “State of Emergency Covid-19 Regulations”, Proclamation No 9 of 2020 is unconstitutional and invalid.
  
5. Regulation 15 contained in the “State of Emergency Covid-19 Regulations”, Proclamation No 17 of 2020 is unconstitutional and invalid.
  
6. The first to the sixth respondents must, jointly and severally, the one paying the other to be absolved, pay the applicants’ costs of this application. The costs to include the cost of one instructing and three instructed counsel.

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## JUDGMENT

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### THE COURT:

#### Introduction

[1] During December 2019, authorities in the City of Wuhan in the People's Republic of China, identified a disease which has come to be known as the coronavirus disease 2019, also referred to as COVID-19 (COVID-19 previously known as "2019 novel coronavirus"). The disease is caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). On 30 January 2020 the World Health Organization (herein referred to as 'WHO') declared the outbreak a Public Health Emergency of International concern and a pandemic<sup>1</sup> on 11 March 2020. COVID-19 is a fierce pandemic with innumerable deaths across the world and unfortunately there is no date on our calendar, which we can circle, to indicate when the storm will finally pass.

[2] According to statistics provided by WHO as of 29 May 2020 (the date on which we heard this application), more than 5.7 million cases of COVID-19 have been reported in more than 188 countries and territories, resulting in more than 357 688 deaths. By the date of this judgment, that number had exceeded 8.9 million and more than 460 000 deaths, respectively. At present, there is no vaccine available, no efficacious treatment and no cure of COVID 19. It is the great equalizer: COVID-19 affects all, regardless of race, age, religion, qualifications, background and social standing and is particularly concerning to the elderly and people with pre-existing health conditions.

[3] As indicated earlier, COVID-19 is a respiratory disease caused by the novel coronavirus (SARS-CoV-2), which is a new and particularly virulent virus. In its early

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<sup>1</sup> A "pandemic" is described as "an epidemic of disease that has spread across a large region, for instance multiple continents or worldwide, affecting a substantial number of people."



state, and throughout the duration of the infection, COVID-19 is asymptomatic. Thus, a person may be infected but may show no outward physical signs of infection. However, they may infect others during this time. COVID-19 is easily transmissible from people who are asymptomatic, pre-symptomatic or mildly symptomatic. It is passed on by droplets secreted from the mouth, nose or eyes of an infected person, which another is then exposed to and, as it is presently understood, which may survive for several hours outside the body. This being so, it can remain in the air and on surfaces where a person has been coughing or sneezing for hours (perhaps even days) earlier.

[4] Because COVID-19 is so virulent, it has the potential to infect a large number of people in a short space of time and thus its infection rates are exponential. Around the world, as the infection rates grew rampantly, countries saw their healthcare systems overwhelmed overnight, with people requiring hospitalisation, intensive care or respiratory support for prolonged periods of time.

[5] On 14 March 2020, Namibia reported her first two cases of COVID-19. This was a Romanian couple, who arrived in Windhoek from Spain through Doha, Qatar on 11 March 2020. The couple was, on their arrival at the Hosea Kutako International Airport, screened for the disease but showed no symptoms at that time. On 19 March 2020, a third case was confirmed. All the people who were in contact with the first three persons who tested positive were traced and tested. By 25 March 2020, the total number of cases reached seven, of which one was thought to be a local transmission. By 28 March 2020, the total number of cases had reached 11, with all new cases being travel-related.

[6] In an initial reaction on 14 March 2020, when the first cases were confirmed, the Government of Namibia suspended air travel to and from Qatar, Ethiopia and Germany for a period of 30 days. All public and private schools were closed for a month, and large gatherings were prohibited. This included celebrations for the 30<sup>th</sup> anniversary of Namibia's Independence that were scheduled to take place on 21 March 2020. In addition thereto libraries, musea, and art galleries were also closed. As a consequence, President Hage Geingob responded and on 17 March 2020, under Article 26(1) of the

Namibian Constitution<sup>2</sup>, read together with s 30(3) of the Disaster Risk Management Act, 2012<sup>3</sup> declared, with immediate effect, that a State of Emergency exists in the whole of Namibia, on account of the outbreak of the Coronavirus disease (COVID -19)<sup>4</sup> as a legal basis to restrict fundamental rights, such as the right to freely move and assemble, guaranteed under the Constitution.

[7] We indicated in paragraph 5 of this judgment that by 25 March 2020, the number of people infected with COVID -19 had risen to seven (this was within a period of less than ten days). Government's further response was for the President to promulgate the COVID-19 Regulations under Proclamation 9 of 2020<sup>5</sup> (the '*Regulations*'). In terms of these *Regulations*, the Khomas and Erongo Regions (including the tarred roads linking the Towns of Okahandja and Rehoboth to Windhoek) were placed under lockdown. The *Regulations* enacted a range of other measures designed to slow the spread of the virus and to "flatten the curve".

[8] By 6 April 2020, the infections had risen to 16 cases overall and 3 recoveries. By that time, government conducted 362 tests. The results led to the review of the Regulations and on 17 April 2020, the President issued Proclamation 13 of 2020<sup>6</sup> (the '*Amended Regulations*'), amending the *Regulations*. In terms of the *Amended Regulations*—the lockdown, movement, restrictions, closure of businesses and associated regulations were extended to the entire country. In addition to extending the lockdown to the entire country, the *Amended Regulations* extended the period of lockdown from 17 April 2020 to 4 May 2020. It is important to note at this stage and for what is to follow this judgment, that regulation 15 of the *Amended Regulations* already criminalised certain conduct<sup>7</sup>.

<sup>2</sup> We will in this judgment for ease of reference simply refer to the Namibian Constitution as the Constitution.

<sup>3</sup> The Disaster Risk Management Act 10 of 2012).

<sup>4</sup> The President declared the State of Emergency by Proclamation 7 of 2020, published in *Government Gazette* 7148 of 18 March 2020.

<sup>5</sup> Proclamation 9 of 2020, published in *Government Gazette* 7159 of 28 March 2020.

<sup>6</sup> Proclamation 13 of 2020, published in *Government Gazette* 7180 of 17 April 2020.

<sup>7</sup> Regulation 15 of under Proclamation 13 of 2020 reads as follows:

- "(1) A person commits an offence if that person –  
 (a) not being an authorised officer, by words, conduct or demeanour falsely represents himself or herself to be an authorised officer;

[9] On 1 April 2020 the government launched the Economic Stimulus and Relief Package, which was aimed at mitigating the impact of COVID-19 in Namibia. The first phase of the Economic Stimulus and Relief Package was geared at addressing the negative effects resulting from the first 21-day lockdown period which ended on 17 April 2020. The government, in collaboration with stakeholders and development partners, adopted a Stimulus and Relief Package amounting to N\$8.1 billion in total. It comprised of approximately N\$2.1 billion in direct support to businesses and households, N\$3.8 billion in accelerated value-added tax (VAT) refunds and payments for goods and services supplied to the government as well as N\$2.3 billion by way of loans to be guaranteed by the government. The relief package *inter alia* included measures aimed at supporting businesses and households by way of wage subsidies and government-backed loans, to formal and informal businesses sectors, which are directly affected by the lockdown measures and one-time income grants to persons who have lost their jobs due to the pandemic and its fallout.

[10] On 28 April 2020, the President issued Proclamation 16<sup>8</sup> titled '*STATE OF EMERGENCY - COVID-19: SUSPENSION OF OPERATION OF PROVISIONS OF CERTAIN LAWS AND ANCILLARY MATTERS REGULATIONS: NAMIBIAN CONSTITUTION*' (the "*Suspension Regulations*"). Amongst the laws that were suspended by Proclamation 16 are certain provisions of the Labour Act, 2007 (the 'Labour Act'), which included regulation 19<sup>9</sup>. Regulation 19 of the *Suspension*

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- (b) hinders, obstructs or improperly attempts to influence an authorised officer when exercising or performing a power or function conferred or imposed by or under these regulations or another law;
  - (c) furnishes or gives false or misleading information to an authorised officer;
  - (d) does anything calculated to improperly influence an authorised officer concerning a matter connected with the functions of the authorised officer; or
  - (e) publishes, through any form of media, including social media –
    - (i) any false or misleading statement about or in connection with the COVID-19; or
    - (ii) any statement that is intended to deceive any other person about the COVID-19 status of any person.

