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**An assessment of the constitutionality of the directions
and regulations issued to local government during the
Covid-19 state of disaster**

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Abbreviations

CoGTA	The Department of Cooperative Governance and Traditional Affairs
DMA	Disaster Management Act 57 of 2003
IDP	Integrated Development Plan
MFMA	Local Government Municipal Financial Management Act 56 of 2003
MSA	Local Government Municipal Systems Act 32 of 2002
MSA	Local Government Municipal Structures Act 117 of 1998
SANDEF	South African National Defence Force
SAPS	South African Police Service



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Chapter 1: Introduction

1.1 Problem Statement

President Cyril Ramaphosa first addressed the nation regarding the Covid-19 pandemic on the 15th of March 2020, when he announced the national state of disaster in terms of the Disaster Management Act (DMA) to prevent the rise of Covid-19 infections.¹ On the 23rd of March 2020 in his second address, the President announced a national Lockdown, initially for 21 days, and outlined more stringent interventions to limit the transmission of the coronavirus and to mitigate its economic and social impact.² Since then, there have been at least four sets of directions issued to the provinces and municipalities in terms of the Disaster Management Act, with the first set of directions to provinces and municipalities taking effect on the 25th of March 2020. The purpose of the directions issued to municipalities were to direct municipalities in respect of the following matters in response to Covid-19 namely, the provision of water and sanitation services, hygiene education, communication, and awareness. For the purposes of this research, the word coronavirus will be used interchangeably with Covid-19.

The first set of directions titled ‘COGTA COVID-19 Disaster Response Directions 2020’ took effect on the 25th of March 2020.³ The directions stipulated that no council meetings outside the District Command Centre meetings may be undertaken during the initial 21 Day Lockdown period, or any other extended period that may be declared. Since then, there have been amendments to these directions. The directions which commenced on the 3rd of July 2020, as far as local governance is concerned, stated that municipalities and municipal entities could convene council meetings.⁴

There is one main issue that needs special attention, whether the regulations and directions issued to municipalities are constitutional. To address this question, the discussion will comprise of two main themes. The first one will discuss whether the directions and regulations that affect local government *functions* are constitutional. The second one will consider whether the directions and regulations that affect municipal *governance* are constitutional. It is important to note that the Constitution in schedules 4B and 5B has listed municipal functions. Municipalities are responsible

¹ South Africa’s policy response to the COVID-19 pandemic available at <https://www.tralac.org/news/article/14617-south-africa-s-policy-response-to-the-covid-19-pandemic> (accessed 29 June 2020).

² See above.

³ Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020.

⁴ Disaster Management Act amended regulations in GN 748 GG 43503 of 3 July 2020.

for delivering essential services such as water and sanitation services as listed in schedule 4B of the Constitution.⁵ More municipal functional areas are listed in schedule 5B of the Constitution and they include refuse removal, refuse dumps and solid waste disposal. To establish whether the directions and regulations promulgated during the pandemic in terms of the DMA are constitutional, these directions and regulations will have to be in line with the municipal functions listed in schedule 4B and 5B of the Constitution.

Section 2 of the Constitution stipulates that the Constitution is the supreme law of the country.⁶ Thus, as the supreme law of the country, all law and conduct must be in line with the Constitution. The Constitution cannot cease to operate due to the declaration of a state of national disaster and the DMA does not replace the Constitution. Any law or conduct which is inconsistent with the Constitution, including the DMA is unconstitutional even during a state of disaster. So, the question which this study examines is whether the regulations and directions issued to municipalities comply with the framework of local government powers and functions as provided for by the Constitution.

The response to the Covid-19 pandemic between March 2020 and November 2020 was fraught with uncertainties because the national government did not know exactly how to regulate, what to regulate and what impact the regulations would have as there was little expert information in dealing with a pandemic of this nature in South Africa. Even though dealing effectively with the pandemic was important, national government also had to pay attention to local government autonomy. National government had to strike a balance between dealing effectively with the pandemic and respecting local government autonomy.

It is important to establish guidelines on how the pandemic can be dealt with whilst respecting the autonomy of municipalities both at the time of a pandemic breaks out and in the future. The autonomy of local government must be respected by other spheres of government because of the supremacy of the Constitution. This can be done by issuing regulations and directions that do not interfere with the functional areas and the governance of municipalities as set out by the Constitution. For example, national government may not exercise executive authority or administer local government matters as listed in schedule 4B and 5B since it will breach the executive authority reserved for municipalities by section 156 (1) (a) of the Constitution.⁷ Simply put, the regulations and directions must meet the requirement of legality. Every law, including the

⁵ Constitution of the Republic of South Africa, 1996.

⁶ Section 2 Constitution.

⁷ Section 156 (1) (a) Constitution.

regulations and directions issued during the pandemic must be in line with the Constitution. The Constitution itself does not identify a state of disaster as one of the justifications for the national government to interfere with how municipalities are supposed to carry out their constitutional mandates.

Prior to the 1996 democratic dispensation, local government had limited autonomy as both the national and provincial governments could interfere in the functions of local government. Therefore, for this reason courts are very mindful of unjustified interference from both the national and provincial governments.

The directions issued by national government to local government must be adhered to by local government because they are law. They remain in operation unless they are amended by the Minister of Cooperative Governance and Traditional Affairs (CoGTA) or set aside by a court order.

1.2 Research Question

The question that this dissertation addresses is whether the directions and regulations issued to local government during the Covid-19 state of disaster are constitutional.

To adequately answer the question of whether the directions and regulations are constitutional or not, it is important to consider the following-

- a) Why did the national government issue the directions and regulations in terms of the DMA? What is the significance of this Act? And what are the regulations and directions that had a direct impact on local government?
- b) What are the functional competencies of local government and how are they protected from national government interference?
- c) What are the governance responsibilities of local government and how are they protected from national government interference?
- d) Are the regulations and directions issued to municipalities and provinces in terms of the DMA constitutional?
- e) What is the correct way of interpreting the Constitution during the state of disaster? Can a different interpretation be adopted to justify a different way of interpreting the Constitution during a state of disaster?

1.3 Argument

The main issue to be considered is whether the regulations and directions issued to municipalities are constitutional or not. The Covid-19 directions to be considered fall under the period between March 2020 and November 2020. For instance, direction 6.2.1 (d) of Directions directed municipalities to provide other appropriate relief measures like water tanks, borehole and storage tanks in water constrained communities that have limited access to municipal water supply.⁸ This raises the question of whether the wording of the directions complies with section 155 (7) of the Constitution. The latter provides that the national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in schedules 4B and 5B by regulating the exercise by municipalities of their executive authority referred to in section 156 (1) of the Constitution. Could it be argued that direction 6.2.1 (d) is instructing municipalities how to perform functions within their areas in respect of providing water and sanitation services?

There were other directions and regulations issued during the state of disaster that affect local governance powers. For example, direction 6.7.2 provided that no council meetings outside the district command centre meetings may be undertaken during the initial 21 Day Lockdown period or any other extended period that may be declared and direction 6.7.2 (e) stated that all ordinary council meetings were initially suspended.⁹ This meant that municipal council meetings were not allowed to take place when this direction came into effect and before it was amended.

Another example which relates to the aspect of municipal governance is the direction issued on the 30th of March 2020 by the Minister of Finance. The direction stated that municipalities and municipal entities are exempted from a provision of the Municipal Finance Management Act, 2003 (MFMA) which requires any action to be taken between the date of publication of this notice and the date that the national state of disaster lapses or is terminated in terms of section 27(5) of the Disaster Management Act, 2002.¹⁰ The issue that must be addressed is how municipal finances are affected by this exemption.

After the announcement on the 15th of August 2020 by the President, the country went to Level 2 effective from the 17th of August 2020. As the country moved to Level 2, the direction exempting

⁸ Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020.

⁹ Disaster Management Act amended regulations in GN 748 GG 43503 of 3 July 2020.

¹⁰ Municipal Finance Management Act, 2003 - Exemption From Act and Regulations in GN 429 GG 43181 of 20 March 2020.

municipalities from complying with certain provisions from the MFMA was still not amended. Alternatively, the exemption may remain in place for the duration of the state of disaster. This dissertation will not be able to cover everything regarding the impact of the response of the coronavirus on local government. Firstly, there is more information regarding the coronavirus that emerges almost every day. Secondly, the response by national government keeps on changing because of the new information. Thirdly, directions and regulations are amended as fast as the new information emerges. For instance, the numbers of infections keep on fluctuating and national government shifts from one level to the next. As stated above, the period of the state of disaster that will be covered will be from March 2020 until November 2020. For the purposes of this paper, the main directions will be referred to as follows:

- a) Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020 (Direction 1 of 25 March 2020);
- b) Disaster Management Act amended directions in GN R432 GG 43184 of 30 March 2020 (Direction 2 of 30 March 2020);
- c) Disaster Management Act amended directions in GN 510 GG 43291 of 07 May 2020 (Direction of 7 May 2020); and
- d) Disaster Management Act amended directions in GN 748 GG 43503 of 03 July 2020 (Direction 4 of 03 July 2020).

1.4 Literature Survey

South Africa (SA) has a multilevel government system which has three spheres of government. Therefore, SA embraces a decentralised system that demands that power not to be centralised. Additionally, as part of municipality's autonomy, Fuo states that municipalities now have self-governing legislative and executive authority vested in democratically elected municipal councils.¹¹ The Constitution has established the principle of subsidiarity. The Constitution has provisions that assign schedule 4A and 5A functional areas to local government if the matter would most effectively be administered locally and the municipality has the capacity to administer it.¹²

Section 40 (1) of the Constitution provides that the government of South Africa is divided into three spheres.¹³ The South African Constitution uses the word *sphere* and according to Mathenjwa,

¹¹ Fuo O 'Intrusion into the autonomy of South African local government: Advancing the minority judgment in the Merafong City case' (2017) 50 *De Jure* 325.

¹² Steytler N & De Visser J *Local government law of South Africa* (2009) ch 5.

¹³ Section 40 (1) Constitution.

the significance of this word is that it provides for an equal government across the three spheres.¹⁴ Nkuna and Nemutanzhela confirm the position and state that a sphere of government, instead of a level or tier of government connotes a vision of non-hierarchical government, where each government possesses the same status.¹⁵

The powers of local government are called original powers because they are sourced directly from the Constitution.¹⁶ Steytler & De Visser state that the significance of original powers is that local government powers cannot be removed or amended by national or provincial government legislation.¹⁷ Municipalities also have incidental powers. These powers refer to the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.¹⁸

With regards to local government powers and functions, Nkuna and Nemutanzhela remarked that local government functions and powers in the Constitution read together with the objects of local government in terms of section 152 of the Constitution provide a conundrum when such functions have to be reduced to a service delivery role by municipalities.¹⁹ Simply put, the powers and functions of local government do not fully embrace the constitutional objectives when the municipalities have to provide service delivery according to their powers and functions.

Local government powers and functions establish some degree of autonomy for local government. The Constitution does not only provide this autonomy but also protects it. Steytler & De Visser state that “the final Constitution has taken the recognition of local government a step forward. The final Constitution has entrenched local autonomy by listing the powers of municipalities and the powers of oversight by other spheres of government and most importantly, securing a stable base for municipal revenue”.²⁰ The Constitution further gives municipalities the right to govern at its own initiative the affairs of its community.²¹ Mathenjwa is of the view that the right afforded to a municipality to govern at its own initiative the affairs of its community enables the municipality

¹⁴ Mathenjwa MJ ‘The role of the principle of legality in preserving municipal constitutional integrity’ (2014) 29 *SAPL* 535.

¹⁵ Nkuna NW & Nemutanzhela TL ‘Locating the role of service delivery within powers and functions of local government in South Africa’ (2012) 47 *JPAD* (2012) 358.

¹⁶ Christmas A & De Visser J ‘Bridging the gap between theory and practice: Reviewing the powers and functions of local government in South Africa’ (2009) *Commonwealth Journal of Local Governance* 111.

¹⁷ Steytler N & De Visser J *Local government law of South Africa* (2009) ch 5.

¹⁸ Section 156 (5) Constitution.

¹⁹ Nkuna NW & Nemutanzhela TL ‘Locating the role of service delivery within powers and functions of local government in South Africa’ (2012) 47 *JPAD* 356.

²⁰ Steytler N & De Visser J ‘Local government’ in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2014) 7.

²¹ Section 151 (3) Constitution.

to exercise its powers independently of the control of the national and provincial governments.²² Steytler & De Visser make a similar remark as they argue that the phrase ‘on its own initiative’ marks the end of an era where municipalities were implementers of national and provincial government legislation.²³ Upholding local government autonomy means compliance with every provision in the Constitution which refers to local government powers and functions.

The Constitution is the supreme law of the Republic. This means all law and conduct must be in line with the Constitution to meet the standard of legality. The rule of law is entrenched by section 1 (c) of the Constitution as it states that the Republic is founded upon, amongst other values, the supremacy of the Constitution and the rule of law. The principle of legality is a necessary incident of the rule of law.²⁴ According to Henrico, there is no definition of this principle as the Constitution does not define what is meant by the rule of law.²⁵ Konstant states that the principle of legality should be thought of as less invasive than administrative law review.²⁶ The principle of legality ensures that any authority that exercises power is authorised to exercise such power.²⁷ Hence Sewpersadh P & Mubangizi remark that actors of public power will mostly seek to justify that their actions fall within the ambit of an executive action so that it can be reviewed under a less intrusive judicial review.²⁸

Whilst section 40 (1) of the Constitution is one of the provisions that enhance the status of local government, it is imperative to ascertain the definition of operative words: distinctive, interdependent, and interrelated. De Visser and Steytler state that the distinctiveness reflects the autonomy of local government in terms of its powers and functions.²⁹ Interrelatedness describes the hierarchy that underpins the relationship between the three spheres which is manifested in the context of local government in the national and provincial governments’ supervisory powers of regulation, monitoring, and intervention. Interdependence refers to the fact that given the dispersal

²² Mathenjwa M ‘The legal status of local government in South Africa under the new constitutional dispensation’ (2018) 33 *SAPL* 4.

²³ Steytler N & De Visser J *Local government law of South Africa* (2009) ch 5.

²⁴ Henrico R ‘Re-visiting the rule of law and principle of legality: judicial nuisance or licence?’ (2014) 742 *JSAL* 742.

²⁵ Henrico R ‘Re-visiting the rule of law and principle of legality: judicial nuisance or licence?’ (2014) 742 *JSAL* 743.

²⁶ Konstant A ‘Administrative Action, the Principle of Legality and Deference – The Case of *Minister of Defence and Military Veterans v Motau*’ (2015) 7 *JLC* 90.

²⁷ Mathenjwa MJ ‘The role of the principle of legality in preserving municipal constitutional integrity’ (2014) 29 *SAPL* 540.

²⁸ Sewpersadh P & Mubangizi JC ‘Judicial review of administrative and executive decisions: Overreach, activism or pragmatism?’ (2017) 21 *LDD* 207.

²⁹ Steytler N & De Visser J *Local government law of South Africa* (2009) ch 5.

of state power among the three spheres of government, the spheres are dependent on one another to secure the well-being of the people of the Republic. This view by De Visser and Steytler acknowledge the hierarchal relationship that exists between the three spheres of government. Despite the local government's elevated status, local government's autonomy is not absolute.³⁰

Another aspect of autonomy for local government is the constitutional power of being able to raise their own revenue by imposing rates on property, surcharges on fees and services rendered. Local government is not completely autonomous for the reasons that follow.³¹ First, local government still depends on the national government for revenue such as conditional grants and unconditional grants.³² Even though municipalities raise a substantial amount of their revenue, they still depend on intergovernmental transfers from national government. Nkuna NW & Nemutanzhela TL state that with regards to local government being a sphere of government, developmental local government remains a constitutional ideal which in practice is unrealistic.³³

1.5 Research Methodology

This is a desktop-based study which will make use of primary sources which include the 1996 Constitution of South Africa, the Disaster Management Act, Local Government: Municipal Financial Management Act 56 of 2003 and regulations and directions under the Disaster Management Act, and court judgments. The secondary sources that the study will rely on includes chapters in books, journal articles and internet sources like online news articles.

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³⁰ Fuo O 'Intrusion into the autonomy of South African local government: Advancing the minority judgment in the Merafong City case' (2017) 50 *De Jure* (2017) 326.

³¹ Nkuna NW & Nemutanzhela TL 'Locating the role of service delivery within powers and functions of local government in South Africa' (2012) 47 *JPAD* (2012) 358.

³² Khumalo B, Dawood B, Mahabir J 'South Africa's Intergovernmental Fiscal Relations System' in N Steytler & Y Ghai (eds) *Devolution in Kenya and South Africa* (2015) 215.

³³ Nkuna NW & Nemutanzhela TL 'Locating the role of service delivery within powers and functions of local government in South Africa' 47 *JPAD* (2012) 358.

Chapter 2: An analysis of the Disaster Management Act

2.1 Introduction

The DMA is the primary legislation that was used to issue most of the directions and regulations to municipalities to deal with the coronavirus pandemic. The DMA empowers the Minister of Cooperative Governance and Traditional Affairs (CoGTA) to issue directions and regulations after a national state of disaster has been declared in terms of section 27(1) of the DMA. Some of the Covid-19 directions were issued in terms of the Local Government: Municipal Finance Management Act 56 of 2003.

This chapter will assess the difference between a state of disaster and a state of emergency. The next part will discuss the directions and regulations issued by the Minister of CoGTA and outline the DMA framework. Thereafter, it will discuss the issues that came with the regulations and directions. Furthermore, this section will discuss several court cases where the constitutionality of the Covid-19 Lockdown regulations was challenged. Finally, this chapter will provide details on the various regulations and directions that affect local government by providing a table that compares the various amendments made to the regulations and directions issued and to show the impact it had on local government. The listed directions and regulations are presented in a table form to illustrate the directions and regulations that were issued to municipalities. The significance of assessing the DMA framework lies in the fact that the DMA is the primary legislation that the government used to declare the National State of Disaster. Secondly, the directions and regulations were issued and promulgated by the national government subject to the DMA.

2.2 The Legal Framework of the Disaster Management Act

This section will begin by stating the purpose for the DMA. The discussion will then outline the legal framework of the DMA. In discussing the framework, the section will provide the legal basis for the declaration of the state of disaster. It will be argued that as much as the state of disaster is governed by the DMA, the state of disaster still has a constitutional basis. The last part will set out the role players in managing a state of disaster as provided by the DMA.

The purpose of the DMA is to, amongst others, provide for an integrated and coordinated disaster management policy that focuses on -

- preventing or reducing the risk of disasters;
- mitigating the severity of disasters;
- emergency preparedness;
- rapid and effective response to disasters and post-disaster recovery; and
- the establishment of national, provincial, and municipal disaster management centres.³⁴

The purpose of the legislation shows why the national government decided to use the DMA and not any other legislation. The purpose of the DMA is a list of objectives for using the DMA. Even though the DMA was not tailor-made for a disaster caused by the Covid-19 virus, the DMA would help the government with emergency preparedness and creating coordinating structures such as disaster management centre.

