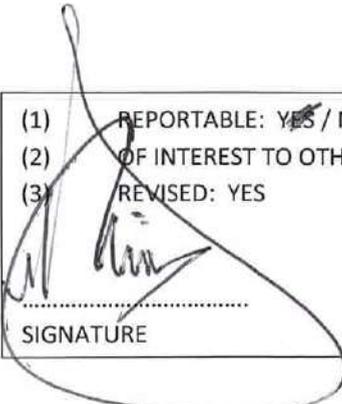




OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MIDDELBURG
(LOCAL SEAT)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES
	
SIGNATURE	DATE
	03/04/20

CASE NO:1170/20

In the matter between:

THE ADMINISTRATOR OF DR JS MOROKA

MUNICIPALITY

DR JS MOROKA MUNICIPALITY

MEC FOR COGTA, MPUMALANGA PROVINCE

MINISTER OF COGTA

and

THAMMY GOODWIN KUBHEKA

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

RESPONDENT



JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] On 27 March 2020 acting Judge Roelofse, in the main seat of this Division, handed down a judgment¹ in a matter where an attorney sought, on an urgent ex-parte basis, leave from the court to travel to Hofmeyer in the Eastern Cape to assist his elderly mother after his grandfather succumbed in a fire. He, amongst others, wished to attend the funeral of his grandfather. The court refused to come to the assistance of the distressed applicant and the court ruled that:

"... I would be authorising the applicant to break the law under a judicial decree – that no court can do"².

I align myself with the reasons provided by Roelofse AJ in the said judgment, more specifically where he addressed and discussed the

¹ Unreported case number 1079/2020 in the Ex-Parte application of Carel Willem van Heerden.

² Ex-parte van Heerden, supra, par 16.



reasons for the lockdown currently in force in the Republic of South Africa (RSA).

[2] The applicants in this matter approached the court on 23 March 2020 on an urgent basis, enrolling the application for hearing on 31 March 2020 at 10h00. The application was opposed by the respondent ("first respondent") and the Economic Freedom Fighters ("the second respondent"), apparently the official opposition in the second applicant's council, sought to join the proceedings at the eleventh hour. Both the first respondent's opposing affidavit and second respondent's the application for joinder was only handed up from the bar in court on 31 March 2020. Adv Matlala, representing the first respondent, informed the Court that the first respondent's opposing affidavit was served and filed on 24 March 2020.

[3] On 31 March 2020, after the legal representatives for the parties requested an opportunity to discuss the matter amongst them, after which I made a draft an order of court³ and recorded, albeit not in the

³ 1. The Rule Nisi hereby issue, returnable on the 7th May 2020 at 10h00, or as soon thereafter as the matter can be heard (NO 9 on the Opposed Roll); calling upon the respondents to show cause why the following interim order should not be made final.

2. The intervening party, the Economic Freedom Fighters is admitted to the proceedings as the second respondent.

3. The first respondent is hereby ordered to vacate the premises of the second applicant with immediate effect on 31 March 2020.

4. The first respondent is hereby interdicted and restrained from entering the premises of Dr J S Moroka Municipality or communicating with any official of the second applicant in any manner, shape or form in so far as the affairs of the second applicant are concerned with effect of 31 March 2020.

court order, that I will deal with the presence of all legal practitioners in court on the day of the hearing in a separate judgment at a later stage. The reason why I did not refuse to hear the merits of the matter, to the extent that I did, and made an order, returnable 7 May 2020, was because I deemed the application extremely urgent, and did not want to cause the residents of the second applicant to suffer one further day because the applicants and respondent was involved in an ongoing dispute (and litigation in this court) that did not concern the residents, but caused basic services to be severely disrupted, prevented the applicants to render basic services to the community and to comply with their constitutional obligations⁴.

-
5. The First Respondent, on good cause shown, may enter the second applicant's premises upon obtaining prior written permission from the Administrator.
 6. The orders in paragraphs 3, 4 and 5 hereof will serve as interdicts with immediate effect, pending the return date.
 7. Applicants are directed to file their answering and/or replying affidavits to the second respondent's application and/or answering affidavit within 10 days from the date of this order.
 8. The first respondent is directed to file any affidavit in response to the applicant's supplementary affidavit within 10 days of this order.
 9. The applicants are directed to file any replying affidavits within 5 days from the date upon which the respondents filed answering affidavit as per paragraph 7 and 8 above.
 10. The application is postponed to the opposed motion roll of 7 May 2020.
 11. It is hereby ordered that should this matter be settled on the date of hearing, parties run the risk of punitive cost order and/or forfeiture of a day fee, against any person responsible for the late settlement of the matter and any such costs order may include payment out of pocket by whoever is responsible for the late settlement of the matter.
 12. Costs are reserved.

⁴ 152 Objects of local government

(1) The objects of local government are-

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).



THE ISSUES AND THE LAW

[4] Before I formally started with the court proceedings I was provided with documentation by the practitioners that appears on behalf of the parties, purporting to be "permits" issued to them in terms of Regulation 11B (1)(a)(i) and (3) of the Regulations by the Minister of Co-Operative Governance and Traditional Affairs ("The Minister") on 25 March 2020⁵, read with the now withdrawn Directives ("the Directives") by the Minister of Justice and Correctional Services⁶ ("The Justice Minister"). In the directives the Justice Minister dealt with certain permissions and permits that has to be obtained by legal practitioners ("Practitioners") in the event of essential services has to be rendered by the. Much of the events were overtaken by an amendment⁷ to the Regulations by the Minister on 04 April 2020 in terms whereof the travelling of essential service workers, which includes practitioners, across provincial borders were authorised, though subject still to a permit being obtained. In the exceptional event that a permit cannot be obtained practitioners may still travel to the court in urgent and essential services, provided certain conditions are complied with by him/her⁸. The amended regulations were however not made effective retrospectively. I am of the opinion that the intention of the Minister was not to give it retrospective force, as

⁵ Government Notice R398 in Government Gazette 25 March 2020 no43148.