<sup>8</sup> Proclamation 16 of 2020, published in *Government Gazette* 7194 of 28 April 2020.

<sup>9</sup> Regulation 19 reads as follows:

- '(1) Despite anything to the contrary in any provision of the Labour Act, 2007 (Act No. 11 of 2007) (hereafter "the Act"), an employer may not, during the lockdown –
  - (a) dismiss an employee or terminate any contract of employment or serve a notice of intended dismissal in terms of section 34 of the Act for reasons related to the actual or potential impact of

*Regulations* makes it an offence for an employer to terminate employment, force leave, reduce remuneration or refuse to reinstate an employee under specific circumstances. Further to this, the President issued Proclamation 18 to suspend the operation of further laws.

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- (b) Covid-19 on the operation of the employer's business;
    - (b) force an employee to take unpaid leave or annual leave for reasons related to –
      - (i) the actual or potential impact of COVID-19 on the operation of the employer's business;
      - or (ii) the implementation of a provision of any regulation which is intended to give effect to the lockdown; or
    - (c) reduce the remuneration of any employee for reasons related to the actual or potential impact of COVID-19 on the operation of the employer's business or to the implementation of a provision of any regulation which is intended to give effect to the lockdown.
  - (2) Despite subregulation (1)(c), if, during the period of lockdown, an employer wishes to reduce or defer payment of full remuneration because of its inability to pay full remuneration due to actual or potential impact of COVID-19, the employer must negotiate in good faith with –
    - (a) a recognised trade union;
    - (b) a workplace representative; or
    - (c) in the absence of a recognised trade union or workplace representative, the affected employee or employees.
  - (3) If the parties have reached an agreement, the agreement must be filed with the Labour Commissioner, but, in the absence of any agreement, any party may refer a dispute to the Labour Commissioner.
  - (4) If an employer has, prior to the commencement of these regulations, dismissed an employee or employees or forced an employee to take unpaid leave or annual leave due to the actual or potential impact of COVID-19 on their business operations, that employer must, as soon as practicable –
    - (a) reinstate such dismissed employees; and
    - (b) engage the dismissed employees in negotiations about their conditions of employment during the lockdown period.
  - (5) An employee, insofar as it relates to the care of a family member who has contracted COVID-19 and is unable to care for him or herself, or is under quarantine or under self-isolation in the employee's care, is –
    - (a) entitled to sick leave provided for in section 24 of the Act; and
    - (b) where the period of sick leave referred to in paragraph (a) is exhausted, entitled to such extended sick leave benefit as permitted by section 30 of the Social Security Act, 1994 (Act No. 34 of 1994), as may be required to care for such a family member.
  - (6) If, prior to the commencement of these regulations, an employer has notified his or her employees of an intended dismissal in terms of section 34 of the Act for reasons related to actual or potential impact of COVID-19 on the operations of the employer's business, the date of the intended dismissal is deemed to be 28 days after the end of the lockdown period, unless a later date is specified in the notice.
  - (7) If, after the period of lockdown, an employer wishes to dismiss employees for reasons related to the actual or potential impact of COVID-19, the employer must do so in compliance with section 33 or section 34 of the Act, including negotiations over the right of the employees to be recalled to their

[11] On 4 May 2020, the President issued two further Proclamations, namely Proclamation 17<sup>10</sup> titled ‘*STAGE 2: STATE OF EMERGENCY-COVID-19 REGULATIONS: NAMIBIAN CONSTITUTION*’ (“*Stage 2 Regulations*”) and Proclamation 18 titled ‘*STATE OF EMERGENCY- COVID-19: FURTHER SUSPENSION OF OPERATION OF PROVISIONS OF CERTAIN LAWS AND ANCILLARY MATTERS REGULATIONS: NAMIBIAN CONSTITUTION.*’ (“*Further Suspension Regulations*”).

[12] With regard to the above Proclamations the applicants argue that they are aggrieved by the following regulations, namely:

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former or comparable positions as the employer’s operation recovers.

- (8) An employer or any other person who –
- (a) dismisses an employee or terminates any contract of employment or serves a notice of intended dismissal in contravention of subregulation (1)(a);
  - (b) forces an employee to take unpaid leave or annual leave in contravention of subregulation (1)(b);
  - (c) reduces the remuneration of any employee without following the process outlined in subregulation (2);
  - (d) fails or refuses to reinstate a dismissed employee or to engage a dismissed employee in negotiations in contravention of subregulation (4); or
  - (e) dismisses an employee without complying with the requirements of subregulation (7),

commits an offence and on conviction is liable to a fine not exceeding N\$10 000, or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.

(9) Parts A to C of Chapter 8 of the Act and regulations, rules or codes of conduct made under that Act, insofar as they relate to the time periods or time limits, processes and procedures in respect of conciliation and arbitration of labour disputes and issuance of arbitration awards, appeals and reviews against decisions of arbitrators and the variation and rescission of awards, are suspended for the duration of the period of lockdown.

(10) Section 87 of the Act, and the time periods or time limits specified in section 89 of the Act, and the Labour Court Rules published under Government Notice No, 279 of 2 December 2008, are suspended for the duration of the period of lockdown.

(11) Despite subregulations (9) and (10), the Chief Justice may regulate the Registrar’s office hours for the purpose of issuing of any process or filing of any document or for the purpose of filing a notice of intention to oppose a matter in the Labour Court by issuing directions for the duration of the period of lockdown.

(12) The computation of any time period or time limit or days required for the completion of any process or the doing of anything as contemplated in this regulation, where interrupted by the period of lockdown, resumes after the expiry of the period of lockdown, and commences after the expiry of that period.

(13) For the purposes of subregulation (11), the provisions of section 39 of the High Court Act, 1990 (Act No. 16 of 1990) and section 119 of the Act which relate to the making of rules of the Labour Court by the Judge-President with the approval of the President, are suspended.

<sup>10</sup> Proclamation 17 of 2020, is published in *Government Gazette* 7203 of 4 May 2020.

- (a) regulations 19(1)(a); 9(1)(b);19(1)(c); 19(2);19(4); 19(6);19(8); and regulation 25 in as far as it relates to the impugned provisions of the *Suspension Regulations*;
- (b) regulation 14 of the *Regulations*,
- (c) regulations 12(1)(a); 12(1)(b); 12(2); 12(5); and regulation 16 in as far as it relates to the impugned provisions of the '*Further Suspension Regulations*'; and
- (d) regulation 15 of *Stage 2 Regulations*.

[13] As a result of their grievance the applicants, on an urgent basis, approached this Court seeking the following:

- (a) an order condoning their non-compliance with the Rules of Court;
- (b) that the matter be heard as one of urgency;
- (c) declaring the regulations that are mentioned in the preceding paragraph as unconstitutional and invalid; and
- (d) costs of the application for the engagement of such instructing and instructed counsel as employed.

#### The applicants' complaints

[14] One of the applicants' complaint is that Regulation 19(1) of the '*Suspension Regulations*' prohibits an employer to, during the period of lockdown:

- (a) dismiss an employee or terminate any contract of employment or serve a notice of intended dismissal in terms of section 34 of the Act for reasons related to the actual or potential impact of Covid-19 on the operation of the employer's business; or
- (b) force an employee to take unpaid leave or annual leave for reasons related to the actual or potential impact of COVID-19 on the operation of the employer's business; or the implementation of a provision of any regulation which is intended to give effect to the lockdown; or

- (c) reduce the remuneration of any employee for reasons related to the actual or potential impact of COVID-19 on the operation of the employer's business or to the implementation of a provision of any regulation which is intended to give effect to the lockdown.