2.2.1 The declaration of the state of disaster

For a state of disaster to be declared, circumstances must meet the criteria of a 'disaster'. The DMA provides that a 'disaster' means a progressive or sudden, widespread, or localised, natural or human-caused occurrence which causes or threatens to cause -

- death, injury, or disease;
- damage to property, infrastructure, or the environment; or
- disruption of the life of a community; and
- is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their resources.³⁵

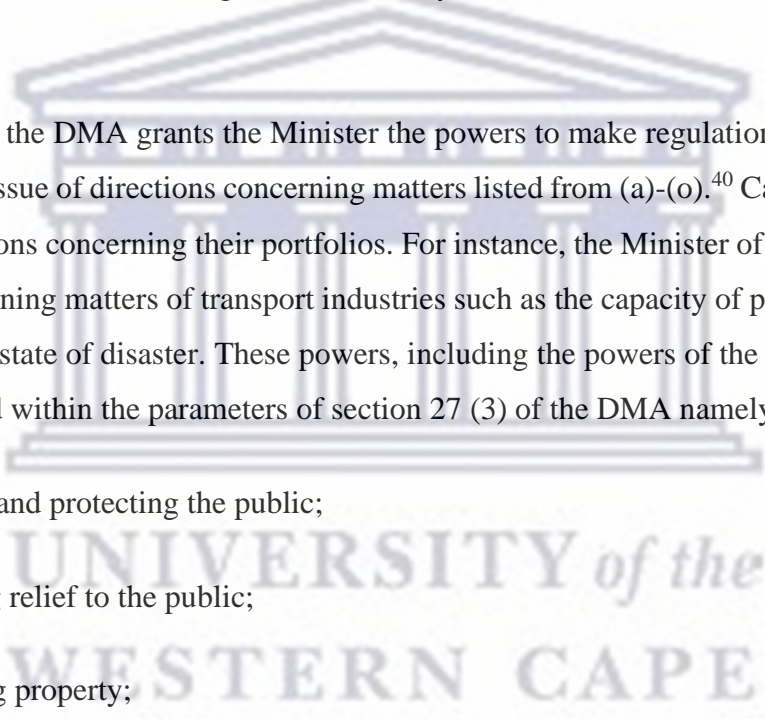
³⁴ The preamble of the DMA.

³⁵ Section 1 DMA.

In terms of section 1 of the DMA, the Minister (Minister of CoGTA) is the cabinet member designated in terms of section 3 to administer this Act.³⁶ Section 27 (1) of the DMA provides that in the event of a national disaster, the Minister may by notice in the *Gazette* declare a national state of disaster.³⁷ Therefore, once the criteria of a ‘disaster’ is met then the Minister has the authority to declare a state of disaster in terms of section 27 (1) of the DMA.

A national state of disaster that has been declared in terms of section 27 (1) of the DMA either lapses three months after it has been declared, or the Minister may terminate it by issuing a notice in the *Government Gazette*.³⁸ The Minister may extend the state of disaster one month at a time before it lapses or the extension is due to expire.³⁹ The last phrase ‘or the extension is due to expire’ means that the Minister has the legislative authority to extend the state of national disaster more than once.

Section 27 (2) of the DMA grants the Minister the powers to make regulations or issue directions or authorise the issue of directions concerning matters listed from (a)-(o).⁴⁰ Cabinet Ministers may also issue directions concerning their portfolios. For instance, the Minister of Transport may issue directions concerning matters of transport industries such as the capacity of passengers allowed in a taxi during the state of disaster. These powers, including the powers of the Minister of CoGTA, may be exercised within the parameters of section 27 (3) of the DMA namely -

- 
- a) assisting and protecting the public;
 - b) providing relief to the public;
 - c) protecting property;
 - d) preventing or combating disruption; and
 - e) dealing with the destructive and other effects of the disaster.⁴¹

³⁶ Section 1 DMA.

³⁷ Section 27 (1) DMA.

³⁸ Section 27 (5) (a).

³⁹ Section 27 (5) (c).

⁴⁰ Section 27 (2) DMA.

⁴¹ Section 27 (3) (a) - (e).

In terms of the DMA, the Minister is granted the discretion to include regulations prescribing penalties for contravention of the regulations promulgated in terms section 27 (2).⁴² The next section explains what a state of emergency is by outlining its legal basis and explaining how it applies in practice.

2.2.2 The state of emergency

The state of emergency has its legal basis in section 37 of the Constitution and is governed by the State of Emergency Act of 1997.⁴³ A state of emergency may be declared only in terms of an Act of Parliament by the President.⁴⁴ The President may declare the emergency within the Republic or any area within the Republic and must furnish reasons behind the declaration.⁴⁵ For a state of emergency to be declared, the life of a nation has to be threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency and to restore peace and order.⁴⁶ Consequently, there are two assessments that have to be made from the requirements to determine whether a state of emergency should be declared. The first assessment is to establish whether there is a disturbance that qualifies as a threat to the life of a nation. The second assessment is to establish whether the state of emergency is necessary for the restoration of peace and order.⁴⁷ The court still retains its authority to decide on the validity of the declaration.⁴⁸

Different situations may require a state of emergency to be declared. However, the Constitution and the State of Emergency Act 64 of 1997 do not distinguish the types of occurrences that may constitute a state of emergency.⁴⁹ During a state of emergency, any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency.⁵⁰ Derogation in law means to modify or suspend and is often used to give the state the power to temporarily suspend rights.⁵¹ The state may also temporarily modify some of the provisions in the Bill of Rights insofar as it is

⁴² Section 27 (4) DMA.

⁴³ Du Plessis E 'Analysis: State of emergency v state of disaster' available at <https://www.news24.com/news24/analysis/analysis-state-of-emergency-vs-state-of-disaster-20200914> (accessed 15 September 2020).

⁴⁴ Fritz N 'States of emergency' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2014) 20.

⁴⁵ Section 1 (1) - (2) State of Emergency Act.

⁴⁶ Section 37 (1) (a) - (b) Constitution.

⁴⁷ Fritz N (2014) 18.

⁴⁸ Fritz N (2014) 21.

⁴⁹ Fritz N (2014) 19.

⁵⁰ Section 37 (4) (a) Constitution.

⁵¹ Du Plessis E (2020).

required by the emergency. However, there are provisions in the Bill of Rights that may not be modified or suspended such as those that entrench and protect equality, human dignity, life, and freedom and security of the person.⁵² A case for a state of emergency to be declared in the Republic may be harder to make because of the requirement in section 37, which requires the restoration of peace and order.

The Minister of CoGTA declared a state of disaster in terms of the DMA as a result of the Covid-19 pandemic. The government did not declare a state of emergency but a state of disaster. The state of disaster and state of emergency each have different legal consequences. First, when a state of emergency is declared, some rights from the Bill of rights may be suspended. However, during a state of disaster, the rights in the Bill of Rights are limited given that they meet the standard of rationality. The state of emergency is declared where there needs to be a restoration of peace and order whereas, a state of disaster is declared when there is a disaster. A state of emergency is declared by the President in terms of section 1 of the State of Emergency Act whereas a state of disaster is declared by the Minister of CoGTA in terms of section 27 (1) of the DMA. The state of emergency includes safeguards that are not included for the state of disaster. This is discussed further in section 2.4 of this chapter. Even though the state of disaster and state of emergency have different legal consequences and are declared in different circumstances, the court still plays a pivotal role in ensuring that the declaration of either is done within the ambit of the law.

2.2.3 The constitutional basis of the DMA

Having stated the definition of the state of emergency and its legal basis, this section discusses the constitutional basis of the DMA. This section will also discuss which sphere of government has the competency for disaster management.

The power to declare a state of disaster is not derived directly from the Constitution. As discussed above, the power to declare a state of disaster is governed by the DMA. However, this does not mean that disaster management and the DMA are not subject to the Constitution. Disaster management is a provincial and national government functional area as it is listed in schedule 4A of the Constitution.⁵³ Schedule 4A of the Constitution lists powers of concurrency meaning that, both national and provincial spheres have the same executive and legislative powers over the same

⁵² Section 37 (5) (c) Constitution.

⁵³ Schedule 4A Constitution.

functional areas.⁵⁴ The position that both spheres may legislate on schedule 4 matters was confirmed in *Re: National Education Policy Bill No 83 of 1995*.⁵⁵ The Court stated that in cases where concurrent powers are given to both the national and provincial governments, both are allowed to legislate on the matter.⁵⁶ Both the national and provincial governments may legislate on concurrent competencies and the Constitution does not limit the legislative autonomy of the two spheres of government. However, the reality is that the multilevel government system in South Africa has made national government occupy much of the legislative space in the concurrent areas.⁵⁷ This has led to provinces being implementers of national legislation. The discussion about schedule 4 powers illustrates the point made earlier that even though the disaster is governed by the DMA, it is still subject to the Constitution as it falls under the concurrent functional areas.

Where there is a conflict between national and provincial government legislation, the matter can be taken to court and section 146 of the Constitution will apply. National legislation will prevail over provincial legislation provided that it is national legislation that applies uniformly concerning the country as a whole and any of the conditions listed under section 146 of the Constitution are met.⁵⁸ Section 2 (3) of the DMA confirms this position and provides that where provincial legislation regulating disaster management in the province is inconsistent with the DMA, the DMA will prevail over the provincial legislation subject to section 146 of the Constitution.

The DMA has a constitutional basis for two main reasons. First, disaster management is a concurrent competency that is listed under schedule 4A of the Constitution. Secondly, the DMA itself is subject to constitutional provisions such as section 146 of the Constitution. The next section discusses the role players that form an integral part of enforcing the DMA during the state of disaster.

2.2.4 The role players of the DMA

The coronavirus pandemic is a national concern. This means that one sphere of government cannot effectively deal with the coronavirus impact on its own. The state of disaster transcends the municipal and provincial jurisdictions. To effectively deal with the coronavirus pandemic, national

⁵⁴ De Visser J 'Concurrent powers in South Africa' in Steytler N (ed) *Concurrent powers in federal systems: Meaning, making, managing* (2017) 224-225.

⁵⁵ *In Re: National Education Policy Bill No 83 of 1995* (CCT46/95) [1996] ZACC 3.

⁵⁶ *In Re: National Education Policy Bill* para 23.

⁵⁷ De Visser J 'Concurrent powers in South Africa' in Steytler N (ed) *Concurrent powers in federal systems: Meaning, making, managing* (2017) 227.

⁵⁸ Section 146 (2) (a) - (b) Constitution.

government opted to use the DMA. The DMA has provided for all spheres of government to be the role players in enforcing the DMA during a state of disaster.

The DMA provides these core institutions for the management of a disaster namely-

- Disaster Management Centres tasked to promote an integrated and coordinated system of disaster risk management; and
- National Disaster Management Advisory Forum, which comprises a wide range of people, such as businesses and Non-Governmental Organisations.

The DMA outlines various powers for the different spheres of government during a state of disaster and encourages co-operative government. For instance, the President must establish the Intergovernmental Committee on Disaster Management.⁵⁹ The role of the Committee is to-

- ensure principles of co-operative government in chapter 3 of the Constitution are applied to issues relating to disaster management;
- be accountable and must report to the Cabinet on the co-ordination of disaster management among the spheres of government; and
- must advise and make recommendations on issues relating to disaster management and establish a national framework for disaster management aimed at ensuring an integrated and uniform approach to disaster management.⁶⁰

The Intergovernmental Committee must consist of cabinet members involved in disaster management or the administration of the DMA.⁶¹ Secondly, the Committee must also consist of MECs from each province involved in disaster management or the implementation of legislation referred to in section 2 (1) (b).⁶² Lastly, the Committee consists of members of municipal councils selected by the South African Local Government Association.⁶³ Section 4 (2) of the DMA provides that the Minister must chair the Intergovernmental Committee.⁶⁴

In terms of section 8 (1) of the DMA, the National Disaster Management Centre is established as an institution within the public service. Section 29 (1) of the DMA provides that each province must establish a disaster management centre.⁶⁵ Moreover, each metropolitan and district

⁵⁹ Section 4 (1) DMA.

⁶⁰ Section 4 (3) (a) - (c) DMA.

⁶¹ Section 4 (1) (a) DMA.

⁶² Section 4 (1) (b) DMA.

⁶³ Section 4 (1) (c) DMA.

⁶⁴ Section 4 (2) DMA.

⁶⁵ Section 29 (1) DMA.

municipality must establish and implement a framework for disaster management in the municipality aimed at ensuring an integrated and uniform approach to disaster management in its area.⁶⁶

The sections discussed above show that the intention is to provide an approach that involves all spheres of government by establishing different institutions to manage disasters. The discussion above also sets out the role players for the implementation and enforcement of the Act. The next section discusses how the government used the DMA to deal with the coronavirus between the period of March 2020 till November 2020.

2.3 How was the DMA used to deal with the coronavirus pandemic?

The previous section discussed the legal framework of the DMA and outlined the different role players and their functions during the state of disaster. The discussion included some of the institutions that were created to assist the Cabinet in dealing with the state of disaster. The following discussion explains how the government used the provisions of the DMA to deal with the coronavirus during the state of disaster. One of the measures introduced by national government was the risk-adjusted strategy. It is guided by several factors such as the level of infection and the rate of transmission.

The declaration of the state of disaster was accompanied by regulations that were promulgated on the 18th of March 2020.⁶⁷ At this stage, the regulations did not impose a full-scale Lockdown. When the regulations promulgated on 18 March 2020 were amended, the strict Lockdown was effected and it commenced on 26 March 2020.⁶⁸ The strict Lockdown was effected to achieve two objectives, namely to ensure greater preparedness of the health care system to cope with the high numbers of Covid-19 infections and to put into effect an active contact tracing system.⁶⁹ The measure to prepare the health care systems shows how the emergency preparedness which is one of the purposes of the state of disaster was fulfilled. The Lockdown was supposed to initially last for 21 days. However, it was extended because, towards the end of the initial Lockdown, the government realised that it needed more time to achieve both of its objectives. Technically, it was the Cabinet that extended the Lockdown by two weeks.⁷⁰ The national government also formed

⁶⁶ Section 42 (1) DMA.

⁶⁷ Disaster Management Act regulations in GN 318 GG 43107 of 18 March 2020.

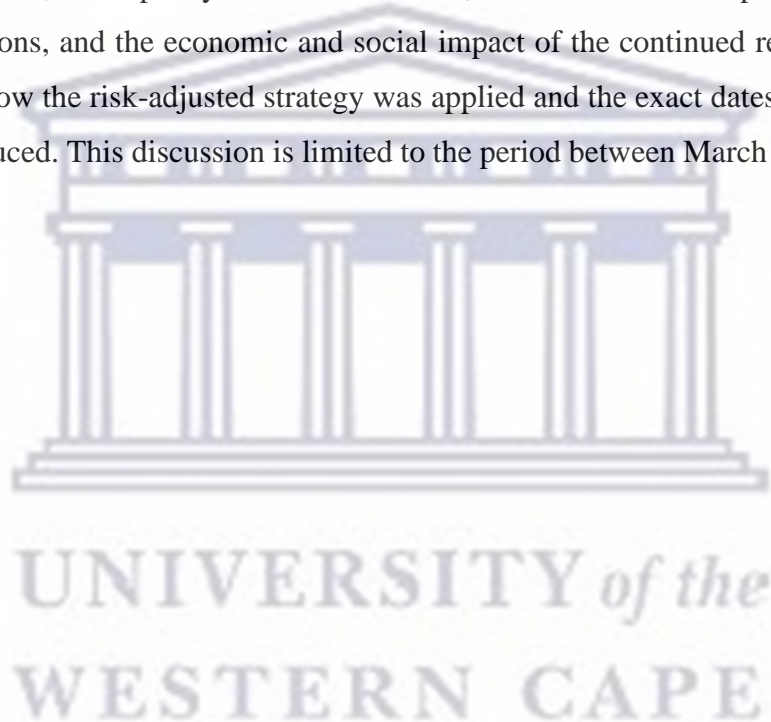
⁶⁸ Disaster Management Act amended regulations in GN 419 GG 43168 of 26 March 2020.

⁶⁹ *One South Africa Movement and Another v President of the Republic of South Africa and Others* (24259/2020) [2020] ZAGPPHC 249.

⁷⁰ *One SA Movement* para 42.

various structures to deal with the pandemic. One of these structures is the National Coronavirus Command Council (NCCC) that initially comprised all the Cabinet ministers. The NCCC, which receives input from the National Joint Operations and Intelligence Structure, and the Ministerial Advisory Committee on Coronavirus Disease 2019 were established by the Department of Health on 21 April 2020.⁷¹

During the President's address delivered on the 23rd of April 2020, he announced the risk-adjusted strategy measures that would enable a phased recovery of the economy.⁷² The government introduced a five-level Covid-19 alert system to manage the gradual easing and tightening of the Lockdown. The criteria that guided the risk-adjusted approach included the level of infections and rate of transmission, the capacity of health facilities, the extent of the implementation of public health interventions, and the economic and social impact of the continued restrictions.⁷³ Table 1 below sets out how the risk-adjusted strategy was applied and the exact dates on which each alert level was introduced. This discussion is limited to the period between March 2020 and November 2020.



⁷¹ Singh JA (2020) 'How South Africa's Ministerial Advisory Committee on COVID-19 can be optimised' (2020) 110 SAMJ 439.

⁷² Ramaphosa C 'South Africa's response to the coronavirus pandemic, Union Buildings, Tshwane' available at <https://sacoronavirus.co.za/2020/04/23/statement-by-president-cyril-ramaphosa-on-south-africas-response-to-the-coronavirus-pandemic-union-buildings-tshwane/> (accessed 14 September 2020).

⁷³ 'About alert system' available at www.gov.za/covid-19/about/about-alert-system (accessed 23 September 2020).

Table 1: The risk-adjusted strategy

Alert Level	Duration	Objective
Level 5	26 March - 30 April 2020	Measures are required to contain the spread of the virus to save lives. Indicates a high Covid-19 spread with a low health system readiness.
Level 4	1 May - 31 May 2020	Some activities can be allowed to resume subject to extreme precautions required to limit community transmission and outbreaks. Indicates a moderate to high Covid-19 spread with a low to moderate health system readiness.
Level 3	1 June - 17 August 2020	The easing of some restrictions, including on work and social activities, to address a high risk of transmission. Indicates a moderate Covid-19 spread with a moderate health system readiness.
Level 2	18 August - 20 September 2020	Further easing of restrictions, but the maintenance of physical distancing and restrictions on some leisure and social activities to prevent a resurgence of the virus. Indicates a moderate Covid-19 spread with a high health system readiness.
Level 1	21 September-	Normal activity can resume, with precautions and health guidelines followed at all times. Indicates a low Covid-19 spread with a high health system readiness.

Source: DMA Municipal and Provincial directions in GN R.867 GG 43599 of 7 August 2020.

The risk-adjusted strategy assisted the government with the easing of restrictions that were imposed during the Lockdown. Although the economy needed to open by easing restrictions, the government had to use a strategy to prevent the spike of infections.

Table 2 discusses the various aspects that were affected by the alert level of the Lockdown, and the content discussed in the table is taken from the various Lockdown Regulations that were promulgated in terms of the DMA between March 2020 and November 2020 namely-

- alert level 1 lockdown regulations, 18 Sept 2020;
- alert level 2 lockdown regulations, 17 Aug 2020;
- alert level 3 lockdown regulations, as amended on 12 Jul 2020;
- alert level 4 lockdown regulations, 29 Apr 2020;
- lockdown regulations, as amended on 20 Apr 2020;
- lockdown regulations amendment, 20 Apr 2020; and
- lockdown regulations amendment, 16 Apr 2020.