⁶ Government Gazette 26 March 2020 no 43167 notice no 418.

Amendment to the Regulations issued in terms of section 27 (2) R 446 Government Gazette 34199 of 4 April 2020.

⁸ See paragraph 45 *infra*.



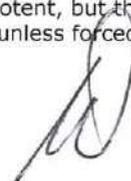
it deals exclusively with matters that may occur in future (funerals, travelling of essential workers, trading etc.), and is not concerned about the past⁹. Therefore the limitations, and requirements that existed on 21 March 2020 are still relevant to the conduct of the legal practitioners leading up to, and during the appearance in this court on 31 March 2020.

[5] Although the application was issued on 23 March 2020 it was only scheduled for hearing on 30 March 2020. On 15 March 2020 the Minister, as designated in terms of section 3 of the Disaster Management Act, Act No 57 of 2002 ("the DMA"), declared a state of disaster in the Republic of South Africa ("RSA") in terms of section 27(2) of the DMA.

[6] The Regulations were made by the Minister on 17 March 2020 to prevent, alleviate, constrain or minimise the effects of the disaster. The disaster is the outbreak, and spreading, of the Corona Virus ('COVID-19') that caused a total lockdown to be implemented by the President of the

⁹ *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) (2006 (2) SACR 319; 2007 (9) BCLR 929; [2005] ZACC 22) para 26; *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) (2006 (2) SACR 319; 2007 (9) BCLR 929; [2005] ZACC 22) Paragraphs [46] & [48]; *Curtis v Johannesburg Municipality* 1906 TS 308 at 311:

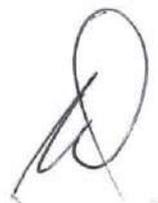
'The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the Courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion.'



Republic of South Africa from 24h00 on Thursday 26 March 2020 until 16 April 2020 at 24h00. In terms of section 27(2)(f) of the DMA, the Minister may provide for the regulation of movement of persons and goods from within the disaster-stricken area. On 25 March 2020 the Minister, after consultations with the Minister of Health and the Cabinet, published amendments to the regulations ("The COVID-19 Regulations", and I will refer to these regulations simply as "the regulations" in this judgment). These regulations are also commonly known as the lockdown regulations.

- [7] The regulations restrict the movements of individuals and goods severely, and severely restricts and impact on almost all of the fundamental rights in chapter 2 of the Constitution. These include: human dignity (section 10); freedom of security of the person (section 12); privacy (section 14); freedom of religion and believe of opinion (section 15); freedom of expression (section 16); freedom of assembly, demonstration, picket (section 17) and petition; freedom of association (section 18); freedom of movement and residence (section 2); freedom of trade, occupation and profession (section 22); and education (section 29). The final lockdown regulations severely and directly limit the aforesaid rights¹⁰.

¹⁰ *Ex-Parte van Heerden, supra*, par 34.



- [8] In terms of the regulations all persons are for the period of lockdown (26 March 2020 to 16 April 2020) confined to his/her places of residence, *unless strictly for the purposes of performing an essential service obtaining an essential service or goods, collecting a social grant or seeking an emergency, life-saving or chronic medical attention*¹¹.
- [9] Gatherings, apart from funerals are prohibited, and the movement between Provinces and between Metropolitan and District areas is prohibited¹².
- [10] In terms of Regulation 11G, the contravention of the restriction of movement, or any of the Regulations, was declared a criminal offence and a perpetrator, if convicted, liable to a fine or imprisonment or both.
- [11] Pursuant to these Regulations, the Justice Minister, on 26 March 2020, issued directions in terms of regulation 10 of the Regulations under the DMA¹³ ("The Directives").

¹¹ Regulation 11B.(1)(a)(i).

¹² Regulation 11B.(1)(a)(ii), (iii) and (iv).

¹³ Regulation 43167, Government Gazette 26 March 2020, notice 418 (the directives).



[12] The purpose of the directives is to address, prevent and combat the spread of COVID-19 in all courts, court precincts and justice service points in the RSA. The directives will, unless otherwise dictate, apply for the total lockdown period.

[13] I pause to mention that these directives, as mentioned earlier in this judgment, were withdrawn by the Justice Minister on 31 March 2020 and replaced by other directives on 31 March 2020¹⁴ which I will deal with later in this judgment.

[14] As the services of legal practitioners and the courts were declared essential services, it may from time to time happen that legal practitioners should have to travel from their homes to court to attend urgent and essential matters, both criminal and civil. The normal business activities of legal practitioners were also disrupted as they, as well as their staff, in terms of the regulations, are restricted to their places of residence for the duration of the lockdown.

[15] Only in exceptional circumstances may legal practitioners leave their residences, other than to purchase food, medicine or attending medical

¹⁴ Government Gazette no. 43191 of 31 March 2020. GN 440,



emergencies. These directives must be read with the final lockdown regulations.

[16] In the regulations, essential services is defined as:

"... services as defined in section 213 of the Labour Relations Act 1995 (Act No 66 of 1995), and designated in terms of section 71(8) of the Labour Relations Act, 1995 (and which designation remains valid as at the date of publication of this regulation), as listed in paragraph B of annexure B as may be amended from time to time".

[17] Paragraph B of annexure B, item 16, determines that essential services shall include and be confined to, amongst other:

"16. Services related to the essential functioning of courts, judicial officers, the Master of the High Court, sheriffs and legal practitioners required for that services".

[18] In terms of regulation 11B (2):

"The head of an institution must determine essential services to be performed by his/her institution, and must determine the essential staff who will provide those services: provided that the head of an institution



may delegate this function as may be required in line with the complexity and size of the business operation".