[15] The word 'lockdown' is defined in the definition part of the '*Regulations*' as the restriction of movement of persons during the period specified in regulation 3(3) and regulation 3(3) states that the period of lockdown starts at 14h00 on Saturday 28 March 2020 and ends at 23h59 on 17 April 2020, inclusive of the first and the last day. It is the applicants' argument that the '*Regulations*' that were promulgated on 28 March 2020 did not prohibit employers to dismiss an employee or terminate any contract of employment or serve a notice of intended dismissal, or force an employee to take unpaid leave or annual leave, or reduce the remuneration of any employee for reasons related to the actual or potential impact of COVID-19 on the operation of the employer's business. But the '*Suspension Regulations*' that were promulgated on 28 April 2020 not only prohibited such conduct or acts by employers but prohibited the conduct for the period of lockdown which is said to have commenced on 28 March 2020.

[16] The applicants' further contended that the effect of regulation 19 of the '*Suspension Regulations*' is to retrospectively regulate the conduct and actions of the employers, and to exacerbate the whole issue, regulation 19(8) retroactively criminalizes acts or omissions undertaken by employers prior to 28 April 2020, which acts or omissions did not constitute a crime at the time when the acts or omissions were done. It also retroactively imposes a penalty which did not exist at the relevant time. The applicants further argued that the retrospective criminalisation of the conduct violates Article 12(3), which protects persons from being tried or convicted for any criminal offence or on account of any act or omission, which did not constitute a criminal offence at the time when the act was committed. The applicants furthermore complained that regulation 19(8), dealing with labour issues, is the only criminalising section in the entire Proclamation 16 of 2020 (i.e. the '*Suspension Regulations*').

[17] Another of the applicants' complaints that related to regulation 19 of the

'*Suspension Regulations*' is that the said regulation suspends certain sections of the Labour Act and to exacerbate the matter, on 4 May 2020, the President promulgated the '*Further Suspension Regulations*', which by regulation 12 further suspended certain sections of the Labour Act.

[18] The applicants do not dispute that the President's power to suspend laws during a State of Emergency derive from Article 26 of the Constitution, in particular sub-Article (5). They however argue that Article 26 of the Namibian Constitution is subject to Article 24 of the same Constitution<sup>11</sup>.

[19] The applicants furthermore reason that in relation to a State of Emergency, only the President may declare a State of Emergency. The President, and the President only, may suspend the provisions of any law. He may not delegate that power to anybody else. The applicants further contend that the President does not have the power to make any regulation he may find convenient when he suspends certain provisions of the law. The Constitution has a built-in protection against abuse or incorrect advice, even if the President, acting *bona fide*, may assume the advice to be correct. Article 26(5) lays down in no uncertain terms that any suspension of a provision of a law must be "*reasonably justifiable*", and "*have the purpose of dealing with the situation which has given rise to the emergency*".

[20] The applicants are of the view that the Proclamations that the President promulgated in terms of Article 26 of the Constitution must be aimed or directed at arresting the spread of the COVID-19 pandemic and not dealing with the consequences which followed the declaration of the State of Emergency and the resultant confinement of the movement of people. It is the applicants' view that regulation 19 of the '*Suspension Regulations*' and regulation 12 of the '*Further Suspension Regulations*' are not reasonably justified to control or curtailing of the

<sup>11</sup> Article 24(3) makes plain that no State of Emergency permits a derogation or suspension of the fundamental rights and freedoms referred to in Article 5. (The general provision that all the rights and freedoms enshrined in the declaration of rights must be respected by all three branches of government), Article 6 (Life), Article 8 (Dignity), Article 9 (Slavery and forced labour), Article 10 (Equality and freedom from discrimination) Article 12 (Fair trial), Article 14 (Family values), Article 15 (Children's rights), Article 18 (Administrative Justice), Article 19 (Cultural rights), Article 21(1)(a) (Freedom of speech and expression), Article 21(1)(b) (Freedom of thought conscience and belief), Article 21(1)(c), (Freedom of religion) and Article 21(1)(e) (Freedom of association).



spread of the COVID-19 virus, but are aimed at protecting employees and are thus a violation of Articles, 10, 22 and 26(5) of the Constitution. The applicants are further of the view that regulation 14 of the *Regulations*<sup>12</sup> and regulation 15 of the '*Stage 2 Regulations*<sup>13</sup> violate the Constitution because those regulations amount to an impermissible delegation of the power conferred on the President by Article 26.

### The answering affidavits

[21] Before we deal with the responses of the respondents to the applicants' complaint, there is an issue that the court needs to deal with and it relates to the answering affidavits filed by the Government respondents. It is apparent that in the main, the present application calls into question the President's exercise of his powers conferred by Article 26.

[22] It is common cause that the President did not file any answering affidavit or confirmatory affidavit explaining his thought process and what issues and information he took into account in issuing the impugned regulations. This exercise, instead, was undertaken by the Minister of Labour, cited as the third respondent, and the Attorney-General, cited as the second respondent.

[23] The Minister, in his answering affidavit, states the following:<sup>14</sup>

'[3] I do not only sit in the Cabinet – where the declaration of a State of Emergency was extensively discussed in my presence and where COVID 19 measures continue to be discussed almost every week – I was also intimately involved in all deliberations leading to the briefing of the President and the Attorney-General, for the purposes of the formulation of the Regulations challenged by the Applicants ("these Regulations") and participated in the Cabinet meetings chaired by the President in which the Regulations and measures were discussed. I thus have full knowledge of all matters considered by the President in formulating these Regulations. The President was always fully briefed. His position is included herein and in the affidavit of the Attorney-General.' (Emphasis added).

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<sup>12</sup> Regulation 14 of Proclamation 9 of 2020.

<sup>13</sup> Regulation 17 of Proclamation 18 of 2020.

<sup>14</sup> Para 3 of the answering affidavit, at 328 of the record of proceedings.

[24] In addition the Attorney-General, in his own affidavit, stated that he 'was directly involved in all the meetings, representations and discussions which resulted in the issue of the Proclamations referred to in the founding papers.'<sup>15</sup> He proceeded to state that the President and no one else issued the Proclamations in question.<sup>16</sup>

[25] At para 6.2<sup>17</sup> of the record, the Attorney-General states the following:

'In issuing these declarations, the First Respondent considered (in consultation with me and, on occasion with representatives of the various ministries) the facts and underlying circumstances more fully dealt with in the following paragraphs of the Second Respondent's main Answering Affidavit ...'

[26] The Attorney-General proceeded to mention that in considering the issues for discussion, the President exercised his powers in consultation with Cabinet and that his main 'objective with the declaration and the Proclamations was to prevent the spread of the disease known as COVID 19.'<sup>18</sup>

[27] As indicated above, it must be pertinently mentioned that the President did not file any affidavit at all. In this particular regard, he did not even file a confirmatory affidavit, in which he would have confirmed what both the Minister and the Attorney-General have stated as the issues and considerations that they perceive the President took into account in issuing the impugned regulations. In law, what the two respondents have stated in their respective affidavits amounts to hearsay evidence, as the President does not confirm what they attribute to him, as being the considerations he took into account in issuing the impugned regulations. It is therefore inadmissible.

[28] We raised this issue with the representatives of all the parties' counsel in court and the position they adopted was that they did not deem it necessary for the President to have deposed to any affidavit at all. We put it to Mr Heathcote that whatever

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<sup>15</sup> Para 3 of the answering affidavit at 405.

<sup>16</sup> Para 6.1 of the answering affidavit at 405.

<sup>17</sup> At 405 of the record.

<sup>18</sup> Paras 6.3 and 6.4 at 405-406 of the record of proceedings.

agreement the parties may have made in that regard, is not binding on the court. He readily, and properly conceded that that was the correct position.

