




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

Case number 21402/20

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
<u>30/4/2020</u> Date:	 Signature:

In the matter between:

MUHAMMED BIN HASSIM MOHAMED

First

Applicant

ANAS MOHAMMED CHOTHIA

Second Applicant

AS SAADIQEN ISLAMIC CENTRE

Third Applicant

And

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First

Respondent

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS

Second Respondent

THE MINISTER OF HEALTH

Third Respondent

And

UNITED ULAMA COUNCIL OF SOUTH AFRICA

First *Amicus Curiae*

WOMEN'S CULTURAL GROUP

Second *Amicus Curiae*

NEUKIRCHER J

1] This application came before me as one of extreme urgency in the urgent court¹ in a time where the country, and indeed the world, is grappling with living with a new enemy called COVID-19.

INTRODUCTION

2] A remark made in 1961 is as appropriate in the times we live in today as it was then:

"Like it or not, we live in interesting times. They are times of danger and uncertainty; but they are also the most creative of any time in the history of mankind."²

THE APPLICATION

¹ In terms of the Directives regarding court operations during COVID-19 lockdown:

"3. *Subject to these Directives, only urgent applications and urgent matters arising from the activities associated with disaster management may be heard in open court during the lockdown period, provided that the Judge...hearing the matter may, if he or she deems it necessary, having regard to the exigencies of each case, hear any such matter through video conferencing or other electronic means which are appropriate in the circumstances, after consultation with the parties concerned.*" (Directive of the Chief Justice dated 17 April 2020)

² Remarks before the Joint Defense Appeal of the American Jewish Committee and the Anti-Defamation League of the B'nai B'rith, Chicago, Illinois, June 21, 1961.

- 3] In this application, the applicant seeks an order
- 3.1 declaring Regulation 11B(i) and (ii), read with the definition of the word “gathering” in the Regulations issued under Section 27 the Act, to be overbroad, excessive and unconstitutional;
- 3.2 that the respondents be ordered to amend the regulations to permit movement of persons between the residence and places of worship on such reasonable conditions as the court deems appropriate; and
- 3.3 that insofar as they are specifically concerned, that the third applicant³ be allowed to conduct each of the five daily prayers⁴ for a congregation limited to 20 people⁵ each under certain strict sanitary precautions⁶; and
- 3.4 that a Magistrate issue a permit and
- “...may attach such conditions for the use of the site contemplated in (ii) above as may be necessary which may include:*
- (a) limiting the number of congregants that may be present at the site at any particular time;*
- (b) where applicable, regulating the number of congregations; the time gap between successive congregations, and the*

³ A mosque

⁴ Of which some may be held for various congregations separated by a gap of 20 minute between each congregation

⁵ Which in the replying affidavit they limit to the minimum number of persons required which is 3 men at the daily prayer and 4 men at the Friday noon prayer

⁶ Such as the wearing of masks and gloves, carrying their own prayer mats, being screened with a thermometer, the appointment of security personnel and a medical practitioner such as a doctor or nurse

times of each successive congregation, in accordance with the prescripts of the applicable faith;

(c) prescribing the distance to be observed between congregants at the site in accordance with the prescripts of the applicable faith;

(d) requiring the use of sanitizing and other hygiene measures, including but not limited to the wearing of face masks and gloves, by persons attending the place of worship..."

- 4] What this application is not about is whether the applicants are correct in their interpretation of their religious doctrine. It is also not about whether they are true in their beliefs.⁷ What this application is about is whether or not Regulations 11B(1)(a)(i) and (ii)⁸ issued out under the Disaster Management Act no 57 of 2002⁹ (the Act) are reasonable and justifiable in the circumstances under which they were promulgated.

BACKGROUND

⁷ In **De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another** 2015 (1) SA 106 (SCA) Ponnann JA stated: “[39] *As the main dispute in the instant matter concerns the internal rules adopted by the church, such a dispute, as far as possible, should be left to the church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our court from pronouncing on matters of religious doctrine, which falls within the exclusive realm of the church.*”

⁸ Regulation 11B(1)(a)(i) and (ii) provide as follows:

“(a) For the period of lockdown—

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

(ii) every gathering, as defined in regulation 1 is hereby prohibited, except for a funeral as provided for in subregulation (8); ...”

⁹ GG43199 of 2 April 2020

- 5] 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.”*¹⁰
- 6] History has taught us that pandemics can have devastating consequences – in October 1347 the Port of Messina welcomed 12 ships from the Black Sea. By the time that Sicilian authorities ordered the ships to leave, the disease that became known as “the Black Death” had spread, and over the following 5 years it killed more than 20 million people in Europe.¹¹ The Spanish Flu of 1918 reportedly killed 100 million people. In the past 100 years, the world has seen several examples of this: the SARS-CoV-1 virus in 2003, the Flu Pandemic caused by the H1N1 virus in 2009, the Ebola virus in December 2013, and not to forget the HIV-AIDS virus.
- 7] On 30 January 2020, the World Health Organisation (WHO) declared the outbreak of COVID-19¹² to be a Public Health Emergency of International Concern and on 11 March 2020 recognised it as a pandemic. By 25 April 2020, over 2 837 215 people worldwide were infected and there were 197 703 reported deaths. By the date of this judgment, that number was 3 229 814 and 228 376 dead respectively.