- [19] Further, and in the event that a legal practitioner must perform an essential service, he/she must be duly designated in writing by the head of an institution in a form that corresponds with form 1 in annexure C to the directives¹⁵.
- [20] Only the Minister may issue directions to provide further conditions that will apply to activities in respect of the restriction of movement, or lockdown and the exception in respect to essential services in Regulation 11G (1). The Regulations may be varied, depending on the circumstances¹⁶. To date hereof the Minister has not provided any further conditions to the regulations, therefore the initial regulations still apply to the procedures in urgent court proceedings and more specifically the proceedings on 31 March 2020 in this court.
- [21] I now turn to the directives by the Justice Minister. The directives regulate the legal profession, and their appearance in the country's courts, during the lockdown. *Essential service* in the directives is defined in the

¹⁵ Regulation 11G (3).

¹⁶ Regulation 11G (7).



same terms as in the Regulations and the "Head of Institution", for purposes of the directives, is defined as:

"... the head of an Institution as defined in the amended regulations, and for the purposes of these directions means the Director of a Provincial Legal Council established in terms of section 23 of the Legal Practice Act, or her/his delegated authority as the case may be."

(Own emphasis).

[22] In order to avoid personal contact between any of the role players in the Justice system, to avoid, combat and prevent the spread of COVID-19 in courts, the directives restrict access to the court precincts and justice points to persons with a *material interest* in a case, subject to certain exceptions and social distancing requirements¹⁷.

[23] Entering into courts and court precincts is only allowed in essential and urgent matters¹⁸, and the number of persons is also regulated. The gravity of the Government's concerns about the spread of COVID-19 appears from the strict limitations of attendance to courts and court precincts during the lockdown.

¹⁷ Directive 2(a).

¹⁸ Directive 2(b)

[24] The Justice Minister deemed the attendance of court proceedings by foreigners, and even by foreign language interpreters from other provinces, undesirable to the extent that foreigners may only attend courts if the matter is urgent, and after they have been screened and found not be infected with COVID-19¹⁹. In the event that a foreign language interpreter is not available in the relevant province where the court proceedings are to take place, arrangements are to be made for such services by way of audio-visual interpretation²⁰.

[25] No person infected with COVID-19, who has been exposed to persons from a high-risk country, or who have been in contact with persons who were exposed to persons who have tested positive for COVID-19 is allowed in courts or court precincts²¹.

[26] No criminal trials will proceed during the lockdown period and such cases, where accused person is detained, will be postponed by audio-link or special arrangements. No awaiting trial accused will appear in courts. The situation is dire to the extent that no contact with accused persons, court personnel and practitioners seems to be allowed²².

¹⁹ Directive 2(d).

²⁰ Directive 2(g).

²¹ Directive 2(e) and (f).

²² Directive (3).

[27] Civil matters enrolled during the lockdown period shall not proceed but postponed, unless identified as urgent **and** essential services. The heads of court retain a discretion to authorise hearings of matters through teleconference or video conference or other electronic mode, which dispenses with the necessity to be physically in the court room²³. The chief Registrar must inform the parties and their legal representatives of the new court date, in writing²⁴. In this Division, in the case of criminal and civil matters a directive by the Judge President have already been implemented. All criminal matters were postponed to two weeks after the 16th of April 2020 after the trial dates were anticipated by the Director of Public Prosecutions. All civil urgent, non-essential matters were postponed to 21 April 2020 by simply sending a letter to the attorneys involved²⁵.

²³ Directive 5(a)

²⁴ Directive 5(b).

²⁵ TEL: (013) 492 2213

THE HIGH COURT OF SOUTH AFRICA

LOCAL SEAT MIDDELBURG

c/o BEYERS NAUDE AND OR TAMBO STREETS

ROOM 5

26 MARCH 2020

Re: MEASURES INTRODUCED TO AVOID THE SPREAD OF COVID-19
URGENT COURT: BORMAN VS DE BRUYN + 9 OTHERS. CASE NO: 1189/2020

The above matter which is set down for hearing on Tuesday 7 April 2020 refers.

Trusting that by now you are aware of the Practice Directive issued by the Judge President of this Division dated 25 March 2020. Paragraph 4 of the Directive provides as follows: "*During the shutdown, only extreme urgent matters that cannot wait until the expiry of the shutdown, will be entertained. In such matters, please contact us on cell phone number 081 737 7649*". Under the circumstances, it is hereby directed that this matter be postponed to 21 April 2020 at 10h00, the first Tuesday after the shutdown.

[28] Even the Legal Aid Board's services are limited to urgent and essential trial cases during the lockdown²⁶.

[29] Legal practitioners and officers of court may travel during the lockdown period, provided they comply with the strict requirements in the directive. In applying the directives, the regulations must be kept in mind. Practitioners are not allowed to cross provincial borders or to travel from Metropolitans to District areas.

[30] In terms of Directive 9, the enforcement officers must allow judges, magistrates, legal practitioners and sheriffs to commute between their place of residence and the court within their area of jurisdiction for purposes of performing essential services upon presentation of proof of appointment to such office²⁷. I repeat that these directives were withdrawn, and more specifically directive 9 was substantially amended. The "old directives" did not apply to the proceedings before this court on 31 Marg 2020. Not only is such travel restricted to performance of

Kindly acknowledge receipt hereof.

S.S MPHAHLELE
JUDGE OF THE HIGH COURT

²⁶ Directive 6.

²⁷ Directive 9.

