

Are fundamental human rights being eroded during the COVID-19 pandemic? A discussion of the *Brits* application



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The Constitution of South Africa's (SA's) 'Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. Due to the current COVID-19 pandemic, many of the fundamental rights have been restricted. In the case of *Brits*

v The President of the Republic of South Africa and Three Others, the applicant approached the court on behalf of the public with specific regard to fundamental rights, as provided for in s 33(2) of the Constitution, seeking transparent reasons for the alleged administrative decisions that the respondents took in light of the pandemic. The purpose of this article is to summarise the above-

mentioned case and to set out the rights allegedly infringed. Legislation will be discussed that regulates the event of a national disaster and whether decisions made by the respondent were justifiable.

Summary

The applicant made a formal request to the first and second respondents, namely, the President of SA and the Minister of Cooperative Governance and Traditional Affairs, for written reasons in terms of s 5(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the administrative decisions taken under their direct leadership due to the COVID-19 pandemic. The applicant applied in the High Court, in an urgent application in his personal - and representative capacity, on behalf of fellow South Africans. The order sought of the President and other parties cited to furnish written reasons, in terms of s 5(2) of PAJA in respect of the administrative actions and/or decisions taken by them, which had materially and adversely af-



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affected the applicant's rights. The applicant requested a declaratory order in the interests of justice to be complied with within a seven-day period. According to the applicant the purpose of the application '[was] aimed at achieving constitutional transparency and accountability within the legal framework (i.e. the Disaster Management Act [57 of 2002 (the Act)]) that the South African Government elected to utilise in their response to Covid-19'. To facilitate such transparency and accountability the applicant provided detail of which rights and civil liberties had been affected or severely infringed on by the respondent.

Outline of the rights in the Constitution infringed as per Brits application

The right to equality in terms of s 9 of the Constitution by –

- disallowing certain businesses from continuing with trade and by allowing certain classes of persons to have more freedom of movement than others.

The right to human dignity in terms of s 10 of the Constitution by –

- restricting certain persons from attending funerals and preventing family members from visiting ill family members, isolated, in quarantine or at frail care facilities;
- depriving breadwinners, including women, domestic workers, and gardeners from earning livelihoods;
- converting 'normal civil liberties', like leaving one's residence to exercise or going to the beach, into criminal offences, and limiting social, personal, and physical interaction with others.
- forcing testing and quarantine for COVID-19 patients at state provided facilities, 'without having a choice between medical facilities at [one's] disposal'; and
- prohibiting visitations at correctional centres, curtailing movement of citizens without a permit and the implementing of a curfew system.

The right to life, in terms of s 11 of the Constitution, by allowing members of security forces to use deadly force to ensure compliance with COVID-19 measures.

The right to freedom and security of persons in terms of s 12 of the Constitution by –

- being forced to undergo medical testing when showing symptoms of COVID-19 and then being at a quarantine facility if one tests positive;
- being forced to submit to mandatory prophylaxis treatment, isolation, or quarantine without a person's consent; and
- being deprived of the choice to use alcohol and/or tobacco products.

The right to privacy in terms of s 14 of the Constitution by –

- including personal information, positive test results and information on suspected contacts on a COVID-19 Tracing Database without a person's consent.

The right to freedom of religion, belief, or opinion in terms of s 31 of the Constitution by prohibiting and then limiting religious gatherings.

The right to freedom of expression, in terms of s 16 of the Constitution, being limited by criminalising any statement, through any media form, with the intention of deceiving any other person about COVID-19, infection status or any measure taken by government to address COVID-19, without defining deception.

A person's political rights by postponing several by-elections across SA.

The right to freedom of movement and residence in terms of s 21 of the Constitution by –

- confining citizens to their residence, and limiting movement between provinces;
- imposing a night curfew on all citizens; and
- requiring citizens to only enter public places while wearing a face mask and limiting the use of public and/or private transport.

The right to freedom of trade, occupation, and profession in terms of s 22 of the Constitution by –

- forcing the lockdown of businesses and preventing them from generating an income.