¹⁰ <https://en.wikipedia.org/wiki/Pandemic>

¹¹ <https://www.history.com/topics/middle-ages/black-death>.

In Medical News Today (<https://medicalnewstoday.com/articles/148945#history>) the number is put at 75 million

¹² First identified in Wuhan, China in December 2019

At present, there is no vaccine available, no efficacious treatment and no cure. 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.

- 8] The COVID-19 is a respiratory disease caused by the novel coronavirus which is a new and particularly virulent virus. In its early 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.
- 9] Because it 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. To demonstrate this, South Africa went from a rate of increase of a few to the number of infected of 5 350 in a matter of 5 weeks with a rise in infections of over 354 in the past 24 hours.

10] Around the world, as the infection rates exponentially rose, countries saw their healthcare systems overwhelmed overnight¹³ with people requiring hospitalization, intensive care and/or respiratory support for prolonged periods of time. There is insufficient PPE¹⁴ for healthcare workers on the frontlines and test equipment is also insufficient. Of major concern is that the number of ventilators needed to keep people alive in the hopes they recover, is hopelessly inadequate to cater for the overwhelming demand on a global scale.

SOUTH AFRICA

11] On 15 March 2020, in South Africa, a state of disaster¹⁵ was declared in relation to the coronavirus pandemic. That state of disaster was to extend from midnight on 25 March 2020 until midnight on 16 April 2020. This period was later extended further and would last until midnight on 30 April 2020.

12] In effect what resulted was a national “lockdown”. The regulations that were promulgated (the Lockdown Regulations) pursuant to that declaration enacted a range of measures designed to slow the spread of the virus and “flatten the curve”.

¹³ Italy, Spain, USA and United Kingdom are but 4 examples of this

¹⁴ Personal protective equipment

¹⁵ In terms of the Disaster Management Act no 57 of 2002

- 13] Amongst others, every person is confined to their place of residence and prohibited from moving around, unless to perform or procure essential services and goods, to access social grants or medical care.¹⁶ All gatherings are strictly prohibited¹⁷ for the duration of the lockdown. Any premises not involved in the provisions of an essential good or service must remain closed¹⁸. Places at which people congregate¹⁹ are expressly required to remain closed to the public.²⁰
- 14] As a result, the Zion Christian church gathering in Moria²¹ could not take place, Pesach²² could not be celebrated in Synagogue nor could the ritual of friends and family together at *sedar*²³ take place at home; Holy Communion and mass had to be foregone by Catholics and Easter could not be celebrated in church services throughout the country. In fact, each religious sector of the country had to make tremendous sacrifices for the greater good.

THE APPLICANTS' CASE

¹⁶ Regulations 11B(1)(a)(i)

¹⁷ This was later relaxed to allow funerals of no more than 50 people under certain strict conditions

¹⁸ Regulation 11(B)(e)

¹⁹ Restaurants, bars, concerts, sports events, places of religious worship

²⁰ Regulation 11B(4) read with Annexure D to the Lockdown Regulations

²¹ One of the largest gatherings in South Africa which takes place in Polokwane each Easter and is attended by millions of people

²² The Jewish Passover

²³ The Seder is a feast that includes reading, drinking wine, telling stories, eating special foods, singing, and other Passover traditions.

15] And so too do the applicants²⁴ say their religious obligations are suffering serious and egregious inroads by this national lockdown. According to the applicants, they believe it is obligatory to perform the five daily prayers in congregation and at mosque. Although they admit²⁵ that their views are not held by the majority of Muslims throughout the country, they claim that the Lockdown Regulations violate their constitutional rights to freedom of movement, freedom of religion, freedom of association (including religious association) and the right to dignity.

16] The applicants state

16.1 “32. *To this extent...the Holy Quran enjoins us to perform five daily prayers, to do so in congregation, to perform our ablution before praying and to enter the house of worship in bare feet.*”;

16.2 “40. *It is my sincere view, that if this application were not brought, the entire community would be sinful and have to account for this sin on the day of judgment. It is also my view, that given my personal circumstances, I have no excuse but to attend the congregational prayer. I accept, that a person who bona fides believes that, to attend a congregational prayer may place him at risk, may not be*

²⁴ Who are Imaams and worshippers at a mosque managed by the third applicant situated in Meyerton called Musjidus Saadiqueen

²⁵ In the founding affidavit they state that they “*readily accept that there is a doctrinal difference of opinion amongst Muslim scholars on this issue in the context of the pandemic*”

sinful. However, the second applicant and I believe that the community is sinful for not establishing the minimum congregational prayer, and that we are sinful because we have no legitimate excuse. Individuals who may believe differently, after taking an opinion from qualified scholars, are entitled to their difference of opinion as there is accommodation for this in Islam. By granting this application, the mosque will be opened for congregational prayer."