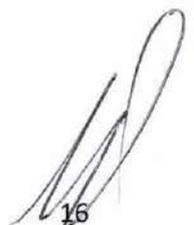


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essential services but also calls for production of such officer's appointment to office. Put differently, a practitioner's admission certificate must be produced, unless the Director of the relevant Provincial Legal Practice Council certifies, in the permit that he issues to practitioner, that such practitioner is a practicing legal practitioner. That is not where it ends. In terms of directive 10, the legal practitioners who needs to attend to urgent or essential service matters during the lockdown period, must also produce a permit issued by the Provincial Legal Practice Council's Director in terms of Regulation 10 (a) (i) to (v). This permit can only be issued to a practising legal practitioner if he/she is appearing in a matter enrolled for hearing and is classified as urgent in terms of the directives²⁸. I pause to mention that it seems as if the Justice Minister watered down the initial requirement for the rendering of services in terms of directive 5(a) from being "*urgent and essential service*", to "*urgent*" in directive 10 (a) (iii). However, in directive 9, the Justice Minister once again refers only to "*essential services*". Both the Regulations and directives are not models of clarity when it comes to the drafting thereof, but it is clear from a reading of both that what was intended by the Ministers was that travelling by practitioners should be the exception, and not the rule. It should be reserved for truly urgent matters that involves essential services as defined by the Minister in the Regulations²⁹.

²⁸ Directive 10(a)(i); (ii); (iii).

²⁹ Regulations Annexure B.



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[31] From the directives, read with the regulations, it is apparent that the director of the relevant Legal Practice Council may only issue a permit to legal practitioners if:

- (1) he/she is a practising legal practitioner;
- (2) who must appear in a case identified as urgent and essential services under regulation 11A(B)(16).

[32] This permit can only be utilised by the legal practitioner with a form of identification, which includes confirmation by the relevant director, signing the certificate, that the practitioner is on the counsel's list of practising legal practitioners³⁰, which in identification must be presented when the permit is used. If such an identification is not presented, or a permit is not available, such practitioner shall return to his/her residence according to regulation 11B(1)(a)(i) for the rest of the lockdown³¹.

[33] The court may, in the interest of justice, order that the application of "*any provision in these directions*"³² be deviated from. It is clear that a court may only deviate from the provisions of the directives issued by the Justice Minister, and not from the regulations. The Justice Minister cannot authorise the court to deviate from the regulations as the directives are

³⁰ Directive 10(a)(iv).

³¹ Directive 10(a)(v).

³² Directive 12.

always subservient to the regulations and, should the Justice Minister endeavour to authorise, or deviate therefrom, such a directive will be *ultra vires*. To read into the directives that the territorial travel limitations may be “condoned” by a court if the interest of justice so demand, will amount to re-writing the regulation, which a court may not do. The wording of regulation 11 B (1) (a) (iii) and (iv) is very clear. I do not have to resort to the well-known rule of interpretation³³ to establish what the Minister’s intention was when she promulgated it. To read into directive 12 that the court may deviate from the limitations will be tantamount to judicial overreach³⁴. It should be left to the Minister (legislator) to amend the Regulation, than for the court to attempt to attribute a meaning to the regulations that is not justified by the clear wording thereof³⁵.

[34] As dealt with in the *Ex-Parte* van Heerden matter, the whole purpose of the regulations is to avoid personal contact between the citizens of South Africa in order to prevent the spread of the COVID-19 virus. To that effect these strict measures were implemented, and the regulations must be interpreted accordingly. There shall be no travelling across provincial borders, or between metropolitans, and district areas. Any travelling done by practitioners shall be in terms of the regulations, duly supplemented by the directives. If a practitioner is not in possession of a

³³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13)

³⁴ De Bruyn NO v Karsten 2018 JDR 1707 (SCA) AT PARAS [27] & [28].

³⁵ De Bruyn NO, supra, at para [28].

permit that was properly issued by the relevant authority, such travelling will amount to a breach of the regulations (and directives), will be illegal, the practitioner will be left exposed to possible criminal prosecution, and investigation by the Legal Practice Council into possible professional misconduct.

THE HEARING ON 31 MARCH 2020

[35] At the hearing of the urgent application on 31 March 2020 the following appearances were noted on behalf of the respective parties:

[35.1] First applicant – Advocate Zondo (Johannesburg Bar);

[35.2] Second to fourth applicants – Advocate Laka SC with Advocate Zwane (Pretoria Bar);

[35.3] First respondent – Advocate Matlala (Mpumalanga Bar);

[35.4] Second respondent – Advocate Ncongwane SC (Pretoria Bar).

Other individuals and attorneys were also present in court at the hearing who indicated that they were legal practitioners involved in the matter, and indicated that they were in possession of permits. Those that were not in possession of permits at court undertook to provide my secretary with such permits before 12h00 on 1 April 2020, which permits were not supplied to her.



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[36] The other individuals and practitioners present in court were:

[36.1] Mr S Setsoalo;

[36.2] Mr L Rumano;

[36.3] Mr T Rampatla;

[36.4] Me P Kwaza;

[36.5] Mr H Shilenge; and

[36.6] Mr T.S Tshukwane.

I accept that apart from Mr Setsoalo who is a practitioner in Middelburg Mpumalanga, the other practitioners are from, either Mbombela, Gauteng, or the Mpumalanga districts.

[37] I will deal with the respective legal representatives "*permits*", or lack thereof in due course.

[38] Before the proceedings started, I raised the concern and enquired from the counsel in court whether their permits complied with the requirements of the regulations and directives. Although I was assured by counsel that it did comply, I could establish by merely glancing at the "*permits*", that there was non-compliance by all, but one of the legal practitioners in court, with the directives and regulations. I will deal with the non-compliance later on.

THE PURPOSE AND AIM OF THE DIRECTIVES AND REGULATIONS

[39] COVID-19 had, and is still having, a devastating effect on our country's economy and human capital. It will have far reaching ramifications on our country in the future as well. In order to "*flatten the curve*"³⁶ the President of the Republic, duly advised by his cabinet, declared a total lockdown of all RSA citizens in order to prevent the further spread of the deadly COVID-19.