Table 2: Alert level and the description of the direction/regulation

Alert Level	Description of key Direction/ Regulation issued by the Minister				
	Places of worship	Evictions	Closure of schools	Tobacco sale	Movement of persons
5	All gatherings were prohibited except for funerals.	Evictions were prohibited.	Schools and institutions of higher learning remained closed.	Only essential goods could be sold. Tobacco and nicotine products were non-essential goods.	Persons were not allowed to leave their residences unless it was for the collection of grants or to perform an essential service.
4	Places of worship were still not allowed to open.	Evictions may be granted if they are suspended until the last day of alert level 4.	All public schools in the country remained closed.	The sale of tobacco was prohibited.	The movement of people was restricted, and they were not allowed to leave their place of residence between 8 pm and 5 am.
3	Places of worship could open but limited to 50 people.	Evictions could take place.	Schools could open but limited to grades 12, and 7.	The sale of tobacco was prohibited.	Persons were confined to their places of residence from 10 pm to 4 am unless they have a permit to justify their movement.
2	All gatherings were prohibited except faith-based gatherings.	Evictions could take place.	All the learners in the remaining grades could return to school.	The sale of tobacco and tobacco products was lifted.	Every person was confined to his/her place of residence from 10 pm till 4 am.
1	All gatherings except night vigils are allowed and people at faith-based institutions are limited to 250.	Evictions could take place.	Schools were open.	The sale of tobacco and tobacco products was lifted.	Every person is confined to his or her place of residence from 12:00 am until 4 am daily.

Source: Various Lockdown Regulations as listed in the last paragraph of page 23.

The table above illustrates how the various key directions and regulations impacted several industries and deprived people of their freedom to move. For instance, the sale of tobacco was prohibited, and the prohibition was only lifted under Level 2. Table 2 also shows that the directions and regulations were amended given the alert Level. For example, places of worship were only allowed to open under alert Level 3 with a maximum of 50 people. Under alert Level 1, the people at faith-based institutions were limited to a maximum of 250 people.

2.4 Court cases that challenged the constitutionality of the Lockdown and its regulations

The study so far has discussed the legal framework of the DMA, its constitutional basis, the legal basis of the state of disaster, and how the DMA was used to deal with the pandemic

When the national government declared a national state of disaster, there were several regulations that were promulgated. Many organisations challenged the constitutionality of the declaration of a state of disaster. This section aims to briefly discuss the court cases that challenged the constitutionality of the Lockdown and its regulations. The court judgments in this section will illustrate that several regulations were declared unconstitutional. The significance of discussing these various court judgments is to show that even during a state of disaster, any conduct or exercise of power is subject to the Constitution.

In the judgment of *Mohamed and Others v President of the Republic of South Africa and Others*,⁷⁴ the Court addressed the issue of whether it was reasonable and justifiable for the state to refuse to allow an exemption to permit congregational worship. The applicants were of a Muslim religion and wanted to be allowed to have their daily prayers at places of worship. The Court held that the restrictions imposed were not unreasonable and unjustifiable because every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. The Court went on further to state that there are at least 850 mosques country-wide and several churches, temples, synagogues, and other places of worship. This means that there were many people traveling from their homes to where they were praying in congregations. Furthermore, the government did not have the police or army resources, which were already stretched to capacity to ensure that safety measures are adhered to at every place of worship in South Africa. Thus, the application failed.

In *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*,⁷⁵ the challenge was based on the constitutionality of the state of disaster and the various Lockdown regulations. The Court held that the declaration of the state of disaster was rational, but the regulations were unconstitutional and invalid. The Court discussed several regulations and found many of them to be irrational. For instance, the Court held that the ban on the operations of the informal sector was irrational because the contact of the informal sector with other people is less

⁷⁴ *Mohamed and Others v President of the Republic of South Africa and Others* (21402/20) [2020] ZAGPPHC 120.

⁷⁵ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184.

compared to that of attendance of a single funeral. The Court also referred to night vigils and stated that it was not rational to ban night vigils. The Court stated that it is better to impose precautionary measures such as night vigils to take place for short space of time, social distance for those attending the night vigil, and closed casket to prevent the spread of the coronavirus. The Minister appealed the decision of the Court and the application for Leave to Appeal was granted.⁷⁶

The judgment of *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*⁷⁷ had to address two issues. The first was that the establishment and existence of the National Coronavirus Command Council (NCCC) was not consistent with the Constitution because the NCCC has no legal validity and no decision-making powers. Yet, the NCCC made decisions that affected all South African's rights. The applicants also argued that the NCCC had been granted powers that ought to have vested in the National Disaster Management Centre.

The Court addressed the first issue, which is the legality of the NCCC and its powers, by stating that the DMA grants the National Disaster Management Centre the power to coordinate the responses of different spheres of government and the private sector, namely stakeholders and NGOs. However, this does not mean that the coordinating function is only vested in the Centre. The role of the Centre includes advising, facilitating, recommending, coordinating, and collating a database. But nowhere in the Act (DMA) does it stipulate that those functions are only to be carried out by the Centre. The Court also stated that the role of the Centre in assisting in the implementation of legislation is not mandatory but optional and the Minister is vested with the discretion to define the assistance, if any, required by the Centre. The Court held that the NCCC did not unlawfully usurp the powers of the Centre.

The second issue that the Court dealt with was whether the various regulations promulgated by the Minister of CoGTA in terms of section 27 (1) of the DMA were unconstitutional. The applicant's main argument was that there was no public participation before the promulgation of the regulations. The Court held that despite the argument advanced on behalf of the respondents that the DMA does not provide for a public participation process, the Minister did engage with other organs of state, spheres of government, the Centre, the National Joint Operational and Intelligence Structure, stakeholders and she was responsive to complaints and suggestions brought to her

⁷⁶ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Others* (21542/2020) [2020] ZAGPPHC 280. In the matter between *De Beer N.O and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 676 the court upheld the appeal and ruled in favour of the Minister of CoGTA.

⁷⁷ *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56.

attention. Those consultations and feedback sessions form part of a public participation process. The Court dismissed the application.⁷⁸

A challenge of lack of oversight by Parliament on the Minister when declaring a state of disaster was considered in the *Freedom Front Plus v President of the Republic of South Africa and Others*.⁷⁹ The first part of the issue was whether the declaration of the state of disaster was constitutional. The applicants argued that the various sections under the DMA do not contain the safeguards that govern a state of emergency provided in section 37 of the Constitution. There are safeguards when declaring state of emergency because of its legal consequences as discussed above in chapter 2.2.2. Some of these safeguards include that a state of emergency may only be extended after a debate in the National Assembly, whereas under the DMA, the Minister of CoGTA may simply extend a state of national disaster, and she may do so unilaterally in terms of section 27 (2) of the DMA.

Chapter 2.2.2 discussed the state of emergency and therefore illustrated how the state of disaster is different from the state of emergency. The Court stated that the state of disaster and state of emergency are different, and they are applicable in different circumstances. A state of emergency may only be declared when the life of a nation is under threat. A state of disaster covers a wide range of circumstances, as there are many forms that a disaster may take place under that threaten the lives of communities. It does not involve the life of a nation under threat nor does a state of disaster disrupt peace and order. Moreover, a state of emergency permits a deviation from the normal constitutional order whilst a state of disaster does not. The Court further held that section 37 of the Constitution provides safeguards because during a state of emergency there is a suspension of normal constitutional protections. This suspension lasts up until a normal constitutional state has been restored. The Court also stated that because of the constitutional deviations permitted under a state of emergency, parliamentary oversight is expressly included in section 37 of the Constitution. Where no such deviation is permitted, it is not necessary to make special provisions for parliamentary oversight. Where a state of disaster is declared, there is no deviation from a normal constitutional order. The safeguards under a state of emergency are there because of the deviation from a normal constitutional order. Where there is no such deviation, the safeguards do not apply.

⁷⁸ In the matter between *Esau and others v Minister of Co-operative Governance and Traditional Affairs and Others* (611/2020) [2021] ZASCA 9, the Court dismissed the appeal.

⁷⁹ *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266.

On the second part of the issue, the Court had to deal with whether the declaration of a state of disaster was unconstitutional because of the lack of safeguards. The Court held that the powers of the Minister of CoGTA are wide and flexible given how different disasters can be. Should the state unjustifiably limit fundamental rights, an application may be launched to the courts. Moreover, the court may review any action under the state of disaster on the part of the executive that is alleged to be irrational or unconstitutional in any other respect. Simply put, the state of disaster does have safeguards. The Court held in favour of the respondents.

Regarding the sale of tobacco products, in the *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*,⁸⁰ the applicants challenged the regulations that prohibited the sale of tobacco. Essentially, the question before the Court was whether the Minister, in placing a ban on the sale of tobacco products in response to the Covid-19 pandemic, acted irrationally and in so doing breached the principle of legality. The Court held that when the Minister banned the cigarette products, her objective was to alleviate the potential devastating burden on the already burdensome healthcare system. Moreover, the illicit trade of tobacco products was not fatal to the rationality of the ban given that the Minister only needs to show that the means chosen to achieve the intended objective were reasonably capable of achieving it. The Court dismissed the applicant's case. In the application for leave to appeal, the Court rejected the application.⁸¹

The court judgments discussed above do not directly affect local government because none of the issues that were raised have a direct impact on local government. However, that does not mean that the directions and regulations issued during the state of disaster do not impact municipalities.

The case of *Mohamed and Others v President of the Republic of South Africa and Others* illustrates that even during a state of disaster when the Minister of CoGTA promulgates regulations that breach the rights of the citizens in the Bill of Rights section 36 of the Constitution still applies. This means that the limitation of the citizens' rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

De Beer and Others v Minister of Cooperative Governance and Traditional Affairs stated first, the definition of the rationality test. The Court described that it is not about determining whether some

⁸⁰ *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 246. The Court's decision which rejected the application for leave to appeal was later overturned.

⁸¹ *Fair Trade Tobacco Association v President of the Republic of South Africa and Others* (21688/2020) [2020] ZAGPPHC 311.

means will achieve the purpose *better than others* but only whether the means employed are *rationally connected* to the purpose for which the power was conferred. And to decide whether the measure is rational the decision is made by applying an objective test. Lastly, should a measure not be rationally connected to the objective then the measure does not comply with the permissible limitation under section 36 of the Constitution.

In the matter of *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* it was shown that even though the formation and existence of the NCCC were not legally founded upon the DMA, its legal basis was section 85 of the Constitution. Therefore, the executive decision to establish the NCCC was legal and the fact that it was not founded in the DMA did not affect the NCCC's constitutionality.

Freedom Front Plus v President of the Republic of South Africa and Others dealt with the difference between a state of emergency and a state of disaster and it was concluded that the state of disaster does not permit a deviation from a normal constitutional order. This is important because it also means that the autonomy of municipalities must still be upheld by complying with constitutional provisions that enhance local autonomy. This is an important aspect which will form part of the analysis in this dissertation and will be discussed in the next chapter.

What can be taken from *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* is similar to what was discussed in the case of *Mohamed* in that the discussion referred to the rationality of a decision by Minister of CoGTA. The Court explained that rationality does not mean that the best measure should be enforced but whether the measure enforced would objectively speaking achieve the purpose. If the measure is not rationally connected to the purpose, then it is irrational and therefore unconstitutional.

The Minister of CoGTA promulgated various directions and regulations relating to municipal functions. These directions and regulations impacted how municipalities perform their functions. The directions and regulations were about the suspended council meetings, places of isolation and public participation. The next section discusses various directions that encompass/involve local government. The importance of discussing these directions and regulations is to determine whether there is an impact on local government or not.

2.5 The regulations and directions that affect local government

Having discussed the various court judgments challenging the response by national government, this section will discuss in detail the directions and regulations that affect local government. This

section focuses on the municipal governance arrangements that were changed by the directions and regulations such as the initial decision to suspend council meetings. In doing so, the section will make use of tables to illustrate the various directions and regulations that had an impact on municipalities. The reason for this discussion is to build a compelling argument to establish the constitutionality of the directions and regulations. The directions and regulations that will be discussed in this section are limited to the ones between March 2020 and November 2020.

Direction 1 of 25 March 2020 was the first set of directions to be issued to municipalities and provinces during the pandemic by the Minister of CoGTA. The directions provided how municipalities should perform various functions. The discussion concerning the regulations and directions issued in terms of the DMA that affect local government takes part in two main categories. The first one is the municipal governance of municipalities. In this context, municipal governance refers to the municipal council and whether the directions and regulations had an impact on the municipal council's ability to govern the municipal area. For example, the Constitution grants the municipalities the right to govern, on their own initiative the local government affairs of its own community subject to national and provincial legislation.⁸² The governance of a municipality is vested in the municipal council.⁸³ The effective performance of government functions relies on a strong, and well-coordinated municipal governance. The discussion of local governance is important because some of the directions and regulations promulgated during the state of disaster impacted local governance. A table will be presented below to show some of these directions and regulations and outline their amendments.

The second category is the municipal functions. Municipal functions are listed in the Constitution under schedules 4B and 5B. The municipalities do not only have the functions to deliver essential services but according to the Constitution, municipalities have developmental duties as well. The discussion of municipal functional areas is also important because there are various directions and regulations which impact how municipalities perform their functions. A further discussion on this aspect will be provided later where a table will be presented to show some of these directions and regulations.

⁸² Section 151 (3) Constitution.

⁸³ Section 151 (2) Constitution.

2.5.1 Establishment of the District Command Council

Direction 2.8.2 (a) of the Directions directed municipalities to establish the District Command Council with immediate effect.⁸⁴ The establishment of this Council raises the question of whether the municipal council was replaced as a result. In chapter 5, it will be argued that the establishment of the District Command Council does not replace the municipal council.

The next section briefly discusses the suspension of council meetings.

2.5.2 Suspended Council Meetings

Direction 6.7.2 provided that no council meetings outside the district command centre meetings could be undertaken during the initial 21 Day Lockdown period or any other extended period that may be declared.⁸⁵ After the Directions were subsequently amended they provided that all meetings of council, tribunals, and entities, had to be done online but council and committees had to meet for council-related business including Integrated Development Plans (IDPs).⁸⁶ The directions issued on the 3rd of July provided that council meetings were allowed to take place however, it was encouraged that the council meetings should be conducted online.⁸⁷ IDPs involve communities, and the next section discusses how the directions affected public participation in the adoption of the IDPs and budgets.

2.5.3 Public participation

The coronavirus pandemic has disrupted the regular flow of two key governance processes namely the IDP and passing of budgets.⁸⁸ The focus of this discussion refers to the importance of community participation in IDPs, consultation processes, and passing of budgets. Direction 6.7.1 of the directions provided that municipalities were required to perform various legislated functions, including the passing of budgets and the adoption of integrated development plans (IDPs).⁸⁹ The first version of the directions which is discussed above suspended the municipal council meetings. However, the directions allowed the adoption of budget and IDPs. This is confusing because only the municipal council may pass a budget and adopt IDPs which is provided by section 16(1) of the

⁸⁴ Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020.

⁸⁵ Direction 6.7.1 of Direction 1 of 25 March 2020.

⁸⁶ Disaster Management Act directions in GN 510 GG 43291 of 7 May 2020.

⁸⁷ Disaster Management Act directions in GN 748 GG 43503 of 3 July 2020.

⁸⁸ De Visser J & Chigwata TC 'Municipal budgeting and planning during covid-19' 1.

⁸⁹ Direction 6.7.1 of Direction 1 of 25 March 2020.

MFMA and section 25(1) of the MSA, respectively.⁹⁰ The directions were subsequently amended as will be shown in the table below. Municipalities were also affected by the exemption from complying with the Local Government: Municipal Finance Management Act 56 of 2003.

2.5.4 Exemption from MFMA

Municipalities were exempted from complying with certain provisions under the MFMA. This exemption was issued by the Minister of Finance on the 30th of March in terms of section 177 (1) (b) of the MFMA. Subject to the condition in paragraph 3, municipalities and municipal entities were exempted from complying with specific provisions of the Act. According to the notice, municipalities do not have to perform any action required by the Act between the date of publication of the above notice and the date that the national state of disaster lapses or is terminated.⁹¹

There were two conditions that applied to the exemption. The first one was that any action that municipalities were exempted from, must be taken within 30 days after the national state of disaster lapsed or is terminated. Secondly, municipal councils may pass a special adjustment budget before the end of the 2019/2020 municipal financial year to authorise all expenditure linked to the emergency to address the Covid-19 pandemic.

The issue with this exemption is that when the Minister promulgated this notice, he did not have the knowledge whether the state of disaster may take longer and whether municipalities will be able to perform all the required functions within the 30 days as required by the notice. Not complying with certain measures also had an impact on the structure of the municipal budget thus removing safeguards brought by the d.

The next section raises the issue around the powers of municipal managers and mayors.

2.5.5 Executive municipal powers granted to Municipal Managers

Under normal circumstances executive and administrative powers may be delegated to committees of the council, the mayor, and the municipal manager.⁹² Under direction 6.7.3 of the Directions to municipalities and provinces, the power to make decisions that would have required the approval of the council, a committee of the council, or the mayor (whether executive or not), were given to

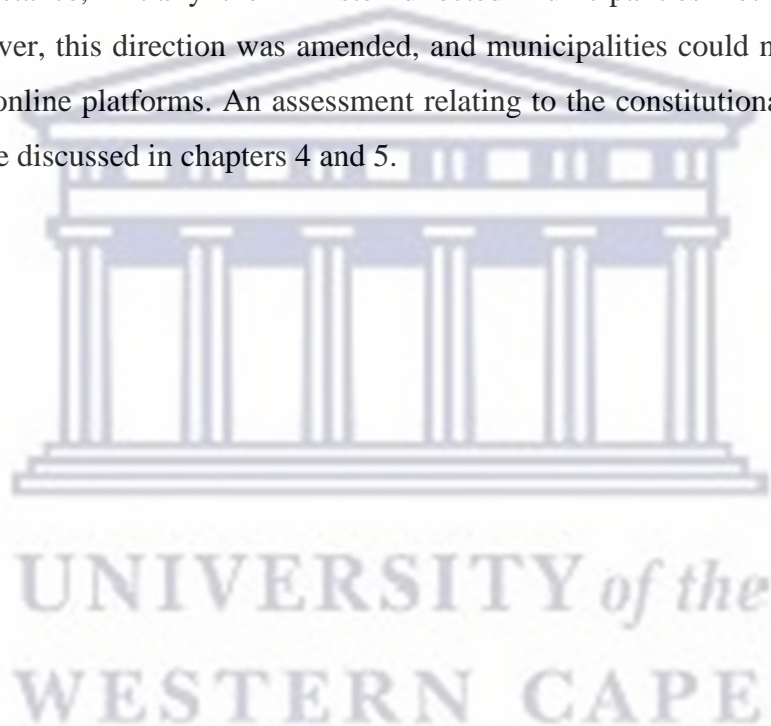
⁹⁰ Section 16 (1) of the Municipal Financial Management Act 32 Of 2002 and section 25 (1) of the Municipal Systems Act 32 of 2002.

⁹¹ Local Government: Municipal Financial Management Act directions in GN 429 GG 43181 of 30 March 2020.