- 17] The applicants have based their belief on a *Fatwa*²⁶ issued by Mufti AK Hoosan, the gist of which is that the community has an obligation to continue establishing the congregational prayer, in the face of the COVID-19 pandemic. According to Mufti AK Hoosan

"Never in the entire 1400-year history of Islam, throughout its numerous plagues, epidemics, and pandemics, did a single Faqeeh (jurist), or any scholar, ever declare the suspension of Jumu'ah (the Friday prayer) or the daily congregational prayers.

These sources place an obligation on the community to establish mosques, to enable the performance of congregational prayer. The obligation on the community is distinct and separate from the obligation on an individual to perform their five daily prayers. If the

²⁶ A legal opinion or ruling issued by a Mufti (a Muslim legal expert who is empowered to give rulings on religious matters)

community closes the Masjid in circumstances where congregational prayer can take place, the community as a collective is sinful and accountable to God.

In order to satisfy the requirements of congregational prayer, a minimum number of people is required. For the Friday Jumm'ua prayer, the minimum number of people is one Imaam, and three other mature males. For the other five daily prayers, it is one Imaam and two other mature males. The prayers, including the Friday congregational prayer, can be performed in less than 10 minutes."

- 18] It is therefore the applicants' argument that the Lockdown Regulations have criminalized the performance of what they consider to be a compulsory act of worship²⁷. The applicants say that they are being forced to make a Hobson's choice²⁸ between disobeying what they regard as a fundamental tenet of their belief²⁹ and disobeying the Lockdown Regulations which do not make provision for their right to practice their religion. In fact, the applicants' case is that this matter is about more than just the right to association which is protected by s31 of the Constitution, it is about their right to freedom of religion which, for them, has at its core the right to freedom of association, freedom of movement, freedom to practice religion in association, the right to life

²⁷ This was particularly emphasized in the replying affidavit and in argument but the particular word ("criminalized") was not used in the founding affidavit

²⁸ The so-called "take it or leave it" principle

²⁹ i.e praying in congregation at mosque. In this they admit that their view is not the majority view of Muslims

and the right to dignity. All these basic principles form the basis of the Bill of Rights which may not be infringed without reasonable or justifiable cause under s 36 of the Constitution.

- 19] The applicants also state that, over and above the congregational prayer, the mosque is a place of refuge and centre for advice for many, including women and children and is used to feed those who fast, and the poor, during the month of Ramadan.
- 20] Given this, it is clear that it is envisaged that the mosque will play host to many more than simply the congregational worshippers.
- 21] In their founding papers, the applicants state that:
- 21.1 small congregations of approximately 10 to 15 people attend the morning (Fajir), afternoon (Zuhar) and evening (Asr) prayers;
 - 21.2 the first applicant will drive directly from home to the mosque, be there for no more than 10 minutes having performed ablution³⁰ at home and wear a mask;
 - 21.3 the third applicant will ensure sanitizing of the mosque takes place before and after the prayers;

³⁰ This involves washing the face, hands up to the elbows, feet up to the ankles, each three times and passing the hands over the head

- 21.4 if prayers attract larger crowds they can be split into 3-5 smaller congregations and each congregation can endure for a maximum of 10 minutes;
- 21.5 security will control the numbers and ensure that no more than 10 people may enter and pray at a time;
- 21.6 this will also apply to the Friday Jumm'ua prayer which must be performed between 12h15 and 15h30 and lasts 10 minutes – this can be split into 10 separate congregations in that time frame;
- 21.7 prayer time will be announced, registers can be kept online to ensure that no more than 20 people³¹ attend at separate times within the window period and a magistrate may issue permits *“with conditions suited to our locality”*³²

22] Thus, what the applicants effectively ask for is an order:

- 22.1 declaring the Lockdown Regulations unconstitutional and invalid to the extent that they fail to allow congregational worship;
- 22.2 directing the Minister to amend the Lockdown Regulations to a) permit places of religious worship³³ to remain open on conditions to be determined by a local Magistrate, and b) to authorize movement to and from places of religious worship under authority of a permit issues by the head of the religious institution; and

³¹ Increased from the 10 people originally mentioned as set out in par 17.5

³² i.e. the Magistrate decides what is and is not permitted

³³ And this refers to ALL places of worship and mosques in particular

- 22.3 pending the enactment of the amended Regulations, permitting the third applicant to hold daily prayers for up to 20 people selected on a roster basis under screening measure of their determination.
- 23] They say that, insofar as the Lockdown Regulations have already been amended, and Government's policy had changed to make provision for funerals, industry and transport, so too can Government frame an exception to cater for religious worship.
- 24] Lest one be tempted to ignore that to which the applicants refer, the following is relevant in the context of this argument:
- 24.1 when the Lockdown Regulations were originally published in GG 43107 on 18 March 2020 all forms of gatherings³⁴ were prohibited. Attendance at funerals³⁵ was strictly controlled, no industry other than essential services could operate and transport was limited to those requiring transport for purposes of attending essential services work and going home;
- 24.2 then Government amended certain of the regulations on 16 April 2020³⁶. It is not necessary to list each and every amendment

³⁴ **'gathering'** means any assembly, concourse or procession in or on-
 (a) any public road, as defined in the National Road Traffic Act, 1996 (Act 93 of 1996); or
 (b) any other building, place or premises, including wholly or partly in the open air, and including, but not limited to, any premises or place used for any sporting, entertainment, funeral, recreational, religious, or cultural purposes"

³⁵ See **Ex parte van Heerden** Case no (1079/2020) [2020] ZAMPMBHC 5 (27 March 2020) which affirmed the fact that one may attend a funeral in groups of no more than 50, but inter-provincial travel to attend a funeral was strictly prohibited under the initial Lockdown Regulations

here. What is relevant are those which permit, in some form or another, the right to “gather”³⁷: taxi’s may now carry 75% of their usual passenger load, mines³⁸ may operate at 50% capacity and funeral goers may now travel, with a permit, across provincial lines under strict conditions.