[29] In the matter of *Mokhosi and Others v Mr. Justice Hungwe and Others*<sup>19</sup> our Deputy Chief Justice, in a judgment of the Court of Appeal of Lesotho, stated the following lapidary remarks:<sup>20</sup>

'As we have said before, admissibility of evidence is a question of law and not of judicial discretion. Evidence is admissible either under the rules of the common law or under statute. Hearsay evidence is no exception. Once an item of evidence constitutes hearsay, it must be sanctioned by statute or the common law to be admissible. If it does not, it remains inadmissible as a matter of law and stands to be rejected by the court even if not specifically objected to by the opposing party.'

[30] This statement of the law is also true in this jurisdiction and we accept it as articulating the correct legal position that is fully applicable in the instant case.

[31] There is, in the circumstances, no gainsaying the fact that in the absence of an affidavit by the President, at the least, confirming what is attributed to him by both the Minister and the Attorney-General, regarding what he personally took into account in issuing the measures he did, particularly the measures that form the subject of this application, the statements by the Minister and the Attorney-General, constitute inadmissible hearsay evidence. This precariously leaves the court in a position afflicted by a cloud of darkness as to what it is that the President took into account in exercising the formidable powers imbued on him by Article 26 of the Constitution.

[32] Perhaps there is some reluctance in some quarters in having the Head of State depose to an affidavit and this may have been regarded as taboo by the President's advisors. This may also have been with the agreement of the applicants' representatives, as indicated earlier. This is perhaps understandable as many people

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<sup>19</sup> *Mokhosi & 15 others V Justice Charles Hungwe & 5 Others* (Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019).

<sup>20</sup> *Ibid* para 55.

may have sensitivity about the President being called upon to depose to an affidavit in a matter serving before court.

[33] Whatever sensibilities may be evoked by the need to have the President depose to an affidavit, the matter must, in our view, be considered from another perspective, namely, the gravity and invasiveness of the powers the Constitution imbues on the President in Article 26. The powers are enormous and may serve, where appropriate, to suspend the exercise and enjoyment of some fundamental rights prescribed by the Constitution. For this reason, there would be no person better placed to account for how the powers were exercised and why, than the repository of the power, the President himself.

[34] Where a citizen or an entity, genuinely apprehends and therefor contends that those enormous powers have not been properly exercised, as the applicants in this case do, it is surely appropriate that the President should, in those cases, inform the party or parties concerned and the court, what considerations he took into account as his personal thinking, perspectives and decision-making are important for this exercise. This is the case because the formidable powers in Article 26 are vested exclusively in the President and no one else.

[35] For that reason, it is the President and him alone that can tell the aggrieved parties and the court in authoritative terms what he took into account in coming to the weighty and far-reaching decision to invoke a State of Emergency, and more particularly, what he took into consideration, in issuing the impugned measures. What the Minister and the Attorney-General may rightly perceive to be what the President took into account, is irrelevant and in any event, hearsay, when we do not hear from the repository of those powers as to what he took into account and why, as there may have been other variables open to him to explore.

[36] Mr Marais, for the respondents, referred the court to the celebrated judgment of *President of the RSA v South African Rugby Football Union*.<sup>21</sup> In that case the High

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<sup>21</sup> *President of the RSA v South African Rugby Football Union* 2001 (1) SA 1 (CC).

Court had made certain unfavourable orders against the President of South Africa, President Mandela, regarding his decision to appoint a commission of enquiry into the affairs of the respondent, SARFU. In this regard, the President was found to have impermissibly abdicated his powers to the Minister and other criticisms were levelled at him that need not be traversed in this judgment.

[37] In that matter, the then Transvaal Provincial Division of the High Court of South Africa, issued a disturbing order in terms of which the presiding judge ordered the President to appear in court to be cross-examined on oath because certain adverse credibility findings had been made against him by the court. The judgment of the High Court came for trenchant criticism by the Constitutional Court and it was set aside.

[38] What is important for the purposes of this case is that President Mandela signed affidavits in the *SARFU* matter<sup>22</sup>, including some supplementary affidavits regarding the making of the decision sought to be impugned. The *SARFU* matter does not, it would seem to us, serve as authority for the proposition that a President may not depose to an affidavit in matters in which decisions he or she may have made are brought to the light of judicial scrutiny.

[39] In impressing on the need to file an affidavit by the actor, whose actions are complained of, Angula DJP, in *Minister of Safety and Security v Inyemba*<sup>23</sup> dealt with a matter in which the Minister and the Inspector-General of the Namibian Police, sought an order rescinding an order of this court.

[40] In that case, the founding affidavit was not deposed to by either of the applicants, but by the head of legal services in the Office of the Inspector-General. In decrying the approach adopted by the applicants, the learned DJP said:

‘Furthermore, there is no explanation why the applicants did not themselves depose to the founding affidavit either jointly or individually. It is a general principle of the law that every natural person with full legal capacity is entitled to prosecute proceedings in his own interest,

<sup>22</sup> *Supra*, note 18.

<sup>23</sup> *Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020).

but has no right or title to institute proceedings on behalf of another person or act on behalf of the public. There are, however exceptions to this rule. First, a person may apply for *habeas corpus* – bring the body of the detained person – for another person if he can set forth in the application reasons or an explanation satisfactory to the court why the detained person could not bring the application himself. There is no evidence that the applicants have been confined or quarantined – given the Emergency Regulations regarding COVID 19 and could therefore not act themselves.<sup>24</sup>

[41] Although the judgment deals with a slightly different scenario, it does, however, impress upon the need for parties who are involved in matters, to themselves, depose to the affidavits appertaining the matters they wish to prosecute. It is only where there are special circumstances that attend to the matter and which satisfy the court that a relaxation in that regard, may be countenanced by the court. This ties in neatly with the importance in this matter regarding the need for the President to explain, justify and rationalise his decisions. He is, revered as his office is, required by law, to do so himself.

[42] It may be useful to refer to another decision in *Longer v Minister of Safety and Security*.<sup>25</sup> This case also affected the Minister responsible for Safety and Security and the Inspector-General of the Namibian Police. The applicant, Mr. Longer had been discharged from the police force and he appealed against the Minister's decision. The appeal remained undetermined for more than twenty years. After an order for application for a *mandamus* was issued, compelling the Minister to determine the appeal, the Minister heard and dismissed the appeal. On review of his decision by this court, however, he did not file an affidavit to explain and rationalise his decision.

[43] In dealing with the absence of the explanation, the court reasoned as follows at paragraphs 29, 30 and 31 of that judgment:

[29] In this connection, it appears to me, that it is the Minister, the maker of the decision that has the duty to show and play open cards with the court as to what was before

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<sup>24</sup> *Ibid* para 20.

<sup>25</sup> *Longer v Minister of Safety and Security* (HC-MD-CIV-MOT-REV-2018-00229) [2019] HAHCMD 411 (11 October 2019).

him; the considerations he took into account in making the decision and why. In this regard, he cannot enlist the services or the assistance of another person, in this case, the Inspector-General, even if that person may have been there during the exercise. The making of an administrative decision is personal to the maker and only he or she can explain and try to convince the court of the correctness of the decision.

[30] I am of the considered view that in the absence of an affidavit of the decision-maker, as explained above, there is no proper and admissible explanation placed before the court. In that regard, it seems to me, there is no explanation and the decision should be set aside on that very point, if the court is satisfied that the decision of the Minister offends against the principles of administrative law, including the Constitution of this Republic.

[31] It is my considered view that the Minister cannot properly delegate the explanation of what he personally considered and placed in the scales to any other person because the decision-making process involves the enlistment of the personal decisional and reasoning faculties of the decision-maker. No other person, in my view, can except in very exceptional circumstances, that would have to be properly pleaded and sanctioned by the court, be properly placed to state the reasons behind the decision as that would be tantamount to inadmissible hearsay evidence.'