⁹² Section 59 (3) (a) MSA.

the municipal manager subject to written advice of the Chief Financial Officer and the approval of the mayor or executive mayor.⁹³ The municipal manager was to only take decisions that were required to be taken immediately and could not be taken after the Lockdown.

A direction discussed in the previous paragraph refers to the local governance of municipalities. The discussion above does not go into detail with regards to the constitutionality of the directions because that argument is reserved for chapters 4 and 5. The purpose of this section was to provide a discussion of the directions that affect local government. Table 3 below illustrates the directions that were discussed above. The purpose of Table 3 is to provide a simple way for reading the directions, whilst also outlining the directions' amendments that were made by the Minister of CoGTA. For instance, initially the Minister directed municipalities not to convene council meetings. However, this direction was amended, and municipalities could now convene council meetings using online platforms. An assessment relating to the constitutionality of the amended directions will be discussed in chapters 4 and 5.



⁹³ Direction 6.7.3 (f) of Direction 2 of 30 March 2020.

Table 3: Directions and regulations relating to municipal governance and their amendments

Description	First Version	Amendment	Further Amendment	Further amendment
Municipal Operations and Governance				
District Command Council	Municipalities must establish the District Command Council and coordinating structures.			
Suspension of council meetings	No council meetings outside the District Command Centre may be undertaken. All ordinary meetings were suspended.	All council meetings were suspended.	All meetings of council, tribunals, and entities, must be done online but council and committees must meet for council-related business including IDPs.	Council meetings had to take place online.
Community participation in IDPs, consultation process, and passing of budgets.	Municipalities must still perform passing of budgets and IDPs.	Municipal councils were prohibited from convening IDP community and consultation processes and passing of budgets.	Communities must only be consulted using media platforms, to provide comments on the draft IDP and Budget.	
MFMA exemption	Municipalities and municipal entities are exempted from complying with the provisions in the MFMA during the state of disaster.			
Municipal Manager	The power to make decisions that would have required the approval of the council, a committee of the council, or the mayor (whether executive or not), were given to the municipal manager subject to written advice of the Chief Financial Officer and the approval of the mayor or executive mayor.			

Source: Direction 1 of 25 March 2020; Direction 2 of 30 March 2020; Direction of 7 May 2020; Direction 4 of 03 July 2020 and Local Government: Municipal Financial Management Act directions in GN 429 GG 43181 of 30 March 2020.

The second theme to be discussed refers to the directions and regulations that affect local government functional areas, where a table that will list the directions.

2.5.6 Permits for the sale of food and waste pickers

During the Lockdown, shops and grocery stores sold limited goods that were classified as essential goods. There were various Lockdown regulations and directions that were promulgated to regulate the sale of food. For various formal and informal stores to operate, they needed permits issued by a municipality. The issuing of permits was an additional mandate for municipalities during the Lockdown because the issuing of permits is not part of the functional areas of municipalities. So, during the Lockdown municipalities were then tasked to perform functions that they would not normally perform if there was no state of disaster declared. The direction was provided under direction 1.4.1 of the Small Business Development directions.⁹⁴

What was confusing concerning informal food traders were the rules that governed their operations during the Lockdown. Regulation 11B (b) of the Regulations stated that during the Lockdown all business entities shall cease operations.⁹⁵ The regulation was confusing because it was not clear what qualifies as an entity in the context of these regulations. Moreover, the issue was whether street traders qualify as an entity that should not have been in operation during the Lockdown. It is suggested that the regulations also refer to street traders because it uses the wording ‘any business or entity’ which had a broad meaning.⁹⁶ The impact of this direction on municipalities was the fact that must cover the cost implications that come with administering the issuing of permits.

With the limited movement of citizens during the Lockdown, the law obligated all persons to remain in their places of residence. To leave those places of residence, they needed to have permits in their possession. Waste pickers also had to ensure that they had permits to leave their place of residence to pick up the waste. Direction 5.1 of the Directions provided that waste pickers were supposed to have in their possession permits which were issued by the municipality.⁹⁷ Again, this mandate became an additional one for municipalities.

⁹⁴ Disaster Management Act directions in GN R450 GG 43208 of 06 April 2020.

⁹⁵ Disaster Management Act amendment regulations in GN R419 GG 43168 of 26 March 2020.

⁹⁶ De Visser J ‘The Lockdown Regulations Are Not A Ban on All Informal Food Traders’ available at <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/> (accessed 30 November 2020).

⁹⁷ Disaster Management Act directions in GN 539 GG 43325 of 14 May 2020.

2.5.7 Places of isolation

Municipalities were directed to provide services that were needed in a state of a disaster such as identifying places of isolation within the municipal area for those infected with the coronavirus.⁹⁸ From the directions, municipalities were only tasked with identifying sites for isolation.

2.5.8 Raising awareness

Municipalities also had to educate the public about the Covid-19 virus and spread the right information to try to prevent the spread of the coronavirus within municipal jurisdictions.⁹⁹ The importance of this direction was to ensure that the public was informed about new ongoing developments relating to Covid-19. The direction does not specify who in the municipalities must perform this function. The impact again would be on the cost of raising awareness as this seemed like another function given by the national government without providing the funds for it.

2.5.9 Provision of potable water and sanitation

Municipalities had to provide potable water and sanitation to many communities. In places where there is no running water, municipalities were required to resort to other measures, such as water tanks and borehole water. Municipalities also had to ensure that public facilities have water and sanitisers. The mandate for local government to provide potable water is found in the Constitution under schedule 4B. In respect of the provision of water, the direction did not provide anything new that the municipalities did not have to provide already. What is new is the provision of sanitisers in public places within the municipalities, more specifically public places.¹⁰⁰ The cost of purchasing these sanitisers fell on the municipality.

2.5.10 Prohibition of gatherings

The first version of Lockdown Regulations required that there should not be any gathering unless it is a funeral. Municipalities were directed to ensure that such gatherings did not exceed the maximum of 50 people. The municipalities had to work with SAPS, SANDF, and other law enforcement agencies to enforce this direction.¹⁰¹

⁹⁸ Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020.

⁹⁹ Direction 6.3.1 of Direction 1 of 25 March 2020.

¹⁰⁰ Direction 6.4.1 of Direction 1 of 25 March 2020.

¹⁰¹ Direction 6.6.1 (b) of Direction 1 of 25 March 2020.

The section above discussed the directions and regulations that affect local government’s functional areas. The purpose of the discussion was to show that the directions impact the functional areas of municipalities. For instance, some directions and regulations resulted in additional expenditure for the municipalities. The next two chapters will examine the constitutionality of these directions and regulations.

Table 4 presents the directions and regulations including the amendments to these directions that impact local government.

Table 4: Directions and regulations relating to municipal functions and their amendments.

Municipal Functions	Amendment	Further amendment
Permits for trading	Grocery stores, spaza shops, and informal food traders needed written permission from the municipality.	The sale of hot cooked food was prohibited. This meant that municipalities could not issue the permits if the sale was for the food which was prohibited.
Hotspot areas	Municipalities had to identify hotspot areas and mitigation measures within their areas of jurisdiction.	
Isolation sites	Municipalities had to identify and make available isolation facilities.	
Permits for waste pickers	Municipalities were directed to issue permits for waste pickers.	
Spreading awareness	Municipalities had to prepare and roll out awareness campaigns on Covid-19 through media streams such as radio and social media.	
Cleaning of public facilities	Public facilities had to be cleaned and sanitised by municipalities.	
Monitor gatherings	Municipalities had to monitor funerals and ensure that there is no other gathering that takes place.	

Source: Lockdown Regulations; Direction 1 of 25 March 2020; Disaster Management Act directions in GN R450 GG 43208 of 06 April 2020; Disaster Management Act amendment

regulations in GN R419 GG 43168 of 26 March 2020 and Disaster Management Act directions in GN 539 GG 43325 of 14 May 2020.

2.6 Conclusion

The first section of this chapter provided the legal framework of the DMA. The framework showed that the powers granted to the Minister of CoGTA by the DMA are wide and flexible. As discussed in this chapter, the Minister was authorised to declare a state of disaster. The next aspect that was considered was the difference between the state of emergency and the state of disaster. It was argued that the state of disaster and the state of emergency are distinct from one another.

Disaster management is a concurrent competency. In cases where the provincial government of any province exercises this legislative power, the provincial Disaster Management Act will have to be consistent with the DMA. This is because disaster management is a functional area of national interest and there must be a uniform approach to effectively deal with the disasters. The provinces are not prohibited from legislating on disaster management because the national government has done so. This position was confirmed in the *Re: National Education Policy Bill No 83 of 1995* as discussed in 2.2.3 of this chapter. However, no province instituted its own legislation on disaster management.

The national government formed various institutions to assist in dealing with the rate of Covid-19 infections. One of those structures is the NCCC, which is not established in terms of legislation. This showed that national government did not merely follow the DMA but established and used other structures as well.

The court judgments show that although the state of disaster was introduced, the Constitution is still supreme. For example, the *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* challenged the declaration of the state of disaster. The Court held that it was rational and therefore the declaration of the state of disaster was constitutional. When public power is exercised during a state of disaster, it must comply with the Constitution. The court judgments did not have any direct impact on local government, but the directions and regulations issued to local government did.

The directions and regulations issued to municipalities in terms of the DMA have an impact local government. The next question then is whether the impact makes the directions and regulations unconstitutional. The next chapter will explain that the Constitution protects and guarantees local government autonomy. One of the purposes of the principle of legality is to protect local autonomy

and the next chapter will discuss this in detail. The chapter will make use of several cases and constitutional provisions to support the argument that local government autonomy is protected through the application of the principle of legality.



Chapter 3: How does the principle of legality ensure the protection of local government autonomy?

3.1 Introduction

Chapter 2 discussed the framework of the DMA and various directions that were issued in terms of the DMA that affected municipal functions and municipal governance. This chapter discusses the principle of legality and its significance in protecting the autonomy of local government. Chapter 3 will use the principle of legality to argue that it does protect local government autonomy. In doing so, this chapter will first discuss the development of the principle of legality by referring to Constitutional Court cases. The second part of the chapter will list and discuss the constitutional provisions that guarantee local government autonomy. The concluding section in this chapter will argue whether there is another interpretative approach which can be used to interpret the Constitution within the context of a state of disaster.

3.2 The development of the Principle of Legality

The principle of legality requires government actions which affect persons to be authorised by law.¹⁰² The Constitution does not define the principle of legality.¹⁰³ When the Minister of CoGTA exercised her powers to issue directions and regulations, she was exercising a power which was conferred to her by the DMA. This means that the exercise of these powers is subject to the principle of legality and not administrative action. This will be explained in detail later. The SARFU judgement discussed in chapter 3.3 of this chapter sets out the difference between the application of the principle of legality and the judicial review of administrative action. Essentially, after it has been determined that to perform or carry out a function is an executive action, the doctrine of legality will be used. There are three main issues about the principle of legality that need to be addressed. The first one is whether the principle of legality can be defined. Secondly, what is the brief development of this principle and lastly, in which circumstances does it apply?

¹⁰² Andrew K 'Administrative Action, the Principle of Legality and Deference – The Case of *Minister of Defence and Military Veterans v Motau*' (2015) 7 JLC 74.

¹⁰³ Henrico R 'Re-visiting the rule of law and principle of legality: judicial nuisance or licence?' (2014) 742 JSAL 743.

3.3 The early development of the principle of legality

The rule of law is recognised in section 1 of the Constitution which provides that the Republic of South Africa is one, sovereign democratic state founded on the values of the supremacy of the Constitution and the rule of law.¹⁰⁴ As discussed in Chapter 1.4, the rule of law is the incident of legality.¹⁰⁵ According to Mathenjwa, the principle of legality requires, a person (in this context it could be the Minister) exercising a power to be legally empowered to do so, the exercise of that power must not be unreasonable and the decision to act must be taken fairly.¹⁰⁶ This section provides a discussion of significant judgments before the Constitutional Court that dealt with public power and the principle of legality. The aim is to show the circumstances in which the principle applies and to determine whether the lack of definition of this principle impacts how the principle should be applied.

a) *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*¹⁰⁷

The *Fedsure* case was decided under the 1993 Constitution. In the *Fedsure* case, certain resolutions (adopted by the Greater Johannesburg Transitional Metropolitan Council (TMC) and the EMS about their 1996/97 budgets) were challenged. Four metropolitan substructures from the Johannesburg Metropolitan agreed to levy a general property rate of 6.45 cents in the Rand. This would result in different consequences for the substructures. For the affluent Eastern Metropolitan Substructures (EMS) and Northern Metropolitan Substructures (NWS), there would be a surplus of income generated, whilst there would be a deficit for the Southern Metropolitan Substructure (SMS) and Western Metropolitan Substructure (WMS).

The appellants argued that local government only have delegated powers and when they impose rates or make by-laws, their action in doing so falls within the ambit of administrative action. The Court stated that detailed powers and functions of local government must be determined by a competent authority, however, this does not mean that the powers exercised by local government

¹⁰⁴ Section 1 (c) Constitution.

¹⁰⁵ Henrico R 'Re-visiting the rule of law and principle of legality: judicial nuisance or licence?' (2014) 742 *JSAL* 742.

¹⁰⁶ Mathenjwa MJ 'The role of the principle of legality in preserving municipal constitutional integrity' (2014) 29 *SAPL* 540.

¹⁰⁷ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17

are delegated.¹⁰⁸ A competent authority had to determine these powers because the 1993 Constitution did not provide the detailed powers of local government. The Court also stated that the action of a municipal legislature in resolving to set rates, to levy the contribution and to pay a subsidy out of public funds cannot be regarded as administrative action as contemplated by section 24 of the Interim Constitution.¹⁰⁹ The Court held that the resolutions of the TMC and EMS did not amount to administrative action but had to comply with the principle of legality, the property rates imposed by the EMS were lawful and the TMC levy imposed on the TMS was lawful. The summary of this case is restricted to the discussion relating to the principle of legality, and it identified the principle of legality and described it as part of the doctrine of the rule of law but separate from the administrative justice clause itself.¹¹⁰

With regard to the principle of legality the *Fedsure* case shows that the principle of legality can be understood to mean that both the legislature and the executive may exercise no power and perform no function beyond what has been conferred to them by law.¹¹¹ The Court stated that ‘fundamental to the Interim Constitution is a principle of legality’.¹¹² The fact that the principle is not codified and not defined by the Constitution does not affect its significance in ensuring that all public power is exercised within the ambit of this principle. Furthermore, its lack of codification does not restrict the courts from using it as a tool of ensuring that the rule of law is not undermined.

The significance of the principle of legality is to ensure that all spheres of government uphold the rule of law and that no organ of state performs power that is not conferred on them by law. Moreover, the Constitution contains provisions that protect local autonomy, and the principle of legality demands that the actors of public power stay within the limit of those provisions.

b) *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹¹³

SARFU judgment discussed the legal principle on which the Court may review the exercise of presidential powers. The Court had to determine the constitutional validity of two presidential notices that appeared in the *Government Gazette*. One announced the appointment of a commission

¹⁰⁸ *Fedsure* para 39.

¹⁰⁹ *Fedsure* para 45.

¹¹⁰ Hoexter C ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie Law Journal* 181.

¹¹¹ *Fedsure* para 56.

¹¹² *Fedsure* para 56.

¹¹³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11.

of enquiry, the other declared the provisions of the Commissions Act 8 of 1997 applicable to the commission and promulgated regulations for its operation.

The Court stated that to determine whether the power that is exercised is an administrative action, the question is whether the task itself is administrative or not. So, the focus is not on the arm of government but on the nature of power the actor is exercising.¹¹⁴ The Court held that when the President appointed the commission of enquiry, he was not implementing legislation but was exercising an original power vested in him alone. This power was not administrative and therefore, did not constitute administrative action within the meaning of section 33 of the Constitution.¹¹⁵

Furthermore, the fact that a power does not constitute administrative action does not mean that there are no constraints to it. One of the constraints of this power is the principle of legality, and as it is implicit in the Constitution, the President must act in good faith and must not misconstrue his powers.¹¹⁶ The Court concluded by saying that the President acted within the constraints of his power when he appointed the commission of inquiry in terms of his constitutional powers.

In the Pharmaceutical matter, the court had to deal with the question of whether an Act of Parliament which was brought into force by the President could be reviewed and set aside by a court of law.¹¹⁷ The President issued Proclamation R49 which would bring into effect the Act that provided the manufacture, sale, and possession of medicines for human and animal use be categorised through a system of scheduling. The Court held that the President's decision to bring the Act into operation was not objectively rational.¹¹⁸ The Constitution requires that the executive and all other functionaries must exercise public power in an objectively rational manner.¹¹⁹ When public power does not meet the threshold of being objectively rational, it is inconsistent with the Constitution and therefore unconstitutional.

The President must exercise his powers in good faith and the principle of the rule of law enshrined in our Constitution.¹²⁰ The requirement of the rule of law requires that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given. To pass the standard, this requirement must

¹¹⁴ SARFU para 141.

¹¹⁵ SARFU para 147.

¹¹⁶ SARFU para 148.

¹¹⁷ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1.

¹¹⁸ *Pharmaceutical* para 89.

¹¹⁹ *Pharmaceutical* para 89.

¹²⁰ *Pharmaceutical* para 83.

be complied with.¹²¹ The Court held that the Constitution requires public power vested in the executive and other functionaries to be exercised in an objectively rational manner. In this case, the President failed to do so.¹²² Consequently, the exercise of this power was unlawful.¹²³

This judgement does not define the principle of legality, but it provides that the principle of legality can be used to review public power which is exercised in terms of the Constitution. The case also shows that the principle of legality also applies even when the power is exercised is not administrative action.

The significance of this court judgment is that whether an organ of state is performing a function or not, there are constraints to that exercise of power. To determine whether an exercise of power is executive or administrative in nature, the focus is not on who is performing the power but the nature of power that the organ of state is exercising.

When the Minister of CoGTA promulgated the regulations in terms of section 27 of the DMA, she was performing an executive action. Therefore, the constraint to that power is the principle of legality. As explained in paragraph 1 chapter 2.2.1, the Minister's powers to issue directions or promulgate regulations are provided by section 27 (2) of the DMA. These powers are vested to the Minister alone, and it means that she also must perform them in good faith and not misconstrue them. Section 27 (2) of the DMA provides a list of factors that the Minister must consider when issuing the directions and promulgating regulations. To determine whether the Minister acted within the constraints of her power, the direction or regulation which is being challenged must be within the ambit of section 27 (2) of the DMA. In cases where the Minister promulgates regulations concerning matters that are not listed in section 27 (2) of the DMA then she has acted beyond the powers that have been conferred to her by law. Therefore, that exercise of power would be unconstitutional.

The precedent that has been established by *Fedsure* and *SARFU* is that an organ of state must not perform powers that are not conferred by law, or the exercise of that power will be unconstitutional. The exercise of power by the Minister must be rationally connected to purpose of performing that power.

¹²¹ *Pharmaceutical* para 85.

¹²² *Pharmaceutical* para 89.

¹²³ *Pharmaceutical* para 90.

c) *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*¹²⁴

The *De Beer* case has been discussed already in chapter 2.4. Its significance in this part of the discussion is to show that the precedent set by *Fedsure and SARFU* is applied in subsequent court judgements. This shows that even during the state of disaster, the courts will continue to apply the principle of legality and the rationality test to ensure that when ministers exercise public power they are held accountable.