[40] The regulations were made to keep South African citizens at home and safe for at least 21 days in order to prevent the uncontrolled spread of the viral infection. Should the citizens not heed the call, the pandemic might reach such proportions that South Africa's health system would not be able to contain the spread thereof, nor treat those infected properly. Italy, and Spain are examples of countries where the pandemic ravaged the population. These are so-called first world countries with health care systems that are of very high standards. As can be gleaned from the deaths in these countries, and all over the world, the measures implemented by our Government are not only essential, but critical, not only for the Governments' sake but for every individual's safety and health.

³⁶ Flatten the curve: what does it mean and why is it important?
<https://www.harpersbazaar.com/uk/culture/culture...>

[41] By restricting movement in the country and limiting the movement between various provinces with different rates of infection, the Government is preventing the spread of COVID-19, and thereby the risk of possible large-scale death amongst the population in the RSA. Note can be taken that Gauteng has the highest infection-rate in South Africa. As at date of writing of this judgment Mpumalanga had only had 15 reported cases of COVID-19 whilst Gauteng had 533 cases.

[42] The ratio behind the regulations prohibiting movements across provincial borders makes perfect sense. The Northern Cape is the province least affected by COVID-19. By preventing Gauteng residents from travelling to Northern Cape or Mpumalanga the spread of COVID-19 is controlled. If no Gauteng resident travels across the provincial border to Mpumalanga, the possibility of the spread of the Corona virus from the Gauteng citizens to the residents Mpumalanga is eliminated. The same can be said about travelling between Metropolitans and country districts.

[43] The Justice Minister, in the ("old") directives (and the current directives) did not interfere, or tried to interfere, with the regulations by the Minister.



[44] On 31 March 2020 after the finalisation of the hearing, the Justice Minister issued directives that replaced his initial directives³⁷. The “new” directives are not applicable to the matter that I was ceased with. The “new” directives did not vary the initial directives substantially, although there are certain pertinent differences.

[45] Amongst others, if a practitioner is not able to secure a permit from the Director of the Legal Practice Council, he/she may travel to a court if he/she has in his/her possession and presents:

[45.1] An original copy of the practitioner's admission certificate;

[45.2] Proof of identification; and

[45.3] Confirmation by the Registrar or Clerk of the relevant Court, that the matter is on the court roll for that particular day, that the practitioner is on record as official legal representative in the particular matter, and that the matter is urgent or essential³⁸ (Own emphasis).

³⁷ Government Gazette Notice No 43191 of 31 March 2020 GN440.

³⁸ New directive Government Gazette No 4391 of 31/03/20. Directive no 9(1)(b)(i), (ii) and (iii).



[46] Even from the amended directives, which only became effective on 31 March 2020 ³⁹, it is abundantly clear that essential services by practitioners are limited to extremely urgent and essential matters.

[47] I understand the exception in the new directive 9(b) (i) to (iii) to cater for that in instances where a practitioner, for reasons beyond his/her control, after having applied with the relevant Director of the Legal Practice Council for a permit, failed to obtain one, he/she may the proceed to travel in order to assist clients with urgent and essential matters, provided he/she have complied with the requirements as set out in paragraph 45 of this judgment. The provision in paragraph 45. *supra*, does not provide a blanket authorisation, or *carte blanche*, to practitioners to travel and render services in the normal course as if it is business as usual, without first endeavouring to obtain a permit from the Director of the Legal Practice Council. Only in the unforeseen, and exceptional, event that a permit cannot be timeously obtained from the Director of the Legal Practice Council, may the alternative procedure be reverted to by practitioners. Put differently, the alternative procedure is the exception, and not the rule. It should not be abused by practitioners, as such abuse will not be tolerated by the courts, and may amount to unprofessional conduct. I mention this in passing as I am not called upon to interpret the relevant section of the "new directive. In any event, the "new"

³⁹ New Directive 14

directives had no effect on the limitations placed on cross border, and travelling between Metropolitans and districts, as was clearly provided for in the Regulation⁴⁰

[48] At risk of repeating, it is clear that the regulation, read with the directives' main purpose is to restrict the movements of persons. More so by prohibiting the unnecessary movement of people between the provinces and metropolitan and district areas. Not even a foreign language interpreter may cross provincial borders even if his/her services is needed during the lockdown. In terms of the now withdrawn regulations practitioners were also only allowed to travel to court within their jurisdictions⁴¹.

[49] Even after the amendment of the directives the limitation on travelling in terms of the regulation remains effective and was in effect on 31 March 2020. The practitioners referred to above paid no attention to, alternatively ignored, alternatively failed to understand the regulations, read with the directives to the extent dealt with hereunder.

INDIVIDUAL LEGAL REPRESENTATIVES AND THEIR PERMITS (OR LACK THEROF)

⁴⁰ Regulation 11 b (1) (a) (iii) & (iv).

⁴¹ See directive 9.



Advocate Zondo (Johannesburg Bar)

[50] Advocate Zondo failed to present a permit to my secretary, despite being requested to do so by her prior to the proceedings and during the proceedings by me.

[51] The practitioners had failed to present the court with valid permits and was, as stated earlier, afforded until 12h00 on 1 April 2020 to present their permits via email to my secretary. Despite this indulgence no permit was received by her or me.

[52] No only did Mr Zondo ignore the regulations by travelling across the provincial borders (Gauteng to Mpumalanga on 31 March 2020), but he simply failed to obtain a permit from the Director of the Legal Practice Council.

[53] Breaching the provisions of the regulations, as stated earlier, amounts to a criminal offence. I am also of the opinion that Mr Zondo's conduct was unprofessional, seen in light of the code of conduct of legal practitioners⁴².

⁴² Code of conduct of legal practitioners in terms of the Legal Practice Act 28 of 2014; GEN N81 of Government Gazette 40610/10/2/2017.

