



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 28 January 2021

STATUS Immediate

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*Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9
(28 January 2021)*

MEDIA STATEMENT

The Supreme Court of Appeal (SCA) today dismissed the appeal of Duwayne Esau and seven other appellants against the Minister of Co-operative Governance and Traditional Affairs, the President of the Republic of South Africa and the Minister of Trade, Industry and Competition.

As a result of the Covid-19 pandemic, the Minister of Co-operative Governance and Traditional Affairs (the COGTA Minister), on 15 March 2020, declared a national state of disaster in terms of the Disaster Management Act 57 of 2002 (the DMA). On the same day, a body called the National Coronavirus Command Council (the NCCC) was formed. It originally consisted of the President and 19 ministers but, within five days, was expanded to include the entire cabinet. Its function, as the name suggests, was to lead the national government's response to the pandemic. On 26 March 2020, a lockdown of the entire population was imposed and regulations were promulgated by the COGTA Minister to give effect to the lockdown. The country was placed on level 5 – the highest level – of a five-level system that classified the severity of the measures needed to combat the pandemic. Later, as the infection rate slowed down, the regulations were amended to ameliorate the harsher effects of the lockdown, as the country was moved to level 4.

The appellants challenged the validity of certain decisions that they claimed were made by the NCCC, as well as the validity of the level 4 regulations and certain directions given by the Minister of Trade, Industry and Competition. All of these

challenges had been dismissed by the court of first instance, the Western Cape Division of the High Court, Cape Town.

The SCA held that on the evidence, only one of the impugned decisions was taken by the NCCC. That decision was not justiciable because it was a policy decision that had no legal effect: it had been given legal effect by the regulations made by the COGTA Minister. In any event, the NCCC, as a cabinet committee, was lawfully entitled to make the policy decision which it had.

The level 4 regulations were challenged, in the first instance, on the basis that the COGTA Minister, in a public participation process that preceded the making of the regulations, had not afforded members of the public an adequate opportunity to make representations. She had allowed two days within which representations were to be forwarded to her. During that time, more than 70 000 representations were received from members of the public. The SCA held that, in the circumstances, an adequate opportunity had been afforded to members of the public to be heard on the content of the level 4 regulations.

It was then argued that the COGTA Minister could not have applied her mind properly to the representations that she received in the short time between the deadline for representations and the promulgation of the level 4 regulations. Her evidence was that teams had been set up to process the representations and that the work of the teams had been fed into her decision-making. The SCA concluded that it had not been established that the COGTA Minister had failed to consider the representations made by members of the public when making the level 4 regulations.

It was then argued by the appellants that the regulations restricting freedom of movement and those concerning economic activity were invalid because they infringed fundamental rights, and those infringements were not justified in terms of s 36(1) of the Constitution. The SCA accepted that the impugned regulations infringed the rights to freedom of movement, to human dignity and to freedom of trade, occupation and profession. It concluded however, that, with the exception of two regulations, the COGTA Minister had justified the limitation of those rights in terms of s 36(1) of the Constitution. The SCA found, however, that the regulations restricting the taking of exercise to certain times, places and modes of exercise, and the prohibition of the over-the-counter sale of cooked hot food were invalid.

Finally, the SCA did not decide on the validity of the directions issued by the Minister of Trade, Industry and Competition. They had ceased to have effect when the country moved from level 4 to level 3 and had been formally withdrawn by notice in the *Government Gazette*. The SCA accordingly found that the challenge to the directions was moot.

In the result, the appeal was dismissed save to the extent that the exercise regulation and the hot food regulation were declared to be invalid.