The issue that had to be addressed was whether the Lockdown regulations were constitutional. The Court commenced by stating what the principle of legality means and how the Constitution provides for this principle through the doctrine of rule of law. The doctrine of legality, which is part of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. The significance of this judgement shows that where the exercise of public power is challenged, the principle of legality should be applied.

The court judgments discussed above show how the principle of legality was applied to ensure that the exercise of public power was constitutional. First, *Fedsure* states that the principle of legality is found within the principle of the supremacy of the Constitution and the rule of law. The Court did not explain what the rule was. The rule ensured that when public power is exercised it does not go beyond what is conferred by law. In the case of *SARFU*, the Court provided three aspects relating to the principle of legality. All exercise of public power must be consistent with the Constitution, this power must be exercised in good faith and the President must not misconstrue his/her powers. The *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (Pharmaceutical)* judgment held that in addition to what the cases of *Fedsure* and *SARFU* have discussed, the public powers must meet the requirement of rationality.

The lessons to be taken from the discussion of court judgments is that the principle of legality will apply in cases where public power is exercised. Whether in a state of disaster or not, the principle of legality will be applied by the courts in cases where the exercise of power is challenged. This is shown in the *De Beer* case which was decided upon during the state of disaster. The judgment used the principle of legality to establish whether the regulations promulgated by the Minister of CoGTA were constitutional.

¹²⁴ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184.

Apart from the principle of legality, the Constitution contains provisions which safeguard the autonomy of local government, and the principle of legality demands that they are adhered to. The next section provides a discussion concerning the constitutional provisions that guarantee local government autonomy.

3.4 The autonomy of local government

What the paper has discussed so far is how the principle of legality was developed and applied by the courts. The principle of legality is there to ensure that public power is performed within the constraints of the law. In the context of local government, other spheres of government must respect the autonomy of local government by not breaching any constitutional provisions under chapter 7 and 3 of the Constitution such as that all spheres of government and all organs of state within each sphere must respect the constitutional status, institutions, powers, and functions of government in the other sphere.¹²⁵

Power is decentralised to three spheres of government namely the national, provincial, and local spheres.¹²⁶ This decentralised governance model adopted in the Constitution designates specific powers and functions to each sphere of government.¹²⁷

Having three spheres of government that all have a degree of autonomy results in complex relationships between the spheres which impacts on the efficiency and effectiveness of government.¹²⁸ The Constitution as the supreme law of the Republic obliges all actors of public power not to exercise powers that are inconsistent with the Constitution.¹²⁹ In this context, powers that are inconsistent with the Constitution would be those ones that undermine the autonomy of local government. The doctrine of legality demands that all public power performed by the executive and legislature must be justified by legislation. In practice, the principle of legality protects municipalities from interference by the national government on local government affairs. The following section will discuss the various constitutional provisions that guarantee local government autonomy.

¹²⁵ Section 41 (1) (e) Constitution.

¹²⁶ Section 40 (1) Constitution.

¹²⁷ Christmas A & De Visser J 'Bridging the gap between theory and practice: Reviewing the powers and functions of local government in South Africa' (2009) *Commonwealth Journal of Local Governance* 109.

¹²⁸ Christmas A & De Visser J 'Bridging the gap between theory and practice: Reviewing the powers and functions of local government in South Africa' (2009) *Commonwealth Journal of Local Governance* 109.

¹²⁹ Section 2 Constitution.

3.4.1 Sphere of government

Before the constitutional dispensation, local government was a creature of statute and the lowest tier of government in a strict hierarchal structure.¹³⁰ Provincial ordinances provided for the existence and the powers of local government.¹³¹ Municipalities were at the bottom of a hierarchy of law-making power. Municipalities were constitutionally unrecognised and unprotected. They were by their very nature 'subordinate members of the government vested with prescribed, controlled governmental powers'.¹³²

However, the status of local government changed in the 1996 Constitution which recognises local government as one of the three spheres of government which are distinctive, interdependent, and interrelated.¹³³ The word *sphere* is significant as it refers to the equality between the three spheres of government as compared to being referred to as tiers or levels of government. A sphere of government, as opposed to a level or tier of government, connotes to a greater or lesser extent, a shift from vertical to horizontal divisions of government power. A vision of non-hierarchical government is one which each government sphere has equivalent status, is self-reliant, inviolable and possesses the constitutional latitude within which to define and express its unique character.¹³⁴

The fact that local government is a sphere of government, means that it is equal with the national and provincial governments and provides a certain level of autonomy for local government. The Constitution provides that other spheres may not interfere with the affairs of the other spheres. Higher-level governments may not be given the responsibility to decide on the powers and functions of subnational governments because decentralisation may not take place as it should.¹³⁵ More importantly, it threatens the autonomy of local government. Therefore, recognition of local government by the Constitution provides the highest level of security of existence of subnational governments.¹³⁶ Furthermore, for the security of existence to be further protected, a constitution must have stringent measures when it comes to its amendment.¹³⁷ Without such measures in place,

¹³⁰ Steytler N & De Visser J *Local government law of South Africa* (2009) 8.

¹³¹ *CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality* (526/05) [2007] ZASCA 1; 2007 (4) SA 276 (SCA).

¹³² *CDA Boerdery* para 33.

¹³³ Section 40 (1) Constitution.

¹³⁴ Nkuna NW & Nemutanzhela TL 'Locating the role of service delivery within powers and functions of local government in South Africa' (2012) 47 *JPAD* 358.

¹³⁵ Chigwata TC TC *Provincial and Local Government Reform in Zimbabwe: An analysis of the law, policy and practice* (2018) 23.

¹³⁶ Chigwata TC *Provincial and Local Government Reform in Zimbabwe: An analysis of the law, policy and practice* (2018) 23.

¹³⁷ Chigwata TC TC *Provincial and Local Government Reform in Zimbabwe: An analysis of the law, policy and practice* (2018) 23.

it would be easy for the national government to centralise the powers of subnational government. In the case of amending the Constitution of South Africa, it is far more difficult than amending legislation and this is because of the supremacy of the Constitution.¹³⁸ The supremacy of the Constitution and rule of law are founding values.¹³⁹ Therefore, local government in South Africa has the highest level of security of existence. The next section discusses the governance of municipalities and how it was impacted by the directions and regulations which were issued between March 2020 and November 2020.

3.4.2 Municipal Council

This section discusses the constitutional provisions that deal with the municipal council. This section illustrates how the Constitution affords municipal councils the power and authority over their areas of jurisdiction. The executive and legislative authority of a municipality is vested in a municipal council.¹⁴⁰ Steytler & De Visser argue that the legislative powers of local government are given the same importance and status as local government's executive powers.¹⁴¹ What can be noted from section 151 (2) of the Constitution is that municipal legislative powers are no longer delegated power but original powers. This was dealt with in the *Fedsure* case which was discussed in 3.3 of this chapter. The power of municipalities to make by-laws is an original power that is sourced directly from the Constitution.

A municipal council is also vested with the authority to determine the internal procedures of the municipality. Section 160 (1) (a) of the Constitution provides that a municipal council makes decisions concerning the exercise of all the powers and the performance of all functions of the municipality.¹⁴² This section provides municipalities with political autonomy because municipalities are given the power to decide their internal procedures, which includes how to structure their council meetings.

Both legislative and executive roles of a municipality are vested in the council but that does not mean that the council takes all the decisions.¹⁴³ The Constitution allows the municipality to delegate its functions to other structures and office bearers within the municipality. However, the

¹³⁸ De Vos P 'Explainer: What's involved in changing South Africa's Constitution' available at <https://theconversation.com/> (accessed 28 September 2020).

¹³⁹ Section 1 (c) Constitution.

¹⁴⁰ Section 151 (1) Constitution

¹⁴¹ Steytler N & De Visser J *Local government law of South Africa* (2009) 10.

¹⁴² Section 160(1)(a) Constitution.

¹⁴³ Steytler N & De Visser J 'Local government' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2014) 37.

council still retains the accountability for the delegated powers and functions. The Constitution provides the powers of a municipal council that may not be delegated. These powers are-

- a) the passing of by-laws;
- b) the approval of budgets;
- c) the imposition of other rates and taxes, levies, and duties; and
- d) the raising of loans.¹⁴⁴

The constitutional framework concerning council meetings is found in section 160 (3) of the Constitution. The Constitution provides that-

- a) a majority of the members of a municipal council must be present before a vote may be taken;
- b) all questions concerning matters mentioned in subsection 2 (the passing of by-laws, the approval of budgets, the imposition of rates and other taxes, levies, and duties and the raising of loans) are determined by a decision taken by a municipal council with a supporting vote if most of its members; and
- c) all other questions before the municipal council are decided by many of the votes cast.¹⁴⁵

The Constitution provides various provisions that suggest that the municipal council is the final decision-maker of all matters concerning the municipality. Matters concerning the meetings, framework of delegation, executive and legislative powers are all vested in the municipal council subject to the Constitution. Hence the Constitution only allows for the intervention of the national and the provincial government in municipalities' affairs in exceptional circumstances.¹⁴⁶ In cases where the national government and provincial government must intervene in local government affairs, the Constitution provides such circumstances.

3.4.3 The right to govern

A municipal council is an elected body that is responsible for governing matters of the municipality. For this power to be recognised, the Constitution grants a municipality the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided by the Constitution.¹⁴⁷ The right afforded to a municipality to govern on its own initiative the affairs of its community enables the municipality to exercise its

¹⁴⁴ Section 160 (2) (a) - (d) Constitution.

¹⁴⁵ Section 160 (3) (a) - (c) Constitution.

¹⁴⁶ Section 139 Constitution.

¹⁴⁷ Section 151 (3) Constitution.

powers independently of the control of national and provincial governments.¹⁴⁸ The word *right* provides the municipality with an entitlement to govern its municipality as provided by the Constitution.¹⁴⁹ The word *govern* suggests that local government has the authority not only to implement or administer laws but to imply a regulatory and policy-making role. Local government has the discretion to exercise its powers.¹⁵⁰ The right to govern is subject to national and provincial legislation. This means that municipalities cannot simply do what they want. It is argued that this aspect shows that local government is not completely autonomous. Municipalities are still subject to the oversight of the national and provincial government and this oversight mechanism is necessary for holding the municipalities accountable for their actions.

The national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.¹⁵¹ Although the Constitution authorises the national and provincial governments to regulate local government's affairs, such involvement should not compromise or impede the municipality's ability to perform its functions. If national or provincial government exercise power in a way that compromises or impedes local government from performing its functions, then it should be deemed unconstitutional because it is in breach of section 151 (4) of the Constitution.

The issue then becomes how the courts can determine that the national or provincial government has compromised or impeded the municipality's ability to perform its functions. The point of departure is the distinction that exists between whether the national or provincial government has the authority to deal with a particular matter and secondly how that power is exercised.¹⁵² The court will have to determine if national or provincial government has the authority to exercise that power which is being contested. As will be shown in the example below, the national government is only permitted to regulate local government functions by setting the minimum standards for matters concerning provincial government. This principle is further discussed under 3.4.4.

For example, if the court is faced with legislation that was passed by national government concerning firefighting services, the court will have to consider what the functional areas of both

¹⁴⁸ Mathenjwa M 'The legal status of local government in South Africa under the new constitutional dispensation' (2018) 33 *SAPL* 4.

¹⁴⁹ Steytler N & De Visser J 'Local government' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2014) 45.

¹⁵⁰ Steytler N & De Visser J 'Local government' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2014) 37.

¹⁵¹ Section 151 (4) Constitution.

¹⁵² Steytler N & De Visser J 'Local government' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2014) 57.

spheres are according to the Constitution. National government has the legislative authority concerning matters found in schedule 4B of the Constitution. This authority is given by section 155 (7) of the Constitution but only to the extent of regulation.

In discussing the firefighting example mentioned in the paragraph above, it was established that national government does have the authority to pass legislation concerning firefighting services. The next enquiry is how the national government legislated this exercise of power. If the legislation instructs municipalities concerning the criteria for employing firefighters, then this will impede how municipalities should perform their functions concerning the firefighting services. National government is permitted to legislate on schedule 4B matters but only to the extent that it does not go beyond regulating. The word regulate is further discussed in section 3.4.4 of this chapter.

3.4.4 The power to regulate municipal affairs

The Constitution has provisions that enable national and provincial spheres of government with a supervisory role to ensure that municipalities perform their functions effectively.¹⁵³ *Regulating* suggests that national government is not allowed to tell municipalities how they should perform their functions. To argue that section 155 (7) of the Constitution means national government can control how municipalities should perform their functions would contradict many provisions in the Constitution that prevent the national government from interfering with the functions of municipalities and undermining the autonomy of municipalities. For instance, the national government may not compromise or impede a municipality's ability to perform its functions.¹⁵⁴ Therefore, it becomes important to consider the meaning of the word *regulate* within the context of section 155 (7) of the Constitution.

The Constitutional Court held that the term *regulate* refers to “a broad managing or controlling rather than a direct authorisation function”.¹⁵⁵ The powers listed under section 155 (7) of the Constitution do not extend to the core of schedule 4B matters.¹⁵⁶ This position was further confirmed in *Habitat* case.

The Court held that regulation does not mean the usurpation of the exercise of a power or the performance of the function itself but, refers to the setting of the norms and standards for exercising

¹⁵³ Section 155 (7) Constitution.

¹⁵⁴ Section 151 (4) Constitution.

¹⁵⁵ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 377.

¹⁵⁶ Steytler N & De Visser J *Local government law of South Africa* (2009) 24.

the power or performance of the function.¹⁵⁷ The significance of this section is to prove that; national government must not go beyond the role of regulating municipal matters listed in schedule 4B. The Constitution further protects local government autonomy through section 154 (2) of the Constitution which provides that draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations concerning the draft legislation.¹⁵⁸ The provision refers to status, institutions, powers and functions of local government and provides that any legislation that affects the four aspects mentioned above must be presented for public comment and municipalities must at least be given the opportunity to make representations as well.

The intention behind this provision is to ensure that the autonomy of local government is not compromised by national or provincial legislation. The fact that the provision allows for the public to also make comments on the draft legislation promotes democracy. This is because the municipal council is accountable to the people within the municipal area. The same voters in those municipalities are the ones that vote for the municipal council. Moreover, it ensures transparency and accountability because national or provincial government cannot simply make legislation that affects the fundamental aspects of a municipality without the knowledge of the public and local government.

3.5 Court cases relating to local autonomy

The previous section discussed various constitutional provisions that protect local government autonomy. This section will discuss various Constitutional Court judgments to illustrate how the courts protect local government autonomy.

In the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* there was a dispute between *the City of Johannesburg Metropolitan Municipality (City) and Gauteng Development Tribunal (Tribunal)*, which was established in terms of the Development Facilitation Act 67 of 1995 (DFA).¹⁵⁹ The dispute was about which sphere of

¹⁵⁷ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (5) BCLR 591 (CC) at para 22.

¹⁵⁸ Section 154 (2) Constitution.

¹⁵⁹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11.

government is entitled in terms of the Constitution to exercise the powers relating to the establishment of townships and rezoning within the municipal area in the City. The Court had to address the issue of the constitutionality of chapters V and VI of the Act. These Chapters authorised Provincial Development Tribunals established in terms of the Act to determine applications for the rezoning of land and establishment of townships.

The Court held that the purpose of the schedules 4 and 5 of the Constitution is to itemise the powers and functions allocated to each sphere of government. Furthermore, the Constitution grants each sphere of government autonomy. This autonomy cannot be achieved if the functional areas itemised in the schedules are interpreted in a manner that fails to give effect to the constitutional vision of distinct spheres of government.¹⁶⁰ The Court also stated that the Constitution confers different planning responsibilities to each of the three spheres of government in accordance with what is appropriate to each sphere.¹⁶¹ 'Municipal planning' is not defined by the Constitution but planning in the context of municipal affairs is a term which has a well-established meaning which includes the zoning of land and establishment of townships.¹⁶² In that context, the term is used to define the control and use of land.¹⁶³ Therefore, when the drafters of the Constitution chose to use the word 'planning' in the municipal context, they were aware of its common meaning.¹⁶⁴

In deciding whether the Constitution grants the same powers to the provincial government, the Court held that spheres of government must respect the functions of other spheres and not assume any functions and powers not conferred on them by the Constitution and not to encroach upon the functional integrity of other spheres.¹⁶⁵ National and provincial spheres cannot, by legislation give themselves the power to exercise executive municipal powers or the right to administer municipal affairs.¹⁶⁶ The Court held that the Chapters of the Act are inconsistent with section 156 of the Constitution read with Part B of schedule 4.¹⁶⁷

In the case of *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others*, the Court had to determine the constitutionality of the National Building Regulations and Building Standards Act (Act) as the Act empowered the

¹⁶⁰ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11 para 50.

¹⁶¹ *Gauteng Development Tribunal* para 52.

¹⁶² *Gauteng Development Tribunal* para 57.

¹⁶³ *Gauteng Development Tribunal* para 57.

¹⁶⁴ *Gauteng Development Tribunal* para 57.

¹⁶⁵ *Gauteng Development Tribunal* para 58.

¹⁶⁶ *Gauteng Development Tribunal* para 59.

¹⁶⁷ *Gauteng Development Tribunal* para 70.

National Building Regulations Review Board (Board) to exercise appellate powers over municipal decisions.¹⁶⁸

Under the Act, an aggrieved party was permitted to appeal for the decision made by the municipality, the objectors lodged an appeal with the Board which is established by the Minister of Trade and Industry (Minister) in terms of section 9 of the Act, against the City's decision.¹⁶⁹ The source of the Board's appellate powers were Regulation 13 which was promulgated by the Minister.

The City was unhappy with the outcome of the Board and therefore instituted an application to challenge the constitutionality of section 9 of the Act.¹⁷⁰ This challenge formed the basis of the main issue which the Court had to address. The issue was whether section 9 of the Act was inconsistent with the Constitution on the ground that it granted the Board appeal powers over decisions of a municipality on matters that fall within the exclusive domain of municipalities.¹⁷¹

The Court stated that the Constitution establishes and entrenches the status and autonomy of municipalities which constitutes the local sphere of government.¹⁷² Municipalities have original constitutional powers that are exercised exclusively by municipalities.¹⁷³ Building regulations and municipal planning are listed in part B of schedule 4 of the Constitution.¹⁷⁴ Schedule 4B read with section 156 of the Constitution grants the municipalities exclusive executive powers over the listed matters in schedule 4B. The Court further stated that the question that requires to be answered is whether the Constitution empowers national government to exercise powers about building regulations and municipal planning on appeal.¹⁷⁵

The Court held that the Constitution grants the national and provincial spheres legislative powers over local government matters, but the Constitution does not empower these spheres to exercise executive authority over local government powers.¹⁷⁶ The national and provincial spheres may only regulate the exercise of power by municipalities.¹⁷⁷ Moreover, there is no constitutional

¹⁶⁸ *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* (CCT186/17) [2018] ZACC 15.

¹⁶⁹ *Johannesburg Metropolitan Municipality* para 10.

¹⁷⁰ *Johannesburg Metropolitan Municipality* para 12.

¹⁷¹ *Johannesburg Metropolitan Municipality* para 19.

¹⁷² *Johannesburg Metropolitan Municipality* para 21.

¹⁷³ *Johannesburg Metropolitan Municipality* para 21.