- 25] Their argument is that if Government can frame certain exceptions to the present rule, they should be able to do so for purposes of congregational worship as well.
- 26] Mr Boda argues that regardless of the laudability of the context under which the Lockdown Regulations were promulgated, they infringe on every civil liberty entrenched in the Bill of Rights. He argues that they were promulgated by one Minister alone and that the standard “justifiability” test must be applied³⁹ and that all the standard questions relating to proportionality must be asked. He argues that the test cannot be a “lesser” test simply because we find ourselves in a State of Disaster.
- 27] As a final salvo, Mr Boda argues that the State has relaxed many restrictions in many sectors since 25 March 2020: funerals may take

³⁶ In GG 43232

³⁷ This word is used loosely in this context - the applicant submits or, at the very least, the relaxation of the strict provision to allow people to be present in groups in proximity albeit under strict hygiene provisions

³⁸ And this is not all mines but are limited to those defined in the regulations

³⁹ **Engelbrecht v RAF** 2007 (6) SA 96 (CC)

place with persons present not exceeding 50, certain mining operations are allowed to resume at capacities of 50%, taxi services may operate with limitations on the number of passengers. Finally, citizens may go to the shops to purchase essential goods but they don't just have those choices available – available have also been array of non-essential items such a sweets, bakery items, chocolates etc.

28] As a result of the approach adopted in the **Christian Education South Africa v Minister of Education**⁴⁰, the court has held that

“[19] ...freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs, Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured and frequently ritualistic and ceremonial. This aspect is underlined by article 18(1) of the

⁴⁰ 2000 (4) SA 757 (CC)

International Covenant on Civil and Political Rights (ICCPR) which states:

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

29] Mr Boda argues that what the applicants seek in fact is *“the minimum relaxation of measures with the maximum precautions.”* He argues that, as the minority community is in pain⁴¹ because of the present harsh and unreasonable rules, the manner in which their pain may be alleviated is to be allowed to return to their place of worship, which is a place of purity and cleanliness, under strict conditions.

30] The matter is of particular exigency and importance as Ramadan started on Friday 24 April 2020 when the moon was sighted. The significance of the holy festival cannot be understated and the fact that Muslims are barred from attending Mosque evokes a particular pain which every Muslim around the country must feel.

THE RESPONDENTS' CASE

⁴¹ The word he specifically used

- 31] The respondents' case is based on two main arguments:
- 31.1 firstly, that there is no constitutional violation entailed in the Lockdown Regulations; and
- 31.2 secondly, that the relief sought is neither competent, nor just and equitable given the circumstances of this case.
- 32] The respondents⁴² have conceded that the Lockdown Regulations, both in their original form and those as amended, have imposed severe restrictions on every person's constitutional rights and particularly those regarding movement and association. Its position is however that those limitations are both reasonable and necessary given the threat that COVID-19 poses to human life, dignity and access to healthcare.
- 33] It is the respondents' position that urgent and drastic measures are necessary to curb the infection rate and to manage the healthcare system to prevent it from being wholly overwhelmed and collapsing. As was stated during argument by Ms Goodman, the collapse of the healthcare system does not just affect those infected with COVID-19, it affects every citizen who urgently needs access to healthcare facilities for whatever medical reason.

⁴² Also referred to as "the Government" interchangeably in this judgment

- 34] The Government has established a National Coronavirus Command Council to assist it with formulating its response to this pandemic. It is guided by a 45-member expert advisory committee (the Task Team) with members spanning a range of scientific and related disciplines to ensure that the response is based on a nuanced understanding of the data, the relevant factors at play and the complexities to which those factors may give rise.
- 35] The present assessment of the Task Team is that:
- 35.1 South Africa is at an early stage of the pandemic and the worst it yet to come. The most likely scenario is a delayed exponential growth in coronavirus infections;
 - 35.2 the nature of the virus makes it difficult to contain and, on average, an infected person will infect two to three others who will go on to infect others with whom they come into contact;
 - 35.3 it is imperative to delay the spread of the virus in order to prevent the healthcare system from being overloaded which, in turn, may result in even more deaths. It buys time for new diagnostic to be developed and rolled out, for new treatments to emerge and a vaccine to be developed. The only way to ensure this is to enforce strict social distancing measures.