- [54] In terms of clause 14.10.2 and 3 of the code of conduct, counsel shall uphold the highest standards of integrity, accountability and diligence in carrying out all their professional responsibilities. They should further understand that the profession of advocacy has fiduciary duties to the courts.
- [55] After a practitioner's admission as such by a court, an oath is taken by the practitioner in terms whereof he/she swears allegiance, in court, to the RSA and swears to uphold the laws of the Republic of South Africa. He/she must remain acquainted and uphold the laws and regulations which includes the DMA and the current lockdown regulations and directives.
- [56] Legal practitioners, as members an honourable profession that interprets and applies the laws, must set an example to other citizens, and dare not flout with it. They must be seen to adhere to the law. Any breach of the law, and regulations in an open fashion will cause the general public to lose faith in the legal profession and system.
- [57] In this matter Mr Zondo and the other practitioners dealt with hereunder, not only acted recklessly by travelling across the border in breach of the regulations and openly defied the regulations and directives in terms of

the DMA. This amounts to contemptuous conduct and the court cannot be seen to approve it.

[58] Mr Zondo was not (legally) allowed to travel to Middelburg from Johannesburg/Gauteng and to represent the first applicant in the proceedings. He is therefore not entitled to charge his client for preparation, travelling and attending the court procedures on 31 March 2020. His conduct must also be reported to the Gauteng Legal Practice Council or such counsel that has jurisdiction over him. To that effect, the order of this court will reflect an instruction to the registrar to provide a copy of this judgment to the Director of the Legal Practice Council.

Adv Laka SC, and Adv LP Zwane

[59] Advocate Laka SC appeared, together with his junior, advocate Zwane, and represented the second to fourth applicants. I pause to mention that I was informed in court by Mr Laka SC that they had both travelled from Pretoria, Gauteng, to attend the proceedings on 31 March 2020.

[60] They presented "*permits to perform essential services*" purporting to constitute permits issued in terms of regulation 11B (3), to the court. These "*permits*" were both issued by:

"Sindisiwe P Xulu



Director-General

No 7 Government Boulevard Makhonjwa Building

Riverside Park

Extension 2

Mbombela". (Own emphasis)

[61] The "permit" simply states that:

Laka AP ID 550415415082, "performs an essential service", and was signed by somebody. The stamp on the document is that of the Director General – support, with date 27/03/2020. No identification was handed to court, as required by the directives⁴³.

[62] Advocate Zwane's "permit" mirrors Mr Laka's, save for the fact that Mr Zwane's name is inserted, instead of Mr Laka's on the "permit". Without repeating what was said about the ethical obligations of counsel, it is trite that both counsels are subject to the same regulations and code of conduct as Mr Zondo.

⁴³ Regulation 10 A (iv).



[63] Mr Laka, having been awarded senior *consultus* status by the President of our country, has a more onerous obligation to the court to comply with this Country's laws. He also acted as a Judge in this Division of the High Court.

[64] In his position as the leader of the 2nd to 4th applicant's defence team, he should have made sure that their travel documentation complied with the strict requirements of the regulations and directives. The nature of the application for a permit holds that Mr Laka SC (and Mr Zwane) should have approached the Director of the Gauteng Legal Practice Council for the permit. The Director-General-support is, and can, by no stretch of the imagination, on the reading of the regulations and directives, be understood to be "*head of institution*" in relation to the two advocates as legal practitioners. They are not employed by the Director-General.

[65] Both practitioners travelled to Middelburg thereby openly flouting the regulations and directives, and in the process, possibly committed not only professional misconduct, but also criminal offences. To worsen matters, Mr Laka tried to convince me that their "*permits*" are legally compliant. They crossed provincial borders, travelled from a metropolitan area to a district area, and to rub salt into the wounds of

the legislature and Ministers, *without a valid permit*. Their permits are not permits at all.

[66] Their conduct, is to say the least, unacceptable. Both counsels appeared for Dr JS Moroka Municipality, Provincial Department and the Minister of the Department of Co-Operative Governance and Traditional Affairs. One also questions why these respondents deemed it necessary to appoint counsel (two counsels) when the appointed administrator (first applicant) was already represented by Advocate Zondo. The relief sought by the first applicant is supported by the other applicants.

[67] It further appeared as if Messrs Laka SC and Zwane was appointed by different entities for exactly the same matter, and relief. I have not noted a formal notice of appointment of attorneys of record on behalf of the second to fourth applicants in the court file. Mr Zondo, and his instructing attorney only acted for the first applicant.

[68] The question begs who instructed Messrs Laka SC and Zwane, unless they are practising as advocates with fidelity fund certificates? That is a question for the legal Practice Council to investigate.

A handwritten signature in black ink, consisting of a large, stylized letter 'A' with a long, sweeping tail that loops back towards the top of the letter.

[69] Having established that Messrs Laka SC and Zwane, attended court without the permits, I find that they are also not entitled to charge their clients any fees for preparation, travelling or appearance in court on 31 March 2020. Further the Registrar of this court will also be directed to provide a copy of this judgment to the Gauteng Legal Practice Council.

Advocate Matlala

[70] Mr Matlala is an advocate practising in Mbombela, and a member of the Mpumalanga Bar Association. He represented the respondent, who became the first respondent after the parties agreed to the terms of the Rule Nisi⁴⁴ and agreed that the Economic Freedom Fighters be joined as second respondent in the case.

[71] Mr Matlala presented the court with a permit to perform essential service in terms of regulation 11 B (3) issued by the Legal Practice Council of Mpumalanga. It was issued on 30 March 2020 by one Riaz Lorgat being the Director of Mpumalanga Provincial Practice Council. Annexed to the permit was a copy of Mr Matlala's identity document. Such identity document is a further identification required by the directives.

⁴⁴Footnote 3 *supra*



[72] Mr Matlala is the only practitioner that appeared in this court that complied with the requirements of the Regulations and Directives.