¹⁷⁴ Schedule 4B Constitution.

¹⁷⁵ *Johannesburg Metropolitan Municipality* para 25.

¹⁷⁶ *Johannesburg Metropolitan Municipality* para 25.

¹⁷⁷ *Johannesburg Metropolitan Municipality* para 25.

provision that allows a member of the cabinet to intervene in the exercise of constitutional powers by municipalities.¹⁷⁸

Section 9 of the Act authorises the Board to reverse the decision of a municipality.¹⁷⁹ This override is not a decision made by the municipality, but a decision made by the Board.¹⁸⁰ Therefore, section 9 of the Act goes beyond the power of regulating the exercise by municipalities of their executive authority referred to in section 156 (1) of the Constitution.

The application of the Constitution does not change because of the state of disaster. This position was confirmed in *Freedom Front Plus v President of the Republic of South Africa and Others*. It was concluded that the state of disaster does not mean there is a deviation from the normal constitutional order.¹⁸¹ Each sphere of government is still subject to the Constitution when exercising its functions. Local government still retains its autonomy to the extent that it is granted by the Constitution itself. Therefore, national government may not assume any of the local government powers because of a state of disaster.

3.6 The interpretation of the Constitution during the state of disaster

This section will deal with the interpretation that may be applied to some of the provisions of the Constitution as a result of the state of disaster. The significance lies in the fact that the interpretation of the Constitution influences how court decisions are reached. Therefore, any interpretation of the Constitution during the state of disaster may influence how judges reach their court judgements. Even though the courts are tasked with the duty and responsibility to ensure that the law is complied with, especially during a state of disaster. The reality is that during a state of disaster certain constitutional provisions are breached. For example, council meetings were suspended for the duration of the Lockdown by the Minister of CoGTA. The direction was not in line with section 151 (4) of the Constitution. The question is, can a different interpretative approach be applied to the constitutional provisions that have been breached. In essence, the argument is concerned with whether the Constitution should be interpreted differently when we are in a state of disaster. This dissertation will introduce two sets of interpretations. In order to answer the question, the first step is to discuss the directions. In discussing these directions, the text-in-context interpretation will be applied. The next step is to determine which of the provisions of the

¹⁷⁸ *Johannesburg Metropolitan Municipality* para 25.

¹⁷⁹ *Johannesburg Metropolitan Municipality* para 36.

¹⁸⁰ *Johannesburg Metropolitan Municipality* para 36.

¹⁸¹ *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266.

Constitution are breached and whether the interpretation of the directions will lead to an unconstitutional interpretation or not.

The main argument of the next section is that by using the context-based interpretation, the courts may arrive at a different conclusion during a state of disaster compared to when there is no state of disaster. For instance, the judgement of *Mohamed and Others v President of the Republic of South Africa and Others* concluded that it was rational for national government to prohibit faith-based gatherings during the state of disaster.¹⁸² The Court acknowledged that we are in a state of disaster, and such requires sacrifices to be made for the greater good. Something that would be unconstitutional outside of a state of disaster can be constitutional because we are in a state of disaster. So, the Court considered the context that we are in, which is a state of disaster. The prohibition of faith-based gatherings would not have been constitutional outside the state of disaster. This shows that the state of disaster may result in the limitation of certain constitutional rights. The limitation of certain constitutional rights means that there must be a different interpretation that is applied to justify the limitation of constitutional provisions during a state of disaster.

The next section discusses in detail the different sets of interpretation. The first one to be discussed is the textual interpretation and the second one is the text-in-context interpretation. The purpose of discussing these sets of interpretations in detail is to illustrate how they will apply and influence the court decisions.

3.6.1 Textual Interpretation

The text-based approach means that when the meaning of a text is clear (plain meaning), it should be applied.¹⁸³ If the plain meaning of the words is ambiguous, vague or misleading, or if a strict interpretation would lead to absurd results then the courts may deviate from the literal meaning to avoid such absurdity.¹⁸⁴ This way of interpreting the text is also known as the Golden Rule.¹⁸⁵ Textual interpretation can be linked to Hart's way of interpreting the text. There is a distinction between the core and the penumbra. In the core, words have a settled meaning and do not need further interpretation.¹⁸⁶ Simply put, words in the core are not given textual interpretation. For example, anyone who can take the Constitution and read it will understand that a municipal council

¹⁸² *Mohamed and Others v President of the Republic of South Africa and Others* (21402/20) [2020] ZAGPPHC 120.

¹⁸³ Botha C *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 91.

¹⁸⁴ Botha C *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 91.

¹⁸⁵ Botha C *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 91.

¹⁸⁶ Perumalsamy K 'The Life and Times of Textualism in South Africa' (2019) 22 *PELJ* 19.

may not delegate its powers to approve a budget.¹⁸⁷ They do not have to know the history behind this provision or consider the context under which the constitutional provision applies. The context does nothing to influence or determine the operation of the rule.¹⁸⁸ So, in this instance, the judge will be obliged to apply section 160 (2) (b) of the Constitution as is.

In the penumbra however, the interpretation of the law is not so simple.¹⁸⁹ In this case, the provision is not clear, and it results in debatable cases that could either fall inside or outside the rule or provision. For instance, the court must determine whether the conduct of the Minister of CoGTA to issue directions that prevent council meetings is rational or not. The rationality test requires further interpretation and depending on the context under which it is applied, it results in different outcomes.

So far, the paper has discussed that according to Perumalsamy there is the core, which is where the law does not need any context to apply. In the penumbra, the context and the purpose of the law is applied. Which means that the purpose of the law or a provision is accompanied by the context, in which it applies. The next section explores the second interpretative method, which is the text-in-context interpretation.

3.6.2 The text-in-context interpretation

In terms of the text-in-context interpretation, the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation.¹⁹⁰ The meaning of the provision is determined either by reading in words, language or provision in the context that the provision applies in.¹⁹¹ The contextual theory also known as text-in-context interpretation demands that the meaning of an enacted provision and its words and language can only be determined in light of its context or background conditions.¹⁹² Simply put, when the text is interpreted through the lens of text-in-context interpretation, the context under which the provision applies is considered, and the purpose of that text. For instance, when a court must apply reasonableness as the standard against which

¹⁸⁷ Section 160(2)(b) Constitution.

¹⁸⁸ Perumalsamy K 'The Life and Times of Textualism in South Africa' (2019) 22 *PELJ* 19

¹⁸⁹ Perumalsamy K 'The Life and Times of Textualism in South Africa' (2019) 22 *PELJ* 20.

¹⁹⁰ Botha C *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 97.

¹⁹¹ Singh A *The impact of the Constitution on transforming the process of statutory interpretation in South Africa* (unpublished LLD, University of KwaZulu Natal, 2014) 41.

¹⁹² Singh A *The impact of the Constitution on transforming the process of statutory interpretation in South Africa* (unpublished LLD, University of KwaZulu Natal, 2014) 41.

to test government action in realising socio-economic rights, the court will have to consider what is reasonable in the given circumstances.¹⁹³

Only the text-in-context interpretation will be used because we are in a state of disaster, and it is the only interpretation that would result in a different interpretation of a constitutional provision from the literal interpretation. The next section advances the argument that by applying the text-in-context interpretation, certain constitutional provisions should be applied differently compared to when there is a state of disaster. The next section also argues that by applying the text-in-context interpretation that interpretation results in an unconstitutional provision.

As discussed above, when the exercise of public power is irrational, it falls short of the principle of legality which is therefore unconstitutional. In the case of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*,¹⁹⁴ the Court held that the Constitution requires public power vested in the executive and other functionaries to be exercised in an objectively rational manner and the President failed to do so.¹⁹⁵ Consequently, the exercise of this power was unlawful.¹⁹⁶ The *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*,¹⁹⁷ was discussed in chapter 2.4 of this thesis and the Court held that the illicit trade of tobacco products was not fatal to the rationality.

The text-in-context interpretation can be applied to a case concerning the rationality test. This test requires further interpretation considering its context or background conditions. This is because rationality is not clear. It cannot be given an ordinary meaning because it requires further interpretation. According to Hart, it falls within the penumbra. This means that the context under which the rationality applies will determine what is rational. The purpose of why rationality must be applied when public power is performed is to ensure that public power is performed within the constraints of the law. For example, during a state of disaster, it may be reasonable to suspend the council meetings to prevent the spread of Covid-19. Suspending the council meetings is in breach of local government autonomy and their right to govern. The right to govern is found in section 151 (3) of the Constitution and this provision was previously discussed in chapter 3.4.3. However,

¹⁹³ Perumalsamy K 'The Life and Times of Textualism in South Africa' (2019) 22 *PELJ* 20.

¹⁹⁴ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1.

¹⁹⁵ *Pharmaceutical* para 89.

¹⁹⁶ *Pharmaceutical* para 90.

¹⁹⁷ *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 246.

since the country is in a state of disaster, momentarily suspending council meetings is rational when the text-in-context interpretation is applied. In other words, the government must prove that there is a rational connection between suspending council meetings and preventing the spread of Covid-19. In this instance, the court would consider the context which is the fact that the country is in a state of disaster.

Secondly, the court would consider the purpose of limiting the right. In this instance, it is to prevent the spread of Covid-19. This approach was confirmed in the case of *Mohamed and Others v President of the Republic of South Africa and Others* where the Court confirmed that it was rational for the national government to prohibit religious gatherings.

Some of the constitutional provisions can be applied differently from when there is no state of disaster because the country is in a state of disaster. The above discussion has illustrated how the text-in-context interpretation can be applied to justify the limitation of certain provisions relating to local government autonomy. Therefore, what is rational during a state of disaster may be irrational when no state of disaster is declared. This is not to say that the Constitution must apply differently because the supremacy of the Constitution demands that the Constitution is applied as it is. The argument is that by using what is deemed as the text-in-context approach the court may decide that it is justifiable to allow a limitation of a constitutional right. The declaration of a state of disaster alone is not enough to justify the limitation of rights.

3.7 Conclusion

Chapter 3 started off by discussing the principle of legality and its development. Various Constitutional Court cases were referred to which provided what the principle of legality is, even though the Constitution itself does not mention it or define it. The following section dealt with how local government autonomy is protected by the principle of legality. Various provisions in the Constitution protect and guarantee local government autonomy. The Constitution does this, amongst other things, by securing the existence of local government and stating that it is a sphere of government. Furthermore, the autonomy is enhanced by the fact that municipalities; must be established throughout the Republic, have the right to govern on their own initiative the affairs of their community and the national and provincial government may not impede or compromise on its ability to perform its functions or exercise its powers.

The principle of legality protects the autonomy of local government. The Constitution makes it clear that its provisions that guarantee and protect local government autonomy may not be

breached. Therefore, when the national government complies with the Constitution by upholding the local government provisions founded in the Constitution, the national government is complying with the principle of legality. Lastly, there are different interpretative methods which can be applied in a state of disaster to justify that the Constitution should apply differently compared to when there is no state of disaster. The text-in-context interpretation may be used to justify government behaviour that would not be legally justifiable had it not been a state of disaster.

The next two chapters are critical for answering the main question of the paper which is whether the government directions and regulations discussed in chapter 2 are constitutional or not. The discussion will show that some directions and regulations do not meet the standard of rationality which means that those directions and regulations are unconstitutional. The last issue to address is to address whether the text-in-context interpretation can result in some directions being unconstitutional.



Chapter 4: Assessing the legality of regulations and directions affecting local government's functional powers

4.1 Introduction

The paper so far has discussed that some of the directions and regulations gave rise to challenges that had an impact on government during the state of disaster. The discussion started off by providing the framework of the Disaster Management Act. The purpose of providing this framework was to illustrate the powers that were granted to the Minister of CoGTA and provide the legislative provisions that govern the state of disaster. Chapter 2 also provided a discussion of the difference between the state of disaster and state of emergency. It was concluded that the main difference lies in the constitutional safeguards which are provided in section 37 of the Constitution. It was also discussed that certain directions and regulations were promulgated that affect local government.

The directions and regulations that impact local government were discussed in chapter 3. This chapter also included a discussion concerning the impact of these directions and regulations on local government autonomy. It was argued that the principle of legality protects the autonomy of local government. Furthermore, there are various constitutional provisions that protect local government autonomy such as section 151 (4) of the Constitution.

This section will discuss which of the constitutional provisions of local government were breached by the directions and regulations issued by the Minister of CoGTA. Thereafter, this section will determine that the breach to those constitutional provisions is unconstitutional.

4.2 An assessment of local government functional areas affected by directions and regulations

This section of chapter 4 will discuss the various constitutional provisions that have been affected by the directions and regulations. Municipalities were directed to perform certain functions and most of these functions are listed in the Constitution. The purpose is to establish whether the directions and regulations issued to municipalities were constitutional. To present the argument, a functional area will be listed from schedule 4B/5B of the Constitution, then a direction or regulation that may impact this provision will be compared with the discussed provision.

4.3 Local government functional areas

The functional areas to be discussed in this section are listed in schedules 4B and 5B of the Constitution. The functional areas being discussed in this section are restricted to the ones that were affected by the directions and regulations which were issued by the Minister of CoGTA. The directions and regulations discussed in this chapter are the ones applicable between March and November 2020.

a) Water and sanitation services

The functional competency for providing sanitation services and water which is limited to potable water supply systems and domestic wastewater and sewage disposal systems is listed in schedule 4B of the Constitution.¹⁹⁸ Direction 6.2.1 of the directions directed municipalities to prevent the transmission of the virus.¹⁹⁹ The directions further directed municipalities to provide potable water and sanitation services to high population density settlements, rural communities and informal settlements.²⁰⁰ The direction covers the overall objective of provision of water by municipalities. Section 27 (1) (b) of the Constitution provides that everyone has the right to have access to sufficient food and water.²⁰¹ Regarding the provision of water, the Constitution does two things. First, schedule 4B of the Constitution lists the provision of potable water as a competency of municipalities and secondly, it provides the minimum standard for water under section 27 (1) (b). The direction does affect how municipalities are now expected to perform this function. The direction further stated that municipalities are directed to provide other appropriate means such as water tankers and borehole water.²⁰² Providing potable water to communities has been a constitutional mandate for municipalities before the directions were issued. The communities where there is no running water, had to find other means such as providing water using borehole and water tanks.

The direction to provide potable water did not go outside the municipalities' functional areas. The provision of potable water is a schedule 4B competency and municipalities have the executive authority and right to administer. Section 155 (7) of the Constitution provides that national government has executive and legislative authority to see the effective performance of municipalities by regulating their executive functions in schedules 4B and 5B of the Constitution

¹⁹⁸ Schedule 4B Constitution.

¹⁹⁹ Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020.

²⁰⁰ Direction 6.2.1 (b) of Direction 2 of 25 March 2020.

²⁰¹ Section 27 (1) (b) Constitution.

²⁰² Direction 6.2.1 (c) of Direction 2 of 25 March 2020.

and assigned powers.²⁰³ In order to determine whether the national government has breached any provision concerning municipal powers and functions, there is a two-legged enquiry that must be undertaken. The first one is whether the Constitution (or any law) permits national government to legislate on the matter at hand concerning municipalities and secondly, how will this power be performed?²⁰⁴ The application of this enquiry is discussed below.

For the first enquiry national government has the authority to regulate municipal functions listed in schedule 4B of the Constitution.²⁰⁵ This authority is provided by section 155 (7) of the Constitution. Therefore, national government is within its constitutional right to regulate the municipalities' functional area concerning the provision of water. The first enquiry was satisfied. The second leg of enquiry looks at how the power to regulate potable water supply was performed by national government. As discussed above in paragraph 2 of chapter 4.3, the municipalities were directed by national government to provide portable water and sanitation services. National government did not assume the executive function of providing water and sanitation services. Instead, national government gave a direction to municipalities which is in line with the minimum standard found in section 27 (1) (b) of the Constitution. The direction to provide water is also expressed in the Water Services Act 108 of 1997. National government is limited to regulating the executive authority and not performing the function. The legislative authority of national government on local government functions is only permitted to ensure that municipalities effectively perform their functions. Therefore, in this case, national government did not breach the Constitution.

National government's legislative and executive authority does not mean the takeover of municipal executive powers or municipality's powers to regulate. This position was confirmed in the *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* as discussed in chapter 3.5 of this thesis. The term regulate within the context of section 155 (7) of the Constitution was extensively discussed in chapter 3.4.4 of this thesis.

Municipalities were also directed to ensure that public facilities have sanitation services and running water. The intention behind this was to ensure that those in public facilities can adhere to the Covid-19 preventative measures. This direction is not in breach of any constitutional provision.

²⁰³ Section 156 (1) (a) Constitution.

²⁰⁴ Steytler N & De Visser J 'Local government' in Woolman S & Bishop M *Constitutional Law of South Africa* 2 ed (2014) 57.

²⁰⁵ Section 155 (7) Constitution.

Since the municipalities have the functional competency of providing water supply within the municipal area, it means that municipalities must provide the water supply in public facilities.

However, in practice, the issue lied in the fact that national government had delivered and installed water tanks in various communities with the expectation that municipalities would fill the tanks with water.²⁰⁶ ‘Limited to water supply systems’ which is found in schedule 4B of the Constitution means that municipalities do not generate water, nor do they manage dams. It is the national government, water boards and water affairs that generate water and manage dams. Municipalities buy bulk water, treat it for consumption and provide it to consumers. Bulk water supply is a national government responsibility.

The issue is that some municipalities did not have the financial capability to meet the obligation of filling the water tanks.²⁰⁷ One of the reasons behind this is that the revenue collection of municipalities had declined. Therefore, municipalities had to make funding available by re-arranging their budgets and ensure that the financial obligations of unfunded mandates are met. It can be argued that the minimum standard set by national government that free water must be made accessible immediately to communities impedes and compromises the performance of municipalities in that it makes the functional area of providing water unduly expensive for municipalities.²⁰⁸ Moreover, national government should have assisted municipalities by providing funding for filling the water tanks. This is not in line with the rule of section 155 (7) of the Constitution which is to ensure the effective performance of municipalities and the efficient use of resources.

b) Cemeteries, funeral parlours, and crematoria

Municipalities were directed to monitor community gatherings by ensuring that no other gathering takes place other than funerals. The municipalities had to work with SAPS and SANDF to limit the number of people at funerals and ensure that attendees are kept to 50.²⁰⁹ The regulations were subsequently amended to a limit of 100 people at a funeral.²¹⁰ The direction issued to

²⁰⁶ Recording of a webinar on the impact of the lockdown on municipal services, finance & governance hosted by the Dullah Omar Institute & South African Local Government Association via Zoom 14 April 2020 available at <https://dullahomarinate.org.za/videos/doi-webinar-local-government-and-covid-19>.

²⁰⁷ Recording of a webinar on the impact of the lockdown on municipal services, finance & governance hosted by the Dullah Omar Institute & South African Local Government Association via Zoom 14 April 2020 available at <https://dullahomarinate.org.za/videos/doi-webinar-local-government-and-covid-19>.

²⁰⁸ Recording of a webinar on the impact of the lockdown on municipal services, finance & governance hosted by the Dullah Omar Institute & South African Local Government Association via Zoom 14 April 2020 available at <https://dullahomarinate.org.za/videos/doi-webinar-local-government-and-covid-19>.

²⁰⁹ Direction 6.6.2 (b) of Direction 2 of 25 March 2020.