[44] We respectfully associate ourselves with the findings of the judgment quoted immediately above. As stated earlier, it is only the President who can explain what he considered in issuing the impugned regulations and why. No other person can do that on his behalf, given, as earlier mentioned, the possibly life-altering powers that Article 26 has to potentially unleash on persons and entities in this country. In this regard we respectfully come to the view that the President was not properly advised on this issue as his personal perspectives are necessary to be laid bare before court, to assist in gauging the rationality of the regulations, given the then prevailing conditions.

[45] The advice for the President not to depose to an affidavit may understandably have been done in good faith and in reverence to his office. That notwithstanding, the law demands the twin principles accountability and transparency of public officials in this Republic, the President included and these are to be jealously observed. This is particularly the case where the levers of power contained in Article 26 are put in motion.

In this respect, the President had a duty to inform the court of the reasons why he placed the measures complained of. Because of the advice he perhaps received, he regrettably did not do so. There is thus no explanation as to why the measures were put in place.

[46] In the premises, the court, in the absence of the considerations taken into account, has to decide this matter from an agnostic position, totally devoid of what the President may have had in mind at the material time. With this having been said the court will consider the submissions by the applicants and those of the respondents that do not amount to hearsay evidence.

#### Respondents' response to the applicants' complaint

[47] The respondents, whilst admitting that the applicants do have ordinary *locus standi* to institute the application which is the subject matter of this judgment, however, deny that the applicants are justifiably aggrieved as envisaged under Article 25 of the Constitution. The respondents base their denial on the contention that the applicants can still comply with their lawful obligations or achieve their lawful goals as envisaged in their respective constitutions.

[48] The respondents dispute the applicants' complaints and argue that, at the time of the declaration of the State of Emergency and publication of the Regulations, just like the rest of the world, Namibia experienced much uncertainty about the nature, spread and effect of the COVID-19 virus. They contend that at that time it was necessary for the President to act with such caution as these uncertainties justified. They continued and stated that the uncertainties then existing, the absence of the luxury of time for assessment or procrastination and the overriding importance of immediate action, necessitated the President to take such action as the uncertainties of the situation demanded and to do so with the caution that the situation required.

[49] The respondents further contend that COVID-19 represented the gravest health risk faced by the world in more than 100 years. At the time when the President



promulgated all the different regulations it had become clear that the virus was likely to have tremendous widespread impact across all spheres of life. It was also, then already, clear that the President needed urgently to deal with the overall risks created by the disease. Naturally, this called for measures that were primarily aimed at preventing the spread of the disease and for those without which either the spread was not going to be properly contained or which were going to make it possible for the spread of the disease to be more effectively contained.

[50] They posited that the regulations which the President promulgated pursuant to the Declaration of the State of Emergency, were all aimed at dealing with the uncertainty and risks created by the COVID-19 disease, including all its expected direct and indirect consequences. The respondents continued and argued that the regulations, viewed holistically and in the context of the risks created by the COVID-19 disease constituted, together, a pattern of measures considered to deal with the disease and its associated consequences. The respondents thus contend that it would be naïve to argue that the regulations must be looked at from the one angle only, namely that of arresting the spread of COVID-19.

[51] The respondents further argued that the applicants' approach to the purpose for which the regulations were promulgated is 'blinkered'. They argued that 'lockdown' was necessary to prevent the spread of the COVID-19 disease. They further argued that to achieve lockdown, it was necessary, to strictly control and reduce movement. For movement to be effectively controlled and restricted, it was necessary for employees to stay at home. For the employees to stay at home, they needed some support and, at least, the peace of mind of income (and food on the table) until the end of lockdown.

[52] The respondents continued and argued that it must follow as a matter of common sense that worker protection in the interim was an absolute necessity to prevent the spread of the COVID-19 disease. It was a difficult tight rope that required a delicate balancing act. The respondents thus argued that the President was well within the powers conferred on him by Article 26(5) of the Constitution to promulgate the different regulations and by so doing did not act *ultra vires* or beyond the powers

conferred on him by Article 26 of the Constitution.

[53] With respect to the contention that the regulations were retrospectively criminalizing the employers' conduct the respondents' reply was that the language in which the regulations were crafted was in the present and future tenses, thus conveying that they were intended to operate prospectively. The respondents thus denied that the regulations violated Article 12(3) of the Constitution. As regards the contention that the President impermissibly, by regulation 14 of the *Regulations* and regulation 15 of the '*Stage 2 Regulations*', delegated the powers conferred on him by the Constitution to ministers, the respondents deny that the President so delegated his powers.

[54] The respondents' argued that the authority given to ministers to issue directives was given with the purpose to practically implement the object of the declaration of the State of Emergency and to implement the regulations. Such directives amounted to subsidiary means of implementing what was enacted by the President in the regulations themselves, and thus essentially covered what was incidental to the execution of the specific provisions of the regulations. The respondents further argued that although none of the directives have been identified or specifically challenged, the ministers could in any event have made such directives under Article 40(a) and (k) of the Constitution.

#### The issues

[55] From what we have discussed in the preceding paragraphs, four issues have been identified for determination, namely:

- (a) whether the applicants are aggrieved as contemplated by Article 25 of the Namibian Constitution;
- (b) whether the President exceeded the powers conferred on him by Article 26(5)(b) of the Namibian Constitution when he promulgated regulation 19 of the '*Suspension Regulations*' and regulation 12 of the '*Further Suspension Regulations*';

(c) whether the President impermissibly delegated the powers conferred on him by Article 26 of the Constitution when he promulgated regulation 14 of the *Regulations* and regulation 15 of the '*Stage 2 Regulations*';

(d) whether regulation 19 of the '*Suspension Regulations*' and regulation 12 of the '*Further Suspension Regulations*' are in breach of Article 12(3) of the Constitution.

#### Relevant constitutional provisions

[56] Article 25 (2) of the Constitution provides as follows:

'(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.'

[57] Article 26(1) and (5) of the Constitution provide:

'(1) At a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order, the President may by Proclamation in the *Gazette* declare that a state of emergency exists in Namibia or any part thereof.

(2) ....

(5) (a) During a state of emergency in terms of this Article or when a state of national defence prevails, the President shall have the power by Proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order.

(b) The powers of the President to make such regulations shall include the

power to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by this Constitution, for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency: provided that nothing in this Sub-Article shall enable the President to act contrary to the provisions of Article 24 hereof.'

Are the applicants aggrieved as contemplated in Article 25(2) of the Constitution?

[58] The respondents took issue with the applicants' standing to pursue the challenge of the legality of the regulations promulgated during the State of Emergency because, they argue, the applicants have failed to show a direct or substantial interest in the issue. Mr Marais, on behalf the respondents argued that there is no indication of any of the applicants' or their members having been charged with an offence arising from a contravention of regulation 8 of the *Suspension Regulations*<sup>26</sup>. He said:

'In effect, the applicants come to court to say "we might or might not have committed a particular offence, and we have not been charged, but we would like the Court nevertheless to declare that the offence is unconstitutional"). In the absence of evidence that any applicant or their member has been arrested the concerns of the applicants and that of their members are academic<sup>27</sup>.'

[59] Mr Heathcote, on the other hand submitted that it is not necessary for a person to first be arrested or threatened with an arrest before he can challenge the constitutionality of a statutory provision.

[60] The legal principles relating to standing were dealt with by the Supreme Court in the matter of *Trustco Ltd T/A Legal Shield Namibia and Another v Deeds Registries Regulation Board And Others*<sup>28</sup> and in that matter O' Regan AJA held that in a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights and that the rules of standing should not ordinarily operate to prevent citizens from obtaining

<sup>26</sup> Proclamation 16 of 2020.

<sup>27</sup> Respondents' heads of arguments para 20

<sup>28</sup> *Trustco Ltd T/A Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

legal clarity as to their legal entitlements. This much Mr Marais acknowledged.