- 36] What the Lockdown Regulations seek to achieve is the “flattening of the curve”⁴³. They do this by requiring everyone to stay at home unless they are providing or accessing a narrow range of essential goods or services⁴⁴. Government has decided what goods and services are permitted during this times by determining whether or not they are necessary for the survival of people within South Africa and whether they contribute to the functioning of the State’s infrastructure and economy.
- 37] Thus the regulations must strike a delicate balance between limiting social contact and possibly allowing the virus to spread on the one hand, and meeting the short- and long-terms needs of people within South Africa on the other.
- 38] The applicants have challenged the Lockdown Regulations arguing that the limitation to their freedom to practice their religion⁴⁵ and to do

⁴³ *“If we were to draw a line plotting the **number of confirmed cases of COVID-19 on one axis, and time since the first case on the other axis**, we would end up with a hump-shaped curve. It’s called an “exponential curve” because it shows exponential change over time – that means there is growth at an increasingly larger rate over time. And, when it comes to COVID-19, the shape of this curve fundamentally affects us all because it shows how well we are doing at curbing the spread of illness.*

By flattening the curve, we delay the peak of the outbreak so the country’s health system remains able to cope with the demand on its services” : <https://www.discovery.co.za/corporate/covid19-flatten-curve>

⁴⁴ Set out in the Lockdown Regulations

⁴⁵ S 15(1) of the Constitution:

“15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

so in communal association with others⁴⁶ has violated their entrenched rights⁴⁷.

39] It is the respondents' position that whilst the Lockdown Regulations entail serious rights limitations, including those mentioned *supra*, they constitute a reasonable and justifiable limitation and are thus constitutionally permissible under section 36 of the Constitution.

40] Section 36 of the Constitution reads as follows:

“36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

⁴⁶ S 31 of the Constitution:

“31 Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

⁴⁷ There was an argument made that the applicants have varied their position in their replying affidavit, and essentially, argued a new case which is impermissible. The one met by the respondents and both *amici* was that set out in the founding affidavit and that is the one addressed in this judgment

(d) *the relation between the limitation and its purpose; and*

(e) *less restrictive means to achieve the purpose.*

(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

41] Whilst no one right is more important than another, a limitations analysis involves

"...the balancing of means and ends. This entails an analysis of all relevant considerations

'to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose'.

*In this process, different and sometimes conflicting interests and values may have to be taken into account. Context is all-important and sufficient material should always be placed before a court dealing with such matters to enable it to weigh up and evaluate the competing values and interests in their proper context."*⁴⁸

42] And so the question that must be posed is whether or not the State's refusal to craft an exemption permit to allow for congregational religious worship, is reasonable and justifiable⁴⁹:

"[32] One further observation needs to be made, however. In the present matter it is clear that what is in issue is not so much whether a general prohibition on corporal punishment in schools can be justified, but whether the impact of such a prohibition on the religious beliefs and practices of the members of the appellant can be justified under the limitations test of s 36. More precisely, the proportionality exercise has to relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption for which the appellant asked, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality."⁵⁰

43] Ms Goodman argues that because the Lockdown Regulations are timebound⁵¹, it impacts only on the right to congregation which the State accepts is a very painful limitation in a time of many limitations. She submits that:

⁴⁹ This especially in light of the exemption granted to funeral attendees
⁵⁰ **Christian Education South Africa v Minister of Education** 2000 (4) SA 757 (CC)
⁵¹ Per s27(5) of the DMA which states:

"(5) A national state of disaster that has been declared in terms of subsection (1)-
(a) lapses three months after it has been declared;
(b) may be terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and
(c) may be extended by the Minister by notice in the Gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire."

- 43.1 it is not whether the Lockdown Regulations are unreasonable – it is whether the failure to allow congregational worship is reasonable and justifiable and whether the Government's refusal to allow for an exemption in this regard is reasonable and justifiable;
- 43.2 the limitation of rights in issue here is based on a policy adopted by Government with the aim of achieving a particular outcome. The formulation and adoption of policy involves a political decision with which a court should not lightly interfere;
- 43.3 for the Lockdown Regulations to constitute a constitutional limitation, Government need not show that they will invariably achieve their objections of stemming the COVID-19 pandemic, it is sufficient if they show that the Lockdown Regulations are a rational measure designed to achieve that end.
- 44] Lastly she submits that the Lockdown Regulations encompass a serious limitation of rights and are justified to protect:
- 44.1 the right to life entrenched in section 11⁵² of the Constitution;
- 44.2 the right of access to healthcare, safeguarded in section 27 of the Constitution;
- 44.3 the right of everyone to an environment that is not harmful to their health and wellbeing⁵³;

⁵² **"11 Life**
Everyone has the right to life."

⁵³ S27 of the Constitution

44.4 the right to dignity⁵⁴**THE UNITED ULAMA COUNCIL OF SOUTH AFRICA (UUCSA)**

- 45] They were admitted as the first *amicus curiae* by agreement between the parties.
- 46] The first *amicus* joins issue with the respondents on the fact that the governments primary responsibility is to place the lives of all South Africans first and that the restrictive measures seek to balance the rights relied upon by the applicant with the wider rights of society to life, dignity and access to healthcare. In addition to this, Mr Bham argues that the Lockdown Regulations protect the rights set out in section 24(a)⁵⁵ of the Constitution, namely every persons' right to an environment not harmful to their health or wellbeing.
- 47] It is the position of the UUCSA that the applicants are not prohibited from prayer in their homes. In addition, their freedom of conscience, religion, thought, belief and opinion is not fundamentally limited save that restrictions have been placed on congregational prayer in places

⁵⁴ Entrenched in section 10 of the Constitution

⁵⁵ **24 Environment**

Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

of worship in order to protect the rights to life, access to healthcare and the avoidance of an environment which risks harm to health and well-being by reason of this pandemic.