²¹⁰ Disaster Management Act amended regulations in GN 999 GG 43725 of 18 September 2020.

municipalities is in line with their functional area of cemeteries, funeral parlours and crematoria listed in schedule 5B of the Constitution. Therefore, the direction regarding funerals was not an additional mandate of municipalities because it is a functional area of municipalities.

There is an issue with regards to the powers of national government concerning schedule 5B functional areas. Schedule 5B provides for functional areas of exclusive provincial legislative competence. However, national government may regulate schedule 5B matters. Schedule 5B is subject to section 44 (2) of the Constitution which permits national government to intervene on matters listed in schedule 5B of the Constitution. In other words, national government may enact legislation concerning schedule 5B matters when it is necessary to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services or prevent unreasonable action taken by a province which is prejudicial to the interests of another or to the country as a whole.²¹¹ In this case, it is suggested that the Minister of CoGTA issued directions concerning cemeteries, funeral parlours and crematoria to maintain essential national standards. In this context, all municipalities would have one standard when it comes to funerals. For instance, the maximum number of people at a funeral would be 100. It makes sense for the standard to be applied throughout the country to municipalities. National government's exercise of power did not breach the Constitution.

c) Refuse removal, refuse dumps and solid waste disposal

Direction 6.4.2 of the directions directed municipalities to ensure that the relevant protocols are followed when disposing of hazardous waste (equipment, masks, gloves, etc.).²¹² Solid waste disposal is listed in schedule 5B of the Constitution as a municipal competency. As discussed in the previous section, the national government is permitted to legislate on matters listed under schedule 5B of the Constitution provided that it is necessary for the circumstances listed under section 44 (2) (a) - (e) of the Constitution. Relevant protocols when disposing hazardous waste must be adhered to so that national standards regarding waste disposal can be adhered to by all municipalities throughout the country. Therefore, national government regulation regarding the waste disposal is not unconstitutional.

The regulation of waste management can also form part of schedule 4B of the Constitution under municipal health services. This is because the definition section of the National Health Act 61 of

²¹¹ Section 44 (2) (a) - (e) Constitution.

²¹² Direction 6.4.2(d) of Direction 2 of 25 March 2020.

2003 provides that municipal health services includes waste management.²¹³ Since municipal health services falls under schedule 4B of the Constitution, national government is permitted to legislate on this matter as provided by section 155 (7) of the Constitution.

Therefore, it is argued that when the Minister of CoGTA issued regulations regarding the disposal of waste it was not unconstitutional. First, the national standards regarding the disposal of waste during Covid-19 need to be upheld by all municipalities throughout the country. Secondly, the regulations by national government did not instruct municipalities as to exactly what to do. However, cleansing and disposal of hazardous waste and material is one of the municipal functional areas.²¹⁴ The regulations referred to protocols that municipalities must adhere to when disposing of hazardous waste. This meets the requirement set by the *Habitat* case that national government when regulating a schedule 4B matter is restricted to setting norms and standards as discussed in chapter 3.4.4 of this thesis.

d) Cleansing

Direction 6.4.2 (b) of the directions provided that in collaboration with relevant health authorities, municipalities must establish capacitated and well-equipped response teams.²¹⁵ These response teams amongst other things must be capacitated with pressure cleaners and spray equipment, anti-biochemical protective clothing. The response teams will be deployed to provide cleansing and sanitisation of places and facilities that could be at high risk for the transmission of the virus.²¹⁶ Cleansing is a functional competency of municipalities listed in schedule 5B of the Constitution.²¹⁷ However, cleansing during the state of disaster is one of the municipal functional areas that has suddenly intensified.²¹⁸ For instance, cleansing will have to be done more regularly whilst making use of measures such as disinfecting public places.

The consequence of intensified cleansing means more money is required to fund the minimum standard required under this functional area. The municipalities raise their own revenue but during the Lockdown the unavoidable consequence was the decrease in collection of revenue. For example, the eThekweni Municipality had lost about R1.5 billion as of 30th April 2020.²¹⁹ This was

²¹³ Schedule 1 National Health Act 61 of 2003.

²¹⁴ De Visser J 'South Africa's response to Covid-19: The Multilevel government dynamic' 2020 5.

²¹⁵ Direction 6.4.2 (b) of Direction 2 of 25 March 2020.

²¹⁶ Direction 6.4.2 (b) of Direction 2 of 25 March 2020.

²¹⁷ Schedule 5B Constitution.

²¹⁸ De Visser J 'South Africa's response to Covid-19: The Multilevel government dynamic' 2020 5.

²¹⁹ Maziwisa MR 'eThekweni Metropolitan Municipality vs COVID-19: 90 days into the Lockdown' available at <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/> (accessed 18 January 2020).

because households and businesses could not pay for services such as electricity and water. In a presentation about the impact of Covid-19 on district and local municipalities, Dr Ncube alluded to the fact that 63% of the 257 municipalities are in financial distress.²²⁰ This illustrates the fact that municipalities were already facing financial challenges prior the Covid-19 pandemic. Regardless of the shortage in municipal revenue, the national government directed municipalities to provide cleansing and sanitisation.

The text-in-context interpretation will be applied to see if the interpretation can result in a breach of the Constitution or not. The direction, which has been discussed in the first paragraph of this section directed municipalities to establish capacitated and well-equipped response teams. In applying the text-in-context interpretation, the direction was necessary for establishing minimum standards for the rendering of cleansing services. The context we are in is a state of disaster and local government must have a uniform response.

Since cleansing is a schedule 5B functional area, national government's legislative intervention is subject to section 44 (2) of the Constitution. The direction informs the municipalities how to perform their function by instructing municipalities to, for instance, establish response teams. The municipalities must have the discretion to decide the organisational body that can perform this function. National government should only regulate the minimum standard of cleansing and not decide on the organisational body within the municipality that should perform this function. No Cabinet member is granted authority by the Constitution to regulate how municipalities should perform their functions. Secondly, when the Constitution allows for a matter to be regulated by national government, in this context, regulation does not mean that national government is permitted to decide on the internal organisation issues of municipalities. The discretion of performing this functional area was left to municipalities.

The Minister should have issued regulations which provided that minimum standards for cleansing so that it may be uniform across all municipalities. By prescribing the operational details of how cleansing should be done, the Minister went beyond section 151 (4) of the Constitution.

In this case, the directions issued to municipalities relating to cleansing are unconstitutional given that the directions compromise the right of municipalities to exercise their power, and in this case of having the discretion of how to respond to cleansing public facilities. The text-in-context

²²⁰ Chigwata TC & De Visser J 'The financial impact of COVID-19 on district and local municipalities: A national perspective' available at <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/archives> (accessed 17 April 2021).

interpretation has resulted in a breach of the Constitution. Once the interpretation is unconstitutional, it cannot be remedied to be unconstitutional.

4.4 Conclusion

The functional areas as discussed above in sections (a)-(d) were regulated by the Minister of CoGTA. Under (a) it was concluded that the directions relating to water and sanitation were not unconstitutional because national government did not go beyond regulating therefore did not breach section 155 (7) of the Constitution. Under (b) the directions relating to cemeteries, funeral parlours and crematoria were not unconstitutional as section 44 (2) of the Constitution permits national government to legislate on local government functions listed in schedule 5 to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.²²¹ The directions relating to refuse removal, refuse dumps and solid waste disposal which were discussed in (c) were concluded to be constitutional. It was argued that the directions relating to the functional area of cleansing in (d) were unconstitutional. The directions were unconstitutional because the Minister went beyond what was permitted under section 151(4) of the Constitution. Despite applying the text-in-context interpretation, the interpretation that the direction was necessary for creating a uniform approach for all municipalities is unconstitutional.

There are constitutional provisions that protect local governance autonomy. Section 151 (3) gives the municipality the *right* to govern. This right is only given to local government. The other spheres of government are not allowed to interfere with this right. The Constitution also provides that the legislative and executive functions of municipalities vest in the municipal council. this grants municipalities the autonomy to perform their executive and legislative functions. Local government is not a sphere that must only be concerned with service delivery. According to the Constitution, local government has developmental duties as well. For these duties to be fulfilled, local government must be autonomous to perform its functions and powers. The next chapter will discuss which of the governance powers of local government are impacted by the directions and regulations.

²²¹ Section 44 (2) (a)-(e) Constitution.

Chapter 5: Assessing the legality of regulations and directions affecting local democracy/local governance

5.1 Introduction

Having discussed the constitutionality of those directions that affect functional areas of local government, only the directions relating to cleansing were found to be unconstitutional. This chapter will argue that some directions and regulations that affect local governance are inconsistent with the Constitution and therefore unconstitutional. In so doing, a discussion of the constitutional provisions that ensure that local government has democratic governance will be provided. Thereafter, this chapter will discuss the directions and regulations that were issued which affect local governance.

5.2 The impact of directions and regulations on local governance

One of the objects of local government is to provide democratic and accountable government for local communities.²²² The directions and regulations which were promulgated have impacted on the governance of local government. The several constitutional provisions that govern local governance were discussed in chapter 3. The purpose of this section is to assess the directions and regulations as to whether they meet the standard of legality or not. Subheadings (a)-(d) will also provide a brief discussion of the in-context-interpretation and apply it to the directions as issued by the government that are found to be unconstitutional. The intention is to establish whether the in-context-interpretation can be applied to the constitutional provisions that were breached.

a) Council meetings

Direction 6.7.2 of the directions to municipalities and provinces provided that no council meetings outside the District Command Centre meetings would be undertaken during the initial 21 Day Lockdown period, or any other extended period that may be declared.²²³ This was the first set of directions from the Minister of CoGTA. The Minister of CoGTA later amended the directions through the *Government Gazette* issued on the 3rd of July 2020. Direction 6.7.3 and 6.7.4 of the directions now provided that municipalities may convene council meetings only where it is necessary, including where an IDP is considered.²²⁴ The major difference between the two set of

²²² Section 152 (1) (a) Constitution.

²²³ Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020.

²²⁴ Disaster Management Act amended regulations in GN 748 GG 43503 of 3 July 2020.

directions issued on 25 March and 3 July respectively lies in the fact that face-to-face council meetings could now resume after being suspended. These council meetings were subject to adherence to Covid-19 safety regulations as provided by direction 6.7.2 of Direction 4 of 03 July 2020. But one of the issues was whether it was constitutional for the Minister of CoGTA to suspend council meetings in the first place.

In applying the text-in-context interpretation, the context under which the direction that suspended council meetings applied is in a state of disaster. The purpose of this direction was to ensure that there was no increase of the Covid-19 virus infections due to contact meetings. Despite the context, the interpretation regarding this direction is not in line with the Constitution. This interpretation is in breach of section 151 (3) of the Constitution. The breach of this provision is further discussed in the next paragraphs.

The dissolution of a municipal council can be done under section 139 of the Constitution as well as section 34 of the Municipal Structures Act (MSA). Section 139 (1) provides the circumstances for the dissolution of the municipal council. Under section 139 (4) of the Constitution, a municipality may be dissolved where a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue raising measures. Section 139 (5) of the Constitution permits for a dissolution of a municipal council if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments. This is testimony to the fact that the Constitution takes the protection of the municipal council very seriously. Section 151 (3) of the Constitution provides that a municipality has the right to govern, on its own initiative the local government affairs of its community subject to provincial and national legislation as provided by the Constitution.²²⁵ Local government is entitled to govern its own affairs. Governing in this context is more than just administering laws but it is also having an executive and legislative function as provided by section 156 (1) of the Constitution. It is argued that matters of the municipal council fall under local government affairs. Therefore, the municipal council should have the discretion to decide firstly whether the municipal meetings must take place and secondly, how they should be conducted. Section 18 (2) of the MSA provides that municipalities must meet at least quarterly.²²⁶ When the

²²⁵ Section 151 (3) Constitution.

²²⁶ Section 18 (2) Municipal Structures Act.

Minister of CoGTA suspended the municipal council, the Minister compromised and impeded the right of a municipal council to exercise its powers and functions.

In addition, the rationale behind the suspension of council meetings was not clear because direction 6.7.1 of the directions to municipalities and provinces provided that municipalities were required to perform various legislated functions, including the passing of budgets and the adoption of integrated development plans (IDPs).²²⁷ Given the fact that council meetings were suspended, it is unclear how the municipalities were supposed to perform legislated functions that require municipal meetings such as the passing of budgets.

Another aspect which is not clear is whether the suspension of face-to-face meetings meant that meetings had to take place electronically. However, this interpretation cannot be correct because direction 6.7.2 of the directions stated that *no council meetings* shall take place. The intention is not clear because the objective is not clear. If the intention behind the directions was to prevent Covid-19 infections from increasing, then why would Command Centre meetings continue to take place? The directions seem to have left the discretion to the Command Centre to decide whether to have these meetings electronically or not. It seems that the Minister had no issue with regards to contact meetings of the Command Centre. If the main reason for suspending council meetings was to prevent infections, then Command Centre meetings should have taken place virtually.

In the *De Beer* case, the applicants challenged the constitutionality of the various regulations promulgated by the Minister of CoGTA.²²⁸ The Court stated that the rationality test answers the question of whether there is a rational connection between the intervention and the purpose for which it was taken?²²⁹ In this instance, the Minister's discontinuation of council meetings was the measure that was taken, and it had to be rational with the purpose of preventing the spread of Covid-19 infections within the municipal area in order to be constitutional. It is argued that there is no rational connection between the intervention of suspending council meetings and preventing the increase of Covid-19 infections because the Command Centre was still allowed to conduct contact meetings. In turn, the Minister's exercise of power that suspended council meetings is inconsistent with the Constitution and therefore unconstitutional. The Minister did not provide municipal councils with the discretion to rather opt for meeting virtually. In essence, it is argued that there seemed to be no valid reason for the Minister's suspension of council meetings. The

²²⁷ Direction 6.7.1 of Direction 4 of 03 July 2020.

²²⁸ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184.

²²⁹ *De Beer* para 6.

Minister's direction that suspended municipal council meetings was unconstitutional because it is inconsistent with section 151 (3) of the Constitution read with section 151 (4) of the Constitution. The directions which suspended council meetings were unconstitutional. Even though the directions were later amended, it does not change the fact that they were unconstitutional.

b) Municipal IDPs and budgets

The Integrated Development Planning (IDP) and budget process are two of the most important processes in fulfilling the developmental duties of local government. This section will define what the IDP and budget process is and why it is important for local government. This section will also discuss whether the directions issued in terms of the DMA pertaining to municipal IDPs and budget processes are constitutional or not.

IDP is a process through which municipalities prepare strategic development plan for the period of their elected term. The IDP is adopted by a municipal council at the start of its term. This plan must for the policy framework and general basis on which annual budgets must be based.²³⁰ When the municipality drafts its IDP, the community must be consulted, and they must participate.²³¹

The municipal council must for each financial year approve an annual budget for the municipality before the start of that financial year.²³² Municipalities must approve their own annual budget after it is tabled by the mayor at a council meeting.²³³ After the annual budget has been tabled it must be made public and local community must be given an opportunity to make representations.²³⁴ When preparing the annual budget, the Mayor of the municipality must take into account the municipality's IDP.²³⁵

An adoption of the annual budget requires the IDP to be considered. This shows that the processes are important for the developmental plan of the council and how the municipality plans to spend its budget. The two processes also include the involvement of the community. This also illustrates the importance of a democratic local government which allows for public participation. The discussion relating to the IDP, and budget process are significant because the provisions discussed in the second and third paragraphs above are taken from national legislations that govern municipalities. Local government is subject to these national legislations as it governs the affairs

²³⁰ Section 25 (1) (c) Municipal Systems Act.

²³¹ Section 29 (1) (b) (i)- (ii) Municipal Systems Act.

²³² Section 16 (1) MFMA.

²³³ Section 16 (2) MFMA.

²³⁴ Section 22 (a) (i)-(ii) MFMA.

²³⁵ Section 21 (2) (a) MFMA.

of its community. The IDP and budget process were impacted by the suspension of the municipal council meetings. It meant that the municipal council could not meet to discuss and facilitate these two processes. After the amendment of Direction 1 of 25 March 2020, council meetings could take place virtually together with the community consultation and for the public participation for both IDP and budget. Many of the usual mechanisms for community participation could not be used for the 2020/2021 municipal budget.²³⁶ For example, many municipalities could not facilitate the 21-day period for public comments during the IDP review process.²³⁷ This raised questions about the legality of the budgets and IDP that lacked the community participation requirement. Even though budgets were adopted, not all of them reflected the public participation from all people of various communities because whilst they were taking place online, not all municipalities and communities have access to internet.

Having discussed the importance of public participation in adopting the annual budget and the IDP, the next section will discuss whether the directions that refer to the IDP and annual budget are constitutional or not. Direction 6.7.3 (b) of the Directions directed municipalities not to convene any meetings, including the IDP community and consultation processes and consideration and passing of budgets during the initial 21-day Lockdown period or any other extended period of Lockdown that may be declared.²³⁸

Using the in-context-interpretation, the context of the direction that breached the Constitution is that the country is in a state of disaster. The purpose of the directions was to ensure that there is no increase of infections. Given that we are in a state of disaster, it seems to be clear why the Minister would issue a direction which suspends the IDP and budget processes. However, this interpretation cannot stand as it is unconstitutional because it is not in line with sections 160 (1) of the Constitution. This interpretation cannot be then redeemed after it is found to be unconstitutional.

The direction concerning the IDP and passing budgets which is direction 6.7.3 (b) did not comply with section 160 (1) of the Constitution. Section 160 (1) of the Constitution provides that a municipal council makes decisions concerning the exercise of all powers and the performance of all the functions of municipalities.²³⁹ The approval of IDP together with the consultation process

²³⁶ De Visser J & Chigwata TC 'Municipal Planning and Budgeting During Covid-19: What Happened in Practice?' 2020 2.

²³⁷ De Visser J & Chigwata TC 'Municipal Planning and Budgeting During Covid-19: What Happened in Practice?' 2020 2.

²³⁸ Disaster Management Act directions in GN R432 GG 43184 of 30 March 2020.

²³⁹ Section 160 (1) (a) Constitution.

forms part of the powers that municipalities have. The Minister of CoGTA does not have the constitutional power to make decisions concerning the exercise of powers and functions of municipalities. The Constitution vested these powers on the municipal council. The Minister should not have disallowed the municipalities from convening their consultation processes and passing of budgets. Instead, the Minister should have directed municipalities to develop electronic and other alternative means which required no physical contact. Municipalities would have been able to determine which alternative would suit their area of jurisdiction. By suspending the consultation process of IDP it meant that the municipal council was unable to perform its functions relating to passing of IDPs and community consultations. The passing of budgets and IDP consultation process form part of municipal government affairs. Section 151 (3) of the Constitution was breached in this case.

The Minister's initial decision to prohibit IDP and consultation processes and passing of budgets was unconstitutional as discussed above.

Direction 6.7.2 (f) of the directions issued to municipalities and provinces stated that municipalities are directed to revise their budgets to prioritise programmes and projects aimed at combating the spread of Covid-19, and the revised budgets must be submitted to the Department of Cooperative Governance before the end of May 2020.²⁴⁰ The budget process is governed by the MFMA. As stated in the previous paragraph, a budget must be tabled by the mayor before a council by the end of March of each year.²⁴¹ Section 25 (1) of the MFMA provides that the council must meet to consider the budget before 30 May.²⁴² A municipal budget must be approved by the 1st of June of each year.²⁴³ The months of March until July are crucial for municipalities because this is when they consider their budgets.