[61] In the matter of *Alexander v Minister of Justice and Others*<sup>29</sup> Strydom AJA explained the significance of the decision in the matter of *Myburgh v Commercial Bank of Namibia*<sup>30</sup>, which is relevant to the present case. He said that the *Myburgh* case held that where a person challenges the constitutionality of a statutory provision and the court eventually finds that the impugned provision is unconstitutional, a party may have had to spend time in prison as a result of an unconstitutional and invalid provision. That would be the inevitable result if ripeness to hear a matter only exists after a person is charged or convicted. The learned judge, relying on the case of *Transvaal Coal Owners Association and Others v Board of Control*<sup>31</sup>, held that the fact that a person is not yet convicted of an offence does not bar such person, whose rights are threatened by an invalid order, to bring the matter to court. In that case (i.e. *Transvaal Coal Owners Association and Others v Board of Control*)<sup>32</sup>, Gregorowski J stated as follows:

'If they contravene the order they are liable to a fine and imprisonment. If the order is invalid their rights and freedom of action are infringed, and it is not at all convincing to say you must first contravene the order and render yourself liable to a fine and imprisonment, and then only can you test the validity of the order, and have it decided whether you are liable to the penalty or not.'

[62] Likewise, it is not necessary for the applicants to wait until any of their members is charged or imprisoned before they can test the constitutionality of the regulations. In the present matter there is a dispute between the parties regarding the constitutionality of the regulations promulgated pursuant to the declaration of the State of Emergency. If the applicants are correct, and the regulations are either *ultra vires* or in conflict with the Constitution, then they will have successfully vindicated their rights. If they are incorrect, then they will have obtained clarity on their legal entitlements. We are accordingly satisfied that the applicants are aggrieved as contemplated in Article 25 of the Constitution.

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<sup>29</sup> *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC).

<sup>30</sup> *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

<sup>31</sup> *Transvaal Coal Owners Association and Others v Board of Control* 1921 TPD 447.

<sup>32</sup> *Ibid* at 452.

Did the President exceed the powers conferred on him by Article 26(5) of the Constitution?

[63] The question whether or not the President exceeded the powers conferred on him by Article 26(5) of the Constitution requires of us to interpret the Article. Mr Marais reminded us of the modern approach to interpretation of written documents as articulated by the Supreme Court in the matter of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*<sup>33</sup> and to keep in mind the pronouncement by the late Chief Justice Mahomed that:

'A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.'<sup>34</sup>

[64] But the very nature of a Constitution which requires that a broad and generous approach be adopted when interpreting it also requires that where rights and freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms must be narrowly or strictly construed.<sup>35</sup>

[65] With this general approach in mind we then proceed to consider whether the President exceeded his powers when he promulgated regulation 19 of the '*Suspension Regulations*' and regulation 12 of the '*Further Suspension Regulations*'.

[66] The applicants argue that Article 26(5) of the Constitution only authorises or empowers the President to suspend a rule of the common law, a statute or the fundamental rights or freedoms protected by the Constitution for a specific time period

<sup>33</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

<sup>34</sup> *Government of the Republic of Namibia and Another v Cultura 2000 and Another*, 1993 NR 328 (SC) at 329.

<sup>35</sup> *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 184H, and also see *Sibeya v Minister of Home Affairs* 2000 NR 224 (HC).

and on conditions which are for the purpose of dealing with the situation which has given rise to the emergency. They argue that the President in Proclamation 7 of 2020 indicated that he, under Article 26(1), of the Constitution, read together with section 30(3) of the Disaster Risk Management Act, 2012, declared a State of Emergency on account of the outbreak of the Coronavirus disease (COVID-19).

[67] The applicants argue that the regulations which the President thus promulgated must be aimed at containing the spread of the Coronavirus. However, so the argument went, regulation 19(1), (2), (4), (6), and (8) of the '*Suspension Regulations*' and regulation 12(1), (2), and (5) of the '*Further Suspension Regulations*' have nothing to do with the containment of the spread of the Coronavirus as these regulations are undoubtedly directed at ensuring that employees are not dismissed during the lock down period on account of reasons relating to the outbreak of the Coronavirus.

[68] The respondents reply by saying that from the labour related provisions of the '*Suspension Regulations*' and the '*Further Suspension Regulations*' the President only interfered to the extent that employers interfered or intended to interfere with employee benefits as a result of the COVID-19 impact. The interference by the President reflects a laudable approach, argued the respondents. The respondents further submitted that the President realised that there was no certainty of how long the lockdown would continue, or how the lockdown would affect businesses so that they would, in due course, have to retrench employees. There was therefore, need for those rights to be protected because employees could not, possibly, exercise access, in the interim, to the labour related processes to be heard to protect their interests. The respondents argued that widespread dismissals could lead to starvation or public disorder.

[69] They furthermore argued that:

'The Applicants argue that the obvious aim behind the challenged Regulations was to protect workers, not to prevent the spread of the virus. This, we submit with respect, reflects a blinkered approach. Lockdown was necessarily to prevent the spread of the disease. To achieve lockdown, it was necessary strictly to control and reduce movement. For movement to be effectively controlled and restricted, it was necessary for employees to stay at home. For

employees to stay at home, they needed some support and, at least, the peace of mind of income (and food on the table) until the end of lockdown. It must follow as a matter of common sense that worker protection in the interim was an absolute necessity to prevent the spread of the disease – and if that meant that some of the processes had to be suspended, so be it. It was a difficult tightrope that required a balancing act.<sup>36</sup>

[70] The answer as to whether or not the regulations are *ultra vires* Article 26 lies in the interpretation of Article 26 itself. But before we venture into the interpretation of that Article, we make the following preliminary remarks.

[71] The *ultra vires* doctrine in simple terms means that a functionary has acted outside his or her powers and as a result the function performed becomes invalid. The rule forms part of the principle of legality, which is an integral component of the rule of law. The South African Constitutional Court in the matter of *Affordable Medicines*<sup>37</sup> affirmed the principle in these terms:

‘The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.’

[72] Ordinarily, the *ultra vires* principle applies where the repository of the public power performs a function outside of the scope of the power conferred. If the functionary had no power at all, then the validity of the relevant action is not impugned with reference to this principle. It has to be challenged on other grounds. In applying the principle in *Affordable Medicines* the Constitutional Court stated:

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<sup>36</sup> Respondents’ Heads of Argument para 101.

<sup>37</sup> *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49.



'In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts *ultra vires* (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under common law by reason of a functionary exceeding his or her powers, is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted *ultra vires* in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought in the empowering provisions<sup>38</sup>.'

[73] In the present matter there is no dispute that the President is mandated by Article 26(1) of the Constitution to declare a State of Emergency and that Article 26(5)(a) further mandates him to, during a state of emergency or when a state of national defence prevails, to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order. There is furthermore no dispute that Article 26(5)(b) mandates the President to make regulations that suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by this Constitution, for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the state of emergency. There is however a limitation contained in the proviso to that mandate. The limitation is that the mandate conferred by Article 26(5)(b) does not empower him to act contrary to the provisions of Article 24 of the Constitution.

[74] It thus follows that if the President makes regulations that do not deal with the situation which has given rise to the State of Emergency or which are contrary to Article 24, the President would have acted *ultra vires* Constitution.

[75] In this matter the applicants furthermore do not dispute that, objectively viewed, the outbreak and spread of the Coronavirus in Namibia is an emergency which

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<sup>38</sup> *Supra*, note 36 para 50.

threatens 'the life of the nation or the constitutional order of the Republic'. The applicants, however contend that the President exceeded his power under Article 26(5) (b) by making regulations prohibiting employers to dismiss an employee; or terminate any contract of employment; or serve a notice of intended dismissal in terms of section 34 of the Labour Act; force an employee to take unpaid leave or annual leave; or to reduce the remuneration of any employee for reasons related to the actual or potential impact of COVID-19 on the operation of the employer's business during lockdown. They say this is so because these regulations do not deal with the situation that has necessitated the President to declare a state of emergency.