The right to health care, food, water, and social security in terms of s 27 of the Constitution by –

- depriving people of the ability to purchase food and preventing non-governmental organisations, churches, and other community organisations from distributing food;
- failing to provide social assistance with disaster relief grants; and
- suspending certain elective surgeries.

The limitation and/or suspension of the right of children and the right to education by closing schools.

The limitation of the right to access to courts by limiting adjudication of disputes based on urgency.

From the founding affidavit in the *Brits* application, it is clear that numerous rights listed in the Bill of Rights have been affected. This leads us to compare the pandemic measures taken in China with the stringency of those taken and implemented in SA and the extent to which rights have been infringed in the South African context.

Measures taken in China

Worldwide, COVID-19 has infected more than 219 million people. One of the first

cities to go into lockdown was Wuhan in the Peoples Republic of China on 23 January 2020. No exceptions were made regarding transport in and out of the city. All shops were closed except for those selling food or medicine. Some of the areas limited people from leaving their homes 'to one family member every two days to buy necessities. Others barred residents from leaving, requiring them to order in food and other supplies from couriers' (Emma Graham-Harrison and Lily Kuo 'China's coronavirus lockdown strategy: brutal but effective' www.theguardian.com, accessed 5-9-2021). It later progressed to such an extent that officials had to go door-to-door for health checks, forcing those who were ill, into isolation (Graham-Harrison and Kuo (*op cit*)).

When comparing some of the restrictions imposed by Wuhan to that of SA, it is clear there are certain similarities in the type of restrictions, but differences in the extent to which Wuhan imposed their regulations. Unlike the position in Wuhan, persons in SA were allowed to leave their homes to buy necessities. They were not restricted to do so once or every second day.

Many of the restrictions or regulations imposed by the respondents have been lifted or decreased incrementally as SA gradually moved from one level of lockdown to the next and back again. Interprovincial travel is at some levels prohibited and almost all parts of the South African economy have reopened. The ban on the sale of alcohol and tobacco products has been lifted but restrictions remain on the sale of alcohol at some levels of lockdown. With regard to public transport, 'bus and taxi services may not carry more than 70% of the licensed capacity for long-distance travel (200 km or more). Public transport may carry 100% of the licensed capacity for any trip not regarded as long-distance travel' (Tebogo Nkabinde 'New Level 4 lockdown rule – what's permitted and what is not' www.businessstechAfrica.co.za, accessed 5-9-2021). After comparing the extent to which measures have been taken in the original dispensation it is necessary to analyse the reasons for the decisions made by the respondent and whether they were justifiable, in the public interest and specifically catered for within or in terms of the Act.

Legislation framework regulating a disaster

• The Act

The Act is managed by a Cabinet Member who is chosen by the President. A committee must then be established with the Minister, as the chairperson. The committee is responsible for making recommendations to the Cabinet on

issues relating to disaster management, as well as on the establishment of a national framework aimed at ensuring an integrated and uniform approach in SA. A National Disaster Management Centre must be established with the objectives 'to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation' (s 9 of the Act).

The National Centre must specialise in issues concerning disasters and disaster management and monitor whether organs of state and statutory functionaries comply with the Act and the national disaster management framework. It must make recommendations regarding the funding of disaster management and initiate and facilitate efforts to make such funding available. The National Centre has the duty of making recommendations on draft legislation affecting the Act, the national disaster management framework, or any other disaster management issue. It must make recommendations on -

- the alignment of national, provincial, or municipal legislation with the Act and the national disaster management framework; or
- in the event of a national disaster, on whether a national state of disaster should be declared in terms of s 27 of the Act.