Advocate Ncongwane SC

[73] Mr Ncongwane SC hails from Pretoria, Gauteng. He holds chambers at Brooklyn Circle Chambers. Mr Ncongwane presented a "permit" to the court, signed by Mr Johan van Staden, the Director of Gauteng Practice Council on 20 March 2020. In terms of the "permit" Mr van Staden certified that Mr Ncongwane is entitled to perform such essential services as contemplated in Regulation 11A(B)16 i.e., essential legal services and is authorised to do so. The "permit" simply refers to:

"Case number

1170/2020 – High Court Middelburg Date

31 March 2020"

This permit, being issued by the Provincial Legal Practice Council of Gauteng does not comply with the requirements of the regulations, read with the directive. The "permit" authorised Mr Ncongwane to travel from Pretoria, a declared metropolitan, to a district (Mbombela.), and goes further by authorising him to cross the border between two provinces, namely Gauteng and Mpumalanga. This is in direct breach of Regulation 11 B (a) (iii) and (iv), as discussed earlier in this judgment. He accordingly attended court on 31 March 2020 without a permit.

[74] Mr Ncongwane should also not be entitled to his fees for the day nor for travelling and preparation. His conduct should equally be referred to the Legal Practice Council as dealt with earlier.

Mr Setsoalo

[75] Mr Setsoalo, is a local practitioner, and attended court on behalf of the second respondent. He could not produce a permit as required by the Regulations and Directives when asked to do so. Mr Setsoalo was one of the individuals that I afforded an opportunity to provide me with the permit. The permit received only by my Secretary on 2 March 2020, was only issued by the Director of the Legal Practice Council on **01 April 2020**, whilst he confirmed with my Secretary (as did Mr Rampatla) that their permits were with them, but they left it in a vehicle that left in the meantime. It is apparent that Mr Setsoalo went about very economical with the truth. Mr Setsoalo, a senior attorney in Middelburg, is the last person that this court expected to blatantly ignore the requirements of the regulations and directives, set for his attendance at court. As one of the senior legal practitioners in town, it is expected of him to set an example to junior practitioners and more specifically the candidate attorneys in this Court's jurisdiction.



[76] His conduct by not even attempting to obtain a permit from the Director Mpumalanga Legal Practice Council, is not acceptable. He did not have a permit to attend court on 31 March 2020, and compounded his problem by not being truthful about it.

[77] As such, Mr Setswalo will not be entitled to claim any fees in respect of preparation and/or attendance at court on 31 March 2020.', and the Registrar will also be directed to send this judgment to the Legal Practice Council

Me P Kwaza

[78] Me Kwaza produced a "permit" to the court, issued by her employer, SSM attorneys, who is the first applicant's attorneys. This "permit" was signed at Randburg on 28 March 2020 by somebody, and the firm SSM attorneys' stamp appears on the "permit". The purported "permit" is not compliant with the relevant legal requirements, as discussed earlier in this judgment. Her employer is not a head of institution, and the " permit" was not granted by the Director of the Gauteng Legal Practice Council, the relevant council with jurisdiction, as her employer's firm, according to the particulars in the "permit", is located in Randburg. Therefore, Me Kwaza also attended court without being in possession of a valid permit as discussed above.



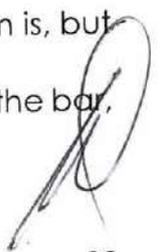
[79] Although Ms Kwaza might only be an employee of SSM Attorneys, she is a legal practitioner, and should have studied the regulations and directives in order to ensure that she is compliant, prior to travelling to Middelburg to attend court. Her employer is also to blame. In the process she crossed a provincial border (Gauteng to Mpumalanga), and also travelled from a metropolitan area to a district.

[80] As a result her attendance at court on 31 March 2020 was also illegal, and her conduct possibly a breach of the code of conduct of legal practitioners.

[81] Ms Kwaza, and SSM Attorneys should suffer the same fate as the other practitioners, as will appear from the order I will make.

Mr Hlulani Shilenge

[82] TMN Kgomo Attorneys presented Mr Shilenge with a "permit to perform essential service" which was signed by somebody. This "permit" is apparently also signed and issued by his employer, TMN Kgomo and Associates Incorporated. They are situated in Evander Mpumalanga. I am not aware what Mr Shilenge's position with the attorney's firm is, but from the plethora of documents, and affidavits, handed up from the bar,



I noticed that the firm acted as first applicant's local correspondent in the matter.

[83] The "permit" issued by his employer, is not a valid permit. Mr Shilenge was not entitled to travel to Middelburg on 31 March 2020, and his attendance of the court proceedings on 31 March 2020 illegal. He and his employer must suffer the same fate as the other practitioners. He and his employer will accordingly not be entitled to charge their client any fees in respect of preparation, travelling or attendance of court on 31 March 2020, and this judgment must also be provided to the Legal Practice Council by the Registrar of this court.

[84] Mr GS Thukwane only provided this court with "form B", a declaration of citizens' movement in exceptional cases. It was apparently signed before a member of the South African Police Services in Siyabuswa, Mpumalanga. Although the document states (in paragraph 8 thereof) that the reason for travelling is to attend court in Middelburg, it does not constitute a permit as required by the Regulations and directives at all.

[85] I am not aware whether Mr Thukwane is a legal practitioner, or or an employee of any of the applicants.

[86] In the order that I will make I will issue a directive against Mr Thukwane, amongst others, to provide me with the necessary information, and if necessary, a supplementary order will be issued in respect of his attendance at court on 31 March 2020.

MR RAMPATLA

[87] Mr Rampatla travelled from Belfast to Middelburg on 31 March 2020. His permit was only issued by the Director of the Mpumalanga Legal Practice Council on 01 April 2020. Therefore Mr Rampatla travelled to Middelburg illegally. His conduct, as Mr Setsoalo's will be referred to the Legal Practice Council. My Secretary was also incorrectly brought under the impression that he was in possession of a permit on 31 March 2020, but that it was in the vehicle with Mr Setsoalo's permit. Mr Rampatla will have to suffer the same fate as the other practitioners. He had no permit to travel to Middelburg. The belated attempt to obtain one is simply not good enough.