[76] In our view it is necessary that, for the power conferred on the President by Article 26(5)(b) to be legally exercised, the regulations that the President makes must be for a specified period; and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the State of Emergency. Having acknowledged and admitted that the situation which has given rise to the declaration of the State of Emergency is the outbreak of the Coronavirus, the critical question is, do regulation 19 of the '*Suspension Regulations*' and regulation 12 of the '*Further Suspension*' deal with the outbreak of the Coronavirus?

[77] The Meriam Webster dictionary amongst other definitions, defines the phrasal verb 'deal with' as to be about (something) or to have (something) as a subject, or to do something about (a person or thing that causes a problem or difficult situation). Mr Marais conceded that these regulations<sup>39</sup> deal with labour related matters and that the President only interfered to the extent that employers interfered or intended to interfere with employee benefits as a result of the COVID-19 impact. In other words, the obvious intention was to, as far as possible, retain the *status quo* (without final removal of rights, either side) pending termination of the lockdown.

[78] What the concession by Mr Marais in our view means is that the regulations do not deal with (in the sense that they do not do something to control or curtail the spread)

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<sup>39</sup> Regulation 19 of Proclamation 16 of 2020 (the Suspension Regulation) and regulation 12 of Proclamation 18 of 2020 (the Further Suspension Regulations).

the Coronavirus. The determination of the legality of the regulations do not depend on how laudable, as Mr Marais argued, they are. The legality of the regulations, strictly interpreted, is measured by enquiring whether they are authorised by the Article of the Constitution cited as the source of the power to make them. The regulations are therefore not “reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency” and to that extent the President breached the principle of legality. Regulation 19 of the *Suspension Regulations* and regulation 12 of the *Further Suspension Regulations* are therefore unconstitutional.

Did the President impermissibly delegate his powers?

[79] The applicants argued that the Constitution confers the power to make regulations during a state of emergency on the President and the President alone and as such the President impermissibly delegated his powers when he, by regulation 14 of the *Regulations* and regulation 15 of *Stage 2 Regulations*, authorised a minister to issue directives for the purpose of supplementing or amplifying on any provision of the regulations; or for the purpose of ensuring that the objectives of the regulations are attained.

[80] The respondents’ reply is that although the applicants do not seek a declarator, they have, in effect, invited the court to strike down regulation 14 and regulation 15 without indicating that they are affected by those regulations. It thus follows that regulation 14 and 15 remain of only academic value (until, firstly, it is shown that directives were issued under the hand of delegatee and, secondly, that the applicants’ interests were affected thereby).

[81] We find it appropriate to, before we consider whether or not the President lawfully delegated the power vested in him, briefly outline the legal principles governing the exercise of public power.

[82] Legislation (in the present case the Constitution), confers power on a named officer (in this case the President) and any power so conferred may be exercised by the

office holder or body upon which it was conferred alone. If someone else purports to exercise that power, the latter's act is simply *ultra vires* the legislation and invalid<sup>40</sup>. It is, however, not an absolute principle. As was recognised long ago, it is a rule whose rigour hinges on the context in question. The point was well-expressed by the Canadian author Willis in 1943:

'A discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute.'<sup>41</sup>

[83] At the heart of the court's assessment of whether a given delegation is lawful lies a tension between two ideas.<sup>42</sup> There is, on the one hand, recognition that there is a clear practical need for delegation especially so in the modern administrative state where many decisions must be taken and institutions need the autonomy to create expedient machinery to make them.<sup>43</sup> There is, on the other hand, the need for decisions in our constitutional landscape to be taken by the proper and suitably qualified decision-maker. A wanton condonation of all forms of delegation would risk substituting institutionally and democratically illegitimate actors *in lieu* of those specifically appointed for that task.<sup>44</sup> For this reason courts have tended to interpret delegatory powers restrictively.<sup>45</sup>

[84] Baxter<sup>46</sup> thus opines that where there is no express authority to delegate, the repository of the power might nevertheless enjoy an implied power of delegation. At common law there is a presumption against this, expressed by the Latin label of '*delegata potestas non potest delegare*.' The learned author continued, and opined that a public authority which purports to delegate its powers without express authority to do so, must show that the delegation is impliedly permitted by the empowering legislation. Such implication might depend on a number of interrelated factors, which factors are not limited to but include, the degree of the devolution of the power, the importance of the

<sup>40</sup> *Skeleton Coast Safaris v Namibia Tender Board and Others* 1993 NR 288 (HC) compare *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TKS).

<sup>41</sup> Willis, J, '*Delegatus non potest delegare*' (1943) 21 Can. B.R. 257, 259.

<sup>42</sup> *Social Security Commission and Another v Coetzee* 2016 (2) NR 388 (SC).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Supra*, note 41.

<sup>45</sup> *Citimakers (Pty) Ltd v Sandton Town Council* 1977 (4) SA 959 (W) at 961-2.

<sup>46</sup> Baxter L. *Administrative Law* (Juta & Co. Ltd: 1984) at 433.

original delegatee, the complexity and breadth of the discretion, the impact of the power and the practical necessities.

[85] Where there is a complete handover of power and responsibility the delegation is impermissible. The converse is true where the delegation is limited and the delegator retains full control over the final decision. In that case the delegation is permissible and *intra vires*<sup>47</sup>. Where the legislation specifically selects a specific official to exercise the power, delegating such power may be *ultra vires*. In the case of *Shidiack v Union Government*<sup>48</sup> Innes ACJ said:

‘... The principles which regulate the right of delegation by one agent to another cannot assist us here. For the Minister is not an agent; he is the person selected by Parliament to exercise a personal discretion and judgment in regard to a matter of great public importance, and the doctrine of agency cannot regulate his power or his responsibility. Had it been intended that he should be at liberty to depute some person to be “satisfied” in his stead, we would have expected a direct provision to that effect. Such provisions find a place in numbers of statutes, and their absence from the present one is highly significant. Then it was suggested that it was impossible for the Minister to personally decide upon applications, which might often be expressed in languages with which he was not familiar. But the same remark would apply to an Immigration Officer. Where an application is couched in a foreign language the Minister will of course call in the aid of an expert in that language; but the decision and the responsibility must be his alone. Lastly, it was contended that to adopt this reading of the section would be to render the Act unworkable. But that is not so. The nature of the measure is such that its administration can only be successfully carried out by officials of tact and discretion; a certain amount of inconvenience is under any, circumstances inevitable, and though the interpretation which we feel compelled to place upon the section may throw somewhat more work on the Minister, and involve in certain cases a somewhat longer delay, the Act need not on that account be described as unworkable. In any event, we are bound to give effect to the language of the Legislature.’

[86] Powers which involve little or no discretion are usually delegable. Baxter argues that, on the other hand where the power has a significant discretionary component,

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<sup>47</sup> *Du Plessis v Administrateur-generaal vir die Gebied van Suidwes-Afrika en Andere* 1980 (2) SA 35 (SWA)

<sup>48</sup> *Shidiack v Union Government* 1912 AD 642 at 648-650.

requiring skilled and careful decision-making it may not be delegated. Where the power in question entails the infringement of common law rights or have far reaching effects, the presumption against delegation is stronger<sup>49</sup>.

[87] Baxter<sup>50</sup> furthermore opines that although the breadth, complexity and impact of the power might constitute important reasons for requiring its holder to exercise it personally, these factors might also constitute the very reasons for construing a power of delegation, the number of decisions that have to be made could make it practically impossible for the power to be exercised personally. Baxter reminds us that the court must show some flexibility and recognize that the benefits of efficiency and localised *ad hoc* discretionary decision-making sometimes outweigh the disadvantages of delegation.