When an event occurs, which is seen as disastrous, the National Centre must determine whether the event should be regarded as a disaster in terms of the Act. If so, it must immediately assess the magnitude and severity or potential magnitude and severity of the disaster; classify the disaster as a local, provincial or national disaster and record the prescribed particulars concerning the disaster in the prescribed register. When a national disaster has been determined, the Minister may, by notice in the *Government Gazette*, declare a national state of disaster. When this has been declared the Minister may, after consulting the responsible Cabinet member, make regulations or issue directions concerning -

- (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
- (b) ... the rendering of emergency services;
- (c) the implementation ... of a national disaster management plan ... ;
- (d) the evacuation to temporary shelters ... from the disaster-stricken or threatened area ... for the preservation of life;
- (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
- (f) the regulation of the movement of persons and goods ... within the disaster-stricken or threatened area;

(g) the control and occupancy of premises in the disaster-stricken or threatened area;

(h) the provision, control or use of temporary emergency accommodation;

(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(k) the dissemination of information required for dealing with the disaster;

(l) emergency procurement procedures;

(m) the facilitation of response and post-disaster recovery and rehabilitation;

(n) other steps that may be necessary to prevent an escalation of the disaster ... ; or

(o) steps to facilitate international assistance.'

These powers, may only be exercised for the purpose of assisting, protecting, and providing relief to the public, preventing or combating disruption or dealing with the destructive and other effects of the disaster.

The Constitution

Section 36 of the Constitution determines that 'the rights in the Bill of Rights may be limited only ... 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' the nature, purpose, extent of the limitation and less restrictive means to achieve the same purpose.

Section 37 provides that 'a state of emergency may be declared ... only when -

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order'. Section 37 further determines that 'a declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -

(a) prospectively; and

(b) for no more than 21 days ... , unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of at least 60 percent of the members of the Assembly'.

'(4) Any legislation enacted in consequences of a declaration of a state of emergency may derogate from the Bill of

Rights only to the extent that -

(a) the derogation is strictly required by the emergency; and

(b) the legislation -

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national *Government Gazette*, as soon as reasonably possible after being enacted'. Section 37(5) holds that 'no Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from the section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3, of the Table' (see next page).

Here are the non-derogable rights that are considered so important that they cannot be limited or suspended under any circumstances.

There is a set legal framework that must be adhered to in the event of a national disaster. In terms of s 27(2) of the Act, the powers and duties given to the Committee and the National Centre must be executed in the public interest. The question remains whether all regulations and declarations made by the respondents were in the public interest.

Analysis and evaluation of the rights infringed

According to the applicant four of the non-derogable rights that have been allegedly infringed during the implementation of the COVID-19 Regulations in SA are the -

- right to equality;
- right to human dignity;
- right to life; and
- right to freedom and security of persons.

The right to human dignity was infringed by restricting human interaction at funerals and visitations, as well as making it a criminal offence to move outside of the boundaries of your own home.

The right to freedom and security was infringed, in that the public has been deprived of rights over their own bodies, forced to submit to mandatory medical treatment and isolation and in some instances criminalised.

The rights of children to education, physical or mental health or spiritual, moral, or social development in terms of s 28 were infringed by the closing of schools and restrictions imposed on social and sports gatherings.

1. Section Number	2. Section Title	3. Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subss (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude.
28	Children	With respect to: - subsection (1)(d) and (e); - the rights in subparagraphs (i) and (ii) of subs (1)(g); and - subsection 1(i) in respect of children 15 years and younger.
35	Arrested, detained and accused persons	With respect to: - subsections (1)(a), (b) and (c) and (2)(d); - the rights in paras (a) to (o) of subs (3), excluding para (d); - subsection (4); and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

In terms of s 27 of the Act, the best-case scenario should reflect the least possible reasonable infringement of non-derogable rights as, by virtue of their description, they are non-derogable. The intention of the Act is to provide a guideline within which disasters should be dealt with in the public interest while keeping in mind our Constitution.

The COVID-19 legislation and its amendments have affected almost all South African citizens and were sig-

nificant in nature. Specific areas of concern were identified in the *Brits* matter and these issues will create a catalyst for legal challenges in our courts in the foreseeable future. The overall picture presents a rather pessimistic prognosis for the relationship between government and citizens as government appears to have unjustifiably infringed on several non-derogable rights, which if litigated on, will expose our legal system to unprecedented strain.

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