- 48] According to the UUCSA, Islam views the value of human life and dignity as all-encompassing because the cluster of environmental, political, cultural, social and economic rights are inextricably linked to human dignity. On this basis, it submits, certain freedoms may be limited if they threaten the sanctity of human life or offend human dignity. According to them, the ethics of public policy and governance from an Islamic perspective involves the identification, prioritization and application for the higher objective of the law, namely the preservation of religion, life, dignity, mind, progeny and wealth. Any action that jeopardizes these objectives, no matter how noble in appearance, is considered harmful.
- 49] It submits that, when considered in appropriate context, the applicants (and all Muslims) would be complying with the objectives of Islamic Law by adhering to the Lockdown Regulations despite the pain experienced by the temporary separation from the mosque. This is because of the importance Islam places on the sanctity of the life and dignity and health of the broader community in the interests of common good over the embellishment of the prayer of an individual Muslim. They submit that the limitations on congregational prayer in a

mosque, during the time of a pandemic, are a practical manifestation of this and are reflective of the opinion of the majority of Muslim scholars across the world.

50] Mr Bham lastly submits that the balance to be struck entails the temporary spiritual pain of not being able to pray in congregation in a place of worship and the steps which, based on expert opinion, are directed towards safeguarding of health as far as possible, assisting access to healthcare, ultimately the preservation of life itself and facilitating an environment to achieve these in the face of the threats posed by the COVID-19 pandemic. He submits that these limitations are suffered by all South Africans and are to the benefit of society as a whole.

51] UUCSA contends that, given this, the fact that the limitations are temporary, that the Lockdown Regulations are directed towards the safeguarding of individual and society's health, access to healthcare, the preservation of life and facilitating an environment in which to achieve this, the measures enacted by Government are reasonable and justifiable.

THE WOMEN'S CULTURAL GROUP (WCG)

52] They were admitted as the second *amicus curiae*, by agreement

between the parties and they represent the views of, particularly, Muslim women⁵⁶.

53] Joining issue with the respondents and UUCSA is the Women's Cultural Group (WCG) who are open for membership to women of all races and religions⁵⁷. Ms Kessery submitted that the grant of this application will expose the women and minor children of every Muslim household whose male members attend congregational worship, to unnecessary health and safety risks. She submits that this then intrudes on their right to life and dignity which is a fundamental right protected by section 11 of the Constitution.

54] She submits that, if this application is granted, it in any event infringes on a woman's right to equality and dignity as entrenched in the Constitution as there is no provision made for their worship at mosque and that, were the exemption to be allowed, the order must be crafted in such a way as to make provision for women as well – separate ablution facilities, separate prayer rooms, separate female security personnel and separate medical staff.

⁵⁶ Although their membership is open to women of all races and cultures, at present they only have Muslim women members

⁵⁷ Although, at present, their members comprise only Muslim women. They are the second *amicus*

IS THE LIMITATION REASONABLE AND JUSTIFIED?

- 55] The true question is whether it is reasonable and justifiable for the State to refuse to allow an exemption to permit congregational worship.
- 56] In **Minister of Home Affairs v NICRO**⁵⁸, the Constitutional Court stated that the limitations analysis
- "...calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily flow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them."*⁵⁹ (my emphasis)
- 57] In other words, for it to be found that the Lockdown Regulations impose a reasonable and justifiable limitation on citizens' rights as enshrined in

⁵⁸ 2005(3) SA 280 (CC)

⁵⁹ At par [35]

the Bill of Rights, the respondents need not show that they will achieve their objectives of stemming or eradicating the COVID-19 pandemic, it is sufficient to show that the Lockdown regulations are a rational measure designed to achieve that end.

58] In this regard, the applicants themselves state

“67. It must be clearly emphasized that I do not contend that the closure of the mosques, an unfortunate consequence of the regulations, is arbitrary in the sense contemplated by the Constitution. The COVID-19 Pandemic has been a drastic disaster, calling for drastic and urgent measures. The Government of the Republic of South Africa has done all that it can, and splendidly so, in the short space of time in issuing the regulations in relation to the lockdown...”

59] But what the applicants do say is that their beliefs form the very basis for their entire existence and that without congregational worship their very right to life is denied.

60] Mr Boda submits that the State is placing the applicants in a Hobson's choice – they must choose between disobeying the tenants of their religion or the Lockdown Regulations, which is not a position that they

should ever have to be in. This he says is clear from **MEC for Education, KZN and others v Pillay**⁶⁰ which states:

“[62] The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson's choice between observance of their faith and adherence to the law. There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity, which is in turn central to equality. Are voluntary practices any less a part of a person's identity or do they affect human dignity any less seriously because they are not mandatory?”