[88] In the present matter Article 26(5) confers regulation-making power, including the power to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by the Constitution, for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency, on the President. The President has for reasons that have not been properly explained to court (but we assume for practical reasons), delegated the power to ministers to issue directives for the purpose of supplementing or amplifying on any provision of the regulations or ensuring that the objectives of the regulations are attained.

[89] Regulation 14 of the '*Regulations*'<sup>51</sup> and regulation 15 of the '*Stage 2 Regulations*'<sup>52</sup> are identically worded. Regulation 14 reads as follows:

'14. (1) The President may authorise a minister to issue directives for the purpose of –

(a) supplementing or amplifying on any provision of these regulation; or

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<sup>49</sup> *Supra*, note 39.

<sup>50</sup> *Supra*, note 39 at 441.

<sup>51</sup> Proclamation 9 of 2020.

<sup>52</sup> Proclamation 17 of 2020.

(b) ensuring that the objectives of these regulations are attained.

(2) A directive issued under this regulation has the force of law and may deal with any matter that is within the ambit of any legislation or other law that is administered by the Minister concerned.

(3) Any directive issued under this regulation must be -

(a) referred to the Attorney-General for approval; and

(b) published in the *Gazette*,

for it to have the force of law.

(4) A directive issued in terms of these regulations becomes effective on the date of its publication in the *Gazette*.

(5) A directive may create offences for contraventions of, or failure to comply with, the directive and provide for penalties of a fine not exceeding N\$2 000 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.'

[90] With the principles that we have enunciated in the preceding paragraphs in mind, we now briefly look at what it is that the President has delegated.

(a) By regulation 14(1)(a) the President authorizes a minister to issue directives for the purpose of supplementing or amplifying on any provision of the regulation. The *Oxford South African Concise Dictionary Second edition* defines supplement as 'a thing added to something else in order to complete or enhance it'. Properly understood, the President is giving power to a minister to add to the regulations made under Article 26(5)(b). We have observed above that this regulation authorises the suspension of rights conferred on citizens by the common law, statute or the Constitution itself. The President is literally speaking abdicating part of his constitutional power and this is impermissible. Regulation 14(1)(a) and its equivalent regulation 15(1)(a) breach the presumption against delegation and are therefore unconstitutional.

(b) By regulation 14(1)(b) and its equivalent regulation 15(1)(b), the President authorises a minister to issue directives for the purpose of ensuring that the objectives of the regulations are attained. Our interpretation here is that the ministers are simply empowered to make sure, by issuing directives, that the regulations made and promulgated by the President are implemented. This is permissible delegation.

(c) By regulation 14(2) the President states that a directive issued under the regulations has the force of law and may deal with any matter that is within the ambit of any legislation or other law that is administered by the minister concerned. This we interpret to mean that the President is giving his ministers 'a *blank cheque*' to deal with any matter that is within the ambit of any legislation or law (this by implication includes the Constitution). This is the purest example of relinquishing power, unfettered and uncontrolled and is surely impermissible delegation. Regulation 14(2) and its equivalent regulation 15(2) breach the presumption against delegation and are therefore unconstitutional.

(d) By regulation 14(3) the President states that a directive issued under the regulations must be referred to the Attorney-General for approval and must be published in the *Gazette*, for the directive to have the force of law. Article 26(5) confers the powers on the President and the President alone to make laws, including the suspension of rights. Therefore the President and he alone has the final say. It is therefore an abdication of power for him to authorize the Attorney-General to have a final say on what the directives must say. Regulation 14(3) is therefore an impermissible delegation of power. Regulation 14(3) and its equivalent regulation 15(3) breach the presumption against delegation and are therefore unconstitutional.

(e) By regulation 14(4) and its equivalent regulation 15(4), the President states that a directive issued in terms of these regulations becomes effective on the date of its publication in the *Gazette*. This regulation in our view is harmless and is thus permissible.



(f) By regulation 14(5) the President states that a directive issued by a minister may create offences for contraventions of, or failure to comply with the directive and provide for penalties of a fine not exceeding N\$2 000 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment. This directive in our view may create offences which may at one time or the other deprive citizens of their liberty. We are thus of the view that this is power that must be exercised by the President himself and this delegation is thus impermissible. Regulation 14(5) and its equivalent regulation 15(5) breach the presumption against delegation and are therefore unconstitutional.

Do regulations 19 and 12 operate retrospectively and in breach of Article 12(3)?

[91] It will be recalled that in paragraph 55 of the judgment, we identified four issues that we stated fall for determination by the court. In view of the conclusions and findings the court has made in relation to the first three issues, as evidenced above, we have found it unnecessary to deal with the last issue mentioned. This is the question whether regulation 19 of the *Suspension Regulations* and regulation 12 of the *Further Suspension Regulations*, are in breach of the provisions of Article 12(3) of the Constitution.

Observation

[92] We find it imperative to mention one issue, as we draw the judgment to a close. According to Article 26(2)(b) of the Constitution, a declaration of the State of Emergency under Article 26(1), if not sooner revoked, shall cease to have effect at the expiry of a period of thirty (30) days after publication of the declaration. This is so unless before the expiration of the thirty day period mentioned immediately above, the said declaration is approved by a resolution passed by the National Assembly, by a two thirds majority of all its members.

[93] This is an issue that was not addressed by either of the parties and does not fall for determination in the instant case. We mention it for the purpose of emphasis and completeness. It is a constitutional requirement that the declaration such as the one made in this case, be placed for approval by the National Assembly, within a period of thirty days from the date of declaration. The court is in the dark as to whether or not this mandatory provision was followed in the instant case and as stated, it is not an issue we need to decide.

### Cost

[94] The general rule is that cost are in the discretion of the court. The second general rule is that cost follows the cause. The respondents have not placed before us any convincing reasons why we must not follow the above ordinary rules. It thus follows that the first to sixth respondents, being unsuccessful parties, should pay the applicants' costs. In our considered view this matter was complex and required to be dealt within a reasonably tight schedule. To that end we are of the view that the cost of three instructed counsel is justified.

### Commendation

[95] We like to express our gratitude to counsel on both sides for their industry and insightful arguments presented. We also note particularly the amiable spirit with which the matter was presented by both sides. This is an example worth emulating by all officers of this court.

### Order

[96] Our order is therefore as follows:

1. The applicants' non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 73(4) of the Rules of Court.

2. The following regulations, namely:
  - 2.1 regulation 12(1)(a);
  - 2.2. regulation 12(1)(b);
  - 2.3 regulation 12(2);
  - 2.4 regulation 12(5); and
  - 2.5 regulation 16 in as far as it relates to the impugned provisions of Proclamation No 18 contained in the “State of Emergency – Covid-19: Further Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations”, Proclamation No 18 of 2020 are unconstitutional and thus invalid.
  
3. The following regulations, namely:
  - 3.1. regulation 19(1)(a);
  - 3.2. regulation 19(1)(b);
  - 3.3. regulation 19(1)(c);
  - 3.4. regulation 19(2);
  - 3.5. regulation 19(4);
  - 3.6. regulation 19(6);
  - 3.7. regulation 19(8); and
  - 3.8. regulation 25, in as far as it relates to the impugned provisions of Proclamation No 16 contained in the “State of Emergency Covid-19 Regulations, Proclamation No 16 of 2020” are unconstitutional and thus invalid.
  
4. Regulation 14 contained in the “State of Emergency Covid-19 Regulations”, Proclamation No 9 of 2020 is unconstitutional and invalid.
  
5. Regulation 15 contained in the “State of Emergency Covid-19 Regulations”, Proclamation No 17 of 2020 is unconstitutional and invalid.

6. The first to the sixth respondents must, jointly and severally, the one paying the other to be absolved, pay the applicants' costs of this application. The costs to include the cost of one instructing and three instructed counsel.

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S Ueitele  
Judge

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T S Masuku  
Judge

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J S Prinsloo  
Judge

## APPEARANCES

1<sup>ST</sup>, 3<sup>RD</sup> – 7<sup>TH</sup> APPLICANT:

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