FURTHER INDIVIDUALS

[88] Ms L Romano attended court without a permit.

[89] Although no permit was provided by the said individual and I wanted to deal with it in this judgment, but in all fairness, I am not able to, unless she

provides me with further information. I will issue a directive in this regard in my order.

CONCLUSION

[90] I am, as stated by Roelfse AJ in *Ex Parte van Heerden*, supra, of the view that the present extreme circumstances caused by COVID-19, justifies the regulations and directives. It is justifiable and reasonable in an open democratic society. Although the legal practitioners render an essential service, they are still subject to the regulations issued by the Minister. There are cogent reasons why these regulations were made, and the directives issued by the Justice Minister. By blatantly ignoring them or acting without proper attention being paid to the Regulations and Directives the practitioners are not doing themselves, nor the citizens of the Republic any favours.

[91] As stated somewhere in this judgment, I was not supposed to even entertain the matter, should have directed all practitioners to return to their places of residence and remain there until the lockdown is over, and struck the matter off the roll. I could not do so as it was apparent from the founding affidavit that the residents of the Dr JS Maroka Municipality, because of first respondent's conduct, did not have proper access to potable water. Water is essential to remain hygienic, and

avoid infection by the novel Coronavirus. Had the parties not come to an agreement, which is contained in the rule nisi that issued⁴⁵, which enabled the second applicant to proceed to render services to its residents, I would have made an order as prayed for in some of the prayers in the notice of motion in order to enable second applicant to comply with their constitutional obligations towards the community.

[92] I am aware of only one judgment⁴⁶ in our Country dealing with the regulations, being that of Roelofse AJ. The applicant, albeit for different reasons, and on different facts, in that matter was also a legal practitioner. One would expect legal practitioners to study the relevant provisions regulating their conduct under the current exceptional circumstances before proceeding to court. The trying times that we live in affects everyone, and although one is sympathetic to the inconvenience that is being experienced by, amongst others, the legal practitioners, the regulations and directives are there for the good of everyone. The Constitution of the Republic of South Africa, 1996 is the supreme law of our Country. Section 165 of the Constitution vests this court with authority and the bounds within which that authority must be exercised. Section 165(2) of the Constitution provides as follows:

⁴⁵ See Footnote 3.

⁴⁶ Ex Parte Van Heerden, supra.



"The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[93] I accordingly make the following order:

[93.1] Mrs L Romano, and GS Thukwane, are hereby directed to provide this Court via email address Lovanstaden@gmail.com, with their duly issued permits (if available), and the particulars of the employers, before close of business 07 April 2020, failing which, the said individuals must file, before close of business on 07 April 2020, at the same email address, affidavits providing reasons why they were not in possession of the relevant permits, as required in terms of Regulation 11B(3), read with Direction 10 A (i) to (v) alternatively on what authority they attended court on 31 March 2020; and

[93.2] Any costs awards in this regard are reserved;

[94] Advocate Zondo may not charge his client, alternatively instructing attorneys' any fees or expenses in respect of preparation, travelling to, and from court, and attending court in Middelburg on 31 March 2020;

[95] Advocate Laka SC and advocate Zwane may not charge their client/s alternatively instructing attorney/s any fees or expenses, and in respect

of preparation, travelling to from court, and attending court in Middelburg on 31 March 2020;

[96] Advocate Ncongwane SC, and Adv Zwane may not charge their client/s, alternatively instructing attorney/s any fees or expenses in respect of preparation, travelling to and from attending court in Middelburg on 31 March 2020;

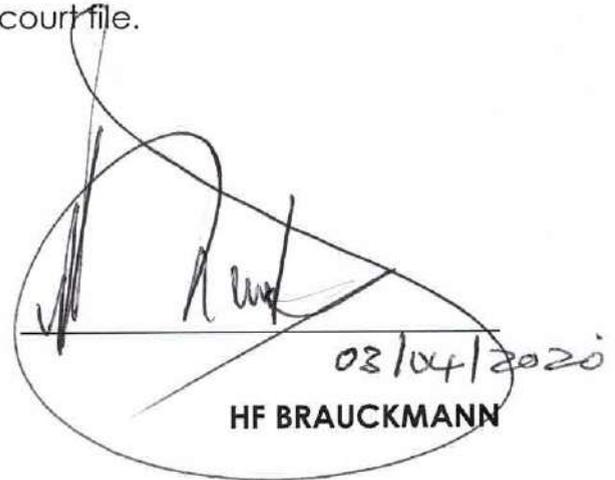
[97] Me P Kwaza, and TM Kgomo and Associates Inc, may not charge their clients any fees or disbursements for preparation, travelling to and from Middelburg, or appearing in Court on 31 March 2020;

[98] Messrs S Setsoalo and A Rampatla may not charge their clients any fees or disbursements for the preparation, travelling to and from Middelburg (if applicable), and appearance in court on 31 March 2020.

[99] The Registrar of this court is directed to send a copy of this judgment to the Directors of the Mpumalanga and Gauteng Legal Practice Councils.

[100] The attorneys acting on behalf of the individual applicants, and the attorneys for the respondents are ordered to serve a copy of this

judgment on their clients before the return date of the rule nisi on 07 May 2020, and file the sheriffs returns on the court file.



03/04/2020
HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE FIRST APPLICANT: ADV ZONDO

REPRESENTATIVE FOR THE SECOND, THIRD AND FOURTH APPLICANT:

ADV LAKA (SC)

ADV ZWANE

INSTRUCTED BY: QQ MKHATSHWA INCORPORATED

REPRESENTATIVE FOR THE RESPONDENT: ADV MATLALA

REPRESENTATIVE FOR SECOND RESPONDENT: ADV NCONGWANO (SC)

INSTRUCTED BY: THOBELA ATTORNEYS

DATE OF HEARING: 31 MARCH 2020

DATE OF JUDGMENT: 3 APRIL 2020