- 61] As has been pointed out *supra*, the infection rates due to COVID-19 have risen dramatically in the past 5 days alone.
- 62] This pandemic poses a serious threat to every person throughout South Africa and their right to life, dignity, freedom of movement, right to access healthcare and their right to a clean, safe and healthy environment. In a country where we are dominated by so much poverty, where people don't have access to basic amenities such as clean running water, housing, food and healthcare, the potential risk to those households poses a further threat which places an additional

⁶⁰ 2008 (1) SA 474 (CC).

burden on the Government to combat – the risk then, in light of those circumstances rises exponentially.

- 63] Having regard to the context in which the Lockdown Regulations have been imposed, it is important that the value and ideals of *Ubuntu* be considered. As was expressed in **Moela and Another v Habib and Another**⁶¹ by Weiner J:

“[60] The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel’ iAfrica.”

- 64] In **S v Makwanyane**⁶² Mokgoro J stated:

“[307] ...Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of ubuntu...”

[308] Generally, ubuntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu,

⁶¹ Unreported decision of Weiner J in Gauteng Division, Johannesburg case number 2020/9215 on 23 March 2020

⁶² 1995 (3) SA 391 (CC) at par [307]

describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly prized. It is values like these that s 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality." (my emphasis)

- 65] What is apparent is that, despite the fact that the applicants have accepted that the Lockdown Regulations are a rational and constitutionally permissible response to the pandemic, and that they recognize this as a "drastic disaster calling for dramatic and urgent measures", they persist with their request that exceptions be made to accommodate them. However, in my view, if regard is had to the sacrifices that have had to be made, they cannot ask that exceptions be made of the nature sought:

- 65.1 children throughout the country are now schooled at home as schools are closed. This means that, for many of them who are without electronic means to conduct videoconferencing with their teachers or receive lessons, homework and tasks to further their education are rendered impossible and their right to education has been compromised, if not for many ground to a halt;
- 65.2 all businesses, with the exception of essential services, have been closed down. Those that are allowed to remain open, have had their trade limited. Nail salons, hairdressers, appliance stores, furniture stores, clothing stores, restaurants, bars, shebeens, entertainment venues, sports grounds and many more are closed and the lack of income has left not just the owners financially at risk, but their employees have either had their income drastically curtailed or have lost their employment and those who can must turn to UIF;
- 65.3 the informal employment sector of the economy – waste pickers, street traders, domestic workers and the majority of people in this country are left without income and therefore without food. Their very basic right to human dignity stripped by a silent and virulent virus that knows no boundaries of race, colour, religious denomination, status or affluence.

66] As already stated, the fact remains that this virus can exist and remain infectious outside the body for several hours, and potentially days, which makes it especially dangerous as a significant proportion of people infected by COVID-19 do not have symptoms but remain infectious to others. Thus, and perhaps even unknowingly, they may infect others. The more people they come into contact with, the higher the risk of exponential infection.

67] What is also of concern is the fact that the applicants seek, not just an order exempting them from the restrictions placed on congregational worship, but all persons. The Notice of Motion seeks, as a general order:

“4. Ordering the Respondents to amend the regulations to permit movement of persons between their residences and places of worship on such reasonable conditions as the court may deem necessary which includes the following:

4.1 Regulation 11B(1)(a)(ii) should read:

“Every gathering as defined in regulation 1 is hereby prohibited, except for funeral as provided for in sub-regulation 8 and attendance at a religious place of worship as provided for in sub-regulation 9”

4.2 Regulation 11B(9) shall read as follows:

"(9)(a) Movement between a place of residence and a place of religious worship that meet the requirements of 11B(9)(b) shall be permitted.

(b) All places of religious worship may remain open to members of the faith for which they cater and to the public on the following conditions...."

68] Of concern is the fact that there are at least 850 mosques throughout South Africa. Added to this the number of churches, temples, synagogues and other places of worship, there are untold numbers of persons who will be moving to and from their residences each day and who will be praying in congregations. Social distancing, imperative in assisting to flattening the curve will be, if not impossible to enforce⁶³, then nigh on impossible as human nature is not suited to the severely restrictive obligations that social distancing has thrust on society so suddenly. Making allowances of the nature sought, would be tantamount to opening the floodgates. This Government does not have the police or army resources, which are already stretched to capacity, to ensure that safety measures are adhered to at each and every place of worship throughout South Africa.

⁶³ The applicants own fatwa of Mufti Chatgami make it clear that some religious groups believe that (a) no one may be turned away from a mosque and (b) prayers must be conducted shoulder to shoulder

- 69] There is also no way to police how far people will travel to their place of worship – whilst some attend their local place of worship, others attend one that is outside their immediate community and this is clear from the applicants own application: there is a mosque close to their home but they frequently attend mosque in a community which is 11km away.
- 70] For every security officer required to police a place of worship and for every medical personnel required to be in attendance, there is one less available to be on the frontline of this pandemic, one less to ensure compliance and one less to assist those sick and in need of care
- 71] As to the request that a Magistrate issue a permit of the nature sought, Ms Goodman submits that this undermines the oversight role of “an appropriate authority”⁶⁴ – the Magistrate cannot be given a discretion as to who should be allowed to attend congregational worship, who not and what conditions should be imposed⁶⁵. The conditions that the Lockdown Regulations presently impose are carefully crafted with input