Direction 6.7.2 (f) of the directions provided that the revised budgets must be submitted to the Department of Cooperative Governance before the end of May 2020.²⁴⁴ The Constitution and national legislation governing municipalities do not have any provisions where the budget must be submitted to a Cabinet member. The directions do not provide that the Minister must approve the budget, so it is unclear what the intention behind submitting the budget to the Minister was. It was clearly not for the Minister to approve. In the *Fedsure* case, the minority judgement rejected the

²⁴⁰ Directions 6.7.2 (f) of Direction 1 of 25 March 2020.

²⁴¹ Section 16 (2) MFMA.

²⁴² Section 25 (1) MFMA.

²⁴³ De Visser J & Chigwata TC 'Municipal Budgeting and Planning During Covid-19' 2020 2.

²⁴⁴ Directions 6.7.2 (f) of Direction 1 of 25 March 2020.

approach that the adoption of a budget by a municipal council is a delegated function. It was held that when a municipal council adopts a budget, the council is performing a legislative function which is derived from the Constitution itself.²⁴⁵ It cannot be said what the submission to the Minister is for.

If the intention behind the submission is for the Minister to monitor municipal finances, then it could be justified. As discussed in chapter 1.4 of this dissertation, interrelatedness which is found in section 40 (1) of the Constitution refers to the relationship between three spheres of government that is hierarchal in nature. This relationship is manifested in the provincial and national governments' supervision powers of regulation, monitoring and intervention. The Constitution permits for the monitoring of local government through section 154 (1) of the Constitution which provides that national government and provincial government, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

It was not rational for the Minister to simply prohibit any meetings, including the IDP community and consultation process and consideration and passing of budgets. As much as the purpose was to ensure that the spread of Covid-19 is not increased, community consultation forms part of a democratic process for local government. Municipalities were directed to revise their budgets to prioritise coronavirus matters. The communities in various municipalities had to be involved so they can raise their concerns and give input about what matters should form part of the budget, especially during the Lockdown. The people within that municipal area elected those municipal councillors to represent them.

The latest amendment within the period under review in this thesis to the directions was issued on the 3rd of July 2020. Direction 6.7.4 (b) provides that municipalities are directed to ensure that communities are consulted using virtual platforms and alternative methods of consultation, instead of contact meetings to provide comments on the draft IDP and budget.²⁴⁶ This alternative was rational because the government was able to ensure that communities were consulted whilst being protected from contracting the virus. Some municipalities used community radio and social media to broadcast their draft budgets.²⁴⁷

²⁴⁵ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17.

²⁴⁶ Direction 6.7.4 of Direction 4 of 03 July 2020.

²⁴⁷ *De Visser J & Chigwata* TC 2020 4.

The Minister of Finance issued regulations which exempted municipalities from complying with certain provisions of the MFMA. This regulation stated that municipalities and municipal entities were exempted from complying with some of the provisions in the MFMA during the state of disaster.²⁴⁸ However, what the municipalities were required to do by the MFMA during the state of disaster must be done 30 days after a state of disaster has lapsed or has been terminated. The issue with this direction lied around the uncertainty about when the state of disaster may lapse.

c) Delegated municipal executive powers

The executive and legislative authority of a municipality is vested in the municipal council.²⁴⁹ Section 59 of the Local Government: Municipal Systems Act 32 Of 2000 (MSA) outlines the framework for delegations.²⁵⁰ Section 59 (1) of the MSA provides that a municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances.²⁵¹ The delegation system of a municipality has to comply with section 160 (2) of the Constitution, which provides a list of matters that may not be delegated. Section 59 (1) (a) of the MSA also lists the powers of municipalities which may not be delegated such as the power to set tariffs and to decide to enter into a service delivery agreement.²⁵² Direction 6.7.3 (f) of the directions issued to municipalities and provinces state that the power to make decisions that would have required the approval of the council, a committee of the council, or the mayor (whether executive or not), will be made by the municipal manager on written recommendation of the Chief Financial Officer and with approval or concurrence of the mayor or executive mayor.²⁵³ It is argued that the municipal council would have adopted a system of delegations that sets out how the municipality's powers are distributed in the municipality. The municipality has the constitutional and statutory authority to do so. The direction disrupts that system by essentially creating an alternative system that centralises all the power in the hands of the mayor, municipal manager, and Chief Financial Officer.

The text-in-context-interpretation to direction 6.7.3 (f) is applied to determine whether this interpretation can be used to give the Constitution a different meaning during the state of disaster. The direction was introduced and applied in a state of disaster. The purpose of the direction was that it was to allow for swift decision making as demanded by the state of disaster. Reason being,

²⁴⁸ Local Government: Municipal Financial Management Act directions in GN 429 GG 43181 of 30 March 2020.

²⁴⁹ Section 151 (2) Constitution.

²⁵⁰ Section 59 Municipal Systems Act 32 Of 2000.

²⁵¹ Section 59 (1) MSA.

²⁵² Section 59 (1) (a) MSA.

²⁵³ Direction 6.7.3 (f) Direction 1 of 25 March 2020.

during the time when the direction was issued, the government did not have much knowledge about the Covid-19 virus. Additionally, the government did not have the time to delay any decision making because of the infections that kept increasing. To apply the text-in-context interpretation, the point of departure is to establish the context in which the country finds itself in. The context which the country is in, is a state of disaster. Does the state of disaster necessitate this kind of response from the Minister for the overall objective of limiting covid-19 infections? The answer is no because the direction takes away the discretion of having a delegation system away from the municipal council. The context of a state of disaster is not enough to justify national government's decision to change the way a municipality distributes its power within its organisation. More especially how the municipality structures the oversight relationship between the council, the executive, and the administration.²⁵⁴ Therefore, the direction issued by the Minister will still be unconstitutional even when interpreted using the in-context-interpretation. After the interpretation is unconstitutional, it cannot be changed to be unconstitutional.

Direction 6.7.2 (f) is not in line with the delegation system under section 59 of the MSA or even the Constitution itself. The system of delegation is left to the discretion of the municipal council. This is in line with the constitutional provision that the executive and legislative powers of a municipality are vested in a municipal council.²⁵⁵ Therefore, only the municipal council may delegate its powers. The Minister delegated the power to make decisions to the municipal manager. However, it was not within her powers under section 27 (2) of the DMA to do so. The set of directions are subject to section 27 (2) of the DMA, and this section provides a long list for directions and regulations that may be issued by the Minister of CoGTA as discussed in chapter 2.2 of this dissertation. The provision does not mention anything about delegating certain functions from the municipal council.

When the Minister issues directions in terms of section 27 (2) of the DMA, the directions must be necessary for the purposes listed in section 27 (3) of the DMA. The purposes are listed as assisting and protecting the public, providing relief to the public, protecting property, preventing or combating disruption or dealing with the disruptive and other effects of the disaster.²⁵⁶ The delegation of municipal functions does not serve the purposes of section 27 (3) of the DMA. The Constitution is clear that the municipality has the right to govern, on its own initiative, the affairs

²⁵⁴ De Visser J & Chigwata TC (2020)

²⁵⁵ Section 151 (2) Constitution.

²⁵⁶ Section 27 (3) DMA.

of its community.²⁵⁷ Delegating functions forms part of governing the affairs of a community. The national legislation that a municipality is subject to in this context is the MSA because it outlines that a municipal council must have a system of delegation and provides the process for such. Simply put, it is suggested that the Minister of CoGTA does not have a legal justification for issuing directions that state the powers in the municipal council should be delegated. Therefore, direction 6.7.2 (f) of the directions is inconsistent with section 160 of the Constitution and section 59 (1) of the MSA.

The intention of the direction above is not clear. It is unclear whether the delegation is an instruction to municipalities to adopt the necessary resolutions to empower the municipal manager as set out in the directions?²⁵⁸ Secondly, with the municipal councils that already have adopted council resolution to empower their mayor or the municipal manager, should they deviate from the resolution and adopt a new resolution?²⁵⁹ The direction seems to lack rationality. It is not clear what the Minister intended to achieve. Instead, it does not comply with what the provisions of the Constitution and the MSA provide regarding the delegation of powers in municipalities.

The direction issued by the Minister of CoGTA regarding the delegation of functions is unconstitutional for two reasons. Firstly, the principle of legality was not complied with as the Minister of CoGTA exercised power that was beyond what was conferred to her by section 27 (2) of the DMA. Secondly, national legislation, MSA provides that only a municipal council may establish a system of delegation.

d) The establishment of the District Command Council

The following discussion is about the establishment of the district command council. This section argues that although the DMA does not have an explicit provision relating to the creation of the command council, it is not unconstitutional. The following discussion will also illustrate how the text-in-context interpretation can be applied to show the Minister's rationale for the direction of creating the command council. Direction 6.8.2 (a) of the directions to municipalities and provinces directed municipalities to establish the district command council with immediate effect.²⁶⁰ The set

²⁵⁷ Section 151 (3) (c) Constitution.

²⁵⁸ De Visser J & Chigwata TC 'Municipalities and COVID-19: What the national disaster management directions mean for municipal governance' available at <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/> (accessed 02 November 2020).

²⁵⁹ De Visser J & Chigwata TC 'Municipalities and COVID-19: What the national disaster management directions mean for municipal governance' available at <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/> (accessed 02 November 2020).

²⁶⁰ Direction 6.8.2 (a) Directions to Municipalities and Provinces.

of directions define the command council as the executive authority that has been put in place to oversee the government response to Covid-19.²⁶¹ It is argued that the definition of the command council suggests that the command council as an executive body is not a municipal sub-structure.

The DMA does not have an explicit provision that creates the command council. Section 43 (1) of the DMA provides that each metropolitan and each district municipality must establish in its administration a *disaster management centre* for its municipal area.²⁶² The district command council does not replace the municipal council because the district command council was not directed to assume municipal council powers and functions.

The municipal council should be the one having the authority and the discretion to create sub-structures that will assist during the disaster in the local sphere. The Constitution places the authority of governing the affairs of a municipality on a municipal council. It is suggested that the Minister of CoGTA did not act beyond the powers that were conferred upon her by the law. The command council as explained in the first paragraph of this heading is an executive body and not a sub-structure of municipalities.

5.3 The significance of discussing Covid-19 directions

Chapter 5 has discussed the directions that impact local governance which were issued during the state of disaster. Some of the directions that are unconstitutional are no longer in operation because they were amended. Therefore, the question is why discuss directions that are no longer in operation? Although it is a moot question, it is still relevant for the following reasons. First, the Covid-19 pandemic is not yet over, and the country is still dealing with it at the time of writing. Secondly, it may prevent the national government from resorting to unconstitutional measures during the next state of disaster. Thirdly, it is to show that the Constitution does not lose its application during a state of disaster. All spheres of government must still exercise their power with constraint. One of these constraints is the principle of legality. As was confirmed in the *Freedom Front Plus v President of the Republic of South Africa and Others*, the state of disaster does not mean there is a deviation from the normal constitutional order.²⁶³ The exercise of power of all spheres must be found within the principle of legality and the rule of law must also be upheld.

²⁶¹ Disaster Management Act directions in GN R399 GG 43147 of 25 March 2020.

²⁶² Section 43 (1) DMA.

²⁶³ *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266.

5.4 Conclusion

This chapter has presented the directions issued by the Minister of CoGTA which affected local governance. It was argued that some of the directions and regulations discussed in this chapter are in breach of the Constitution. Chapter 5 discussed four themes that illustrate how the directions affected local governance.

The first theme was the council meetings. The directions suspended council meetings and it was concluded that this measure was irrational because the intention behind the suspension of council meetings was unclear. If the council meetings were suspended to prevent the spread of Covid-19 then municipal council meetings should have taken place virtually. The district command council meetings should have taken place virtually as well. The direction that suspended the council meetings was in breach of section 151 (3) of the Constitution read with section 151 (4) of the Constitution.

The second discussion was about the municipal IDPs and budget. The main issue was not the revision of budgets but the lack of involvement of the community. In this section, it was argued that public participation is a significant part of the democracy, and it is a process that is demanded by the law. The direction that prevented public participation was therefore unconstitutional as it breached section 151 (3) of the Constitution and various provisions from the MFMA and MSA which require public participation.

The third discussion was about the delegated municipal executive powers. In this section, it was argued that the exercise of power in terms of the delegation to the municipal manager on written recommendation of the Chief Financial Officer with the approval or concurrence of the mayor or executive mayor by the Minister of CoGTA was unconstitutional. This is because it is not in line with any provision in the DMA as there is no provision that permits the national government to perform such powers. Secondly, it breaches the delegation requirements which have been outlined in section 59 of the MSA.

The fourth theme discussed was the establishment of the district command council. It was discussed that the directions directed municipalities to establish the district command council. The command council is an executive body and not a sub-structure of municipalities. The directions that directed municipalities to establish the command council is not unconstitutional.

Chapter 6 will provide the key findings of this research, lessons that can be taken from this pandemic and lastly recommendations on how the government may effectively deal with a

pandemic without interfering with the powers and functions, and local governance of municipalities.



Chapter 6: General Conclusion

When the Covid-19 virus hit the shores of the Republic of South Africa, the government had to take swift decisions to prevent the spread. Even though the government had limited expert knowledge about the virus they still had to take those decisions. These decisions included using the Disaster Management Act to issue directions and regulations after a state of disaster was declared.

Chapter 2 was about how the DMA was to declare a state of disaster and promulgate directions and regulations. The directions and regulations which were issued to municipalities impacted how municipalities perform some of their functions. For instance, the directions suspended council meetings and granted executive powers to the municipal manager. Even though the state of disaster is governed by the DMA, it still has a constitutional basis given that disaster management is a functional area found in schedule 5A of the Constitution.

The state of emergency is governed by the Constitution given its legal consequences which are different from the state of disaster legal consequences. For example, when the state of emergency is declared by the President and certain constitutional rights may be suspended. When a state of disaster is declared by the Minister of Cooperative Governance and Traditional Affairs Minister, no constitutional rights may be suspended. The fact that the state of disaster and state of emergency results to different legal consequences was confirmed in the *Freedom Front Plus v President of the Republic of South Africa and Others* case.²⁶⁴ This case held that safeguards during a state of disaster and those under the state of emergency are different because of the different legal consequences. There were other court cases that dealt with the regulations that were promulgated in terms of the DMA. There were various court cases which led to the challenge of various directions and regulations issued in terms of the DMA. For example, the case of *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*, which showed that during the state of disaster, the Constitution still applies, and the test of rationality is applied.

Chapter 3 argued that some constitutional provisions relating to local government guarantee and protect local government autonomy. Local government is a sphere of government that performs original powers which are entrenched from the Constitution. Local government has autonomy because some of its powers are not delegated, and other spheres of government are not permitted to exercise authority over local government functions. It was also argued that the supremacy clause

²⁶⁴ *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266.

found in section 1 (c) of the Constitution does protect the autonomy of municipalities. This chapter also introduced the principle of legality and referred to court judgements that applied the principle of legality. Chapter 3 also introduced the text-in-context interpretation and the textual interpretation.

The direction to provide water and sanitation in chapter 4 was not unconstitutional because the municipalities had to provide such services before the Covid-19 pandemic was declared. National government did not assume the executive functions of municipalities but gave a direction in line with the minimum standard found in section 27 (1) (b) of the Constitution. The issue arose in practise when the water tanks were installed in various communities and municipalities had to pay for these water tanks. This presented municipalities with a new issue for as municipalities had to provide this service by using their limited financial resources.

The direction relating to cemeteries, funeral parlours and crematoria did not breach any provision of the Constitution. The functional area of cemeteries, funeral parlours and crematoria are listed in schedule 5B of Constitution. National government may regulate schedule 5B matters. The same conclusion was reached for directions relating to waste disposal. It was concluded that they were not unconstitutional.

Directions relating to cleansing were not in line with the Constitution. Cleansing is a 5B functional area found in the Constitution. Regulating this functional area would have to be in terms of section 151(4) of the Constitution. The direction did not meet the provision of section 151(4) of the Constitution because it did not satisfy the requirements under section 151(4) of the Constitution. Another reason why it is inconsistent with the constitution is because the direction informs the municipalities how to perform their function regarding cleansing which goes beyond regulating.

In the first set of directions found in chapter 5, the Minister of CoGTA suspended the council meetings. It was concluded that municipalities have the right to govern their own municipal areas. Municipalities should have the right to decide when municipal council meetings should take place and how they should be conducted. The Minister impeded on the municipalities' ability to perform its functions given that there are legislated functions that municipalities could not perform as a result of suspended council meetings. The Minister acted unconstitutionally by suspending council meetings. The directions that suspended municipal IDP and budget processes were unconstitutional. By suspending these processes, the Minister is taking away the municipalities' discretion of deciding how to spend their finances. Secondly, the Minister is preventing the community participation which is required for the IDP process and the passing of budgets.

Direction 6.7.3 (b) was concluded as being unconstitutional because it breached section 160 (1) of the Constitution. Direction 6.7.2 (f) which directed that revised budget must be submitted to the Department of Cooperative Governance was not unconstitutional because it seems that the submission which was to be made was for the purposes of monitoring.

Direction 6.7.3 (f) directed the municipal manager to make decisions that would have required the approval of the council. There is a delegation which has taken place and this delegation was not made by the municipal council. This direction should be unconstitutional as the Minister is not the one who is allowed to decide on the delegation system of municipalities. The delegation is not in line with section 59 of the MSA.

Direction 6.8.2A directed municipalities to establish district councils with immediate effect. The directions define a command council as an executive body. This means that the command council which must be established is not a sub-structure of municipalities even though it is a municipality that should establish it therefore direction 6.8.2 A is not unconstitutional.

During the state of disaster, the legal order does not change. Constitutional provisions must apply as they would outside a state of disaster. This means that the national government must still uphold the constitutional provisions that prevent undue interference when municipalities must perform their functions. South Africa still uses a multilevel government system with three spheres and national government must not assume any powers of the provincial or local government.

Dr Ncube also made the point that governance at local sphere was impacted in that decision making at the local level was delayed at the detriment of service delivery, IDPs of many municipalities were thrown of course and public participation was disrupted.²⁶⁵ However, as much as the Covid-19 pandemic brought along several challenges to the local sphere, there are measures that can be taken to better deal with the Covid-19 effects. Firstly, local government must be allowed to govern their municipalities in order to increase efficiency in performing their functions. Secondly, national government must allow municipalities to decide how to better respond to the effects of Covid-19 based on their community, revenue and resources. National government must do this by not resorting to directions and regulations that assume a blanket approach. Local government will have

²⁶⁵ Chigwata TC & De Visser J 'The financial impact of COVID-19 on district and local municipalities: A national perspective' available at <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives> (accessed 17 April 2021).

to invest in electronic measures that will allow for alternative ways of having council meetings and public participation.

This study was significant for the following reasons. Firstly, to prevent similar problems in future disasters. Secondly, to show that the Constitution remains the supreme law of the Republic and must be upheld. Thirdly, organs of state from national government must not assume any powers that are not provided in law, especially those powers that compromise local government autonomy. Even when the text-in-context interpretation was applied, the interpretations that resulted were in breach of various provisions of the Constitution and therefore and therefore should be declared unconstitutional.



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