⁶⁴ **S v Lawrence; S v Negal, S v Solberg** 1997 (40 SA 1176 (CC) at par [119]

⁶⁵ Paragraph 4.2 has a condition that the amendment to regulation 11B(9) contain a clause which reads: “(ii) The Magistrate issuing the permit may attach such conditions for the use of the site contemplated in (ii) above as may be necessary which may include:

- (a) limiting the number of congregants that may be present at the site at any particular time;
- (b) where applicable, regulating the number of congregations; the time gap between successive congregations, and the times of each successive congregation, in accordance with the prescripts of the applicable faith;
- (c) prescribing the distance to be observed between congregants at the site in accordance with the prescripts of the applicable faith;
- (d) requiring the use of sanitizing and other hygiene measures, including but not limited to the wearing of face masks and gloves, by persons attending the place of worship...”

from all available resources, experts and role players⁶⁶ and in the best interests of society as a whole.

72] Whilst it is so that accommodation has been made for various sectors to be exempt from the Lockdown Regulations, those have been regulated strictly and in accordance with the advice of experts and taking into account whether they are necessary for the survival of people within South Africa⁶⁷, whether they contribute to the functioning of the State's infrastructure and economy⁶⁸ and whether they are necessary for the maintenance of that infrastructure and economic activity. Without them, the basic structure of the economy would flounder and collapse.

73] The attendance of funerals was a particular issue raised. This is a thorny issue but seen in context, saying a last “goodbye” to a loved one is a “once off event” – it cannot be equated with attending congregational worship five times daily⁶⁹. The risk of exposure rises with each attendance at mosque. This we have seen from, for example:

73.1 the Jerusalem Prayer Breakfast (JPB) gathering from March 9-11 2020 at the Divine Restoration Ministries in Bloemfontein, Free State which saw the start of the pandemic in the Free State;

⁶⁶ Which includes various religious bodies

⁶⁷ For example retail shops and the sale of foods and goods (which are essential goods)

⁶⁸ Such as certain mining operations, banks, etc

- 73.2 the spike in India's coronavirus cases linked to the attendance of 3400 worshippers held at the Nizamuddin Mosque in Delhi; and
- 73.3 patient 31 in South Korea was in a minor car accident in Daegu, which is a city of about 2,000,000 people. Worried about her health post-accident, she went to the hospital to be checked out but was not screened her for the coronavirus, and then she left the hospital. She then attended Shincheonji Church, twice, which has about 300,000 members. Following this, she had lunch at a local hotel while suffering from a fever. Two days later, she found out that she had COVID-19. In the coming days, the cases of COVID-19 spiked in the country. Hundreds of Patient 31's fellow church-goers fell ill with the virus, leaving medics scrambling to tackle their numbers

- 74] It is also clear that the exemptions afforded to taxi operators cannot be equated with the relief the applicants seek – the taxi operators ferry essential workers to and from work. With the vast majority of South Africans unable to afford their own private transport, these operators are an essential service in allowing those designated to be an “essential service worker” to be able to function. Without them we would not be able to purchase the food we need for our daily sustenance as, firstly the food would not be able to be delivered to the retail store and secondly there would be no one to man the store. We would be unable to access healthcare as those facilities would be

closed without staff to provide the care the sick and dying with the care they need.

75] In my view, in South Africa right now, every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of “the greater good”, the spirit of “*unubtu*” and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic.

76] As already stated, the world over, entire countries of people have had to suffer similar inroads to their civil liberties and way of life – in this respect, South Africa is not unique or alone in its efforts. In some countries, these restrictions were placed too late and others have suffered criticism of being too draconian⁷⁰. What they all have in common is the presence of COVID-19 and the toll it has taken on human life in so many ways.

77] To the extent that the Government has put together its Task Team, has consulted exhaustively with them to ensure the safety⁷¹ of its citizens in

⁷⁰ Such as Germany, New Zealand and some States in the United States of America

⁷¹ As much as it can

order to “flatten the curve” and prevent an already fragile health system from being overwhelmed⁷², I cannot find that the restrictions imposed are either unreasonable or unjustifiable and thus the application must fail.

COSTS

78] As no party has sought costs, no order will be made.

ORDER

79] As a result, the following order is made:

The application is dismissed.



NEUKIRCHER J

Date of hearing: 21 and 23 April 2020

Date of judgment 30 April 2020

⁷²

In this context, the Constitutional Court has stated:

“[77] Hence, depending on the right infringed, the reasonableness criterion may vary in intensity. Some limitations on rights will be approached with more scepticism than others, and some infringements will be scrutinised more intensely. For example, the scrutiny in determining the reasonableness of a measure that affects the right to life will differ if that measure is designed to progressively realise the right of access to healthcare — in contrast to where the disputed measure is justified merely by a lack of resources. Demonstrated resource scarcity may mean that the measure could more easily be shown to be reasonable. But the scrutiny will nevertheless be intense because of the right at issue.”- **Dladla And Others v City of Johannesburg And Another** 2018 (2) SA 327 (CC)

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