The Delegation of Parliament's Law-Making Power:

Democratic Alliance v Minister of Co-Operative Governance and Traditional Affairs
[2021] ZAGPPHC 168; 2024 (5) SA 463 (SCA)

1 Introduction

Section 27 of the Disaster Management Act (57 of 2002) (DMA) grants the national executive authority delegated law-making power to manage a disaster effectively, as occurred when COVID-19 was confirmed in South Africa in March 2020. Section 27 empowers the responsible Minister to make regulations on several aspects listed in section 27(2). These regulations permit the Minister to make subordinate legislation that has immediate and, in some cases, drastic and far-reaching implications. The Minister used the power granted to her in terms of section 27 to issue regulations to deal with the outbreak of COVID-19. For instance, the Minister was empowered to issue regulations that made it unlawful for persons to leave their homes except for very narrowly defined and specific reasons (s 11B of the Amendment of the Regulations issued in terms of section 27; GN R398 in *GG* 43148 of 2020-03-25). However, given the wide discretion awarded to the Minister, there were several examples where some regulations may have been either unlawful or irrational (see, for instance, *Esau v Minister of Co-operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) (*Esau*), where the court invalidated several regulations on the basis of irrationality).

The delegation of Parliament's law-making power to the executive authority has previously been considered by the Constitutional Court. In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (1995 (4) SA 877 (CC)) (*Executive Council*), Chaskalson P stated that "[i]n a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters" (par 51). As indicated in *Justice Alliance of South Africa v President of the Republic of South Africa* (2011 (5) SA 388 (CC)), the "primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details" (par 61). It is therefore accepted that although Parliament has sole legislative authority in the Republic of South Africa, it can, and in some cases must, delegate limited law-making powers to members of the executive authority or other functionaries to deal with a range of matters in a "modern, developed administrative state and its

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enormous bureaucracy" (Hoexter and Penfold *Administrative Law in South Africa* 3ed (2021) 32–33 365).

The question as to the lawful bounds of the delegation of Parliament's law-making powers to the executive authority was revisited in the High Court, Gauteng Division, and then the Supreme Court of Appeal in *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs* ([2021] ZAGPPHC 168; 2024 (5) SA 463 (SCA)). In this case, the courts examined whether section 27 of the DMA amounts to an excessive, and therefore unlawful, delegation of legislative power to the Minister of Co-operative Governance and Traditional Affairs (the Minister). The Democratic Alliance (DA) challenged the constitutionality specifically of section 27(2) of the DMA, arguing that it constitutes an unlawful delegation of law-making power. The DA's challenge was not concerned with any particular regulation that may have been issued in terms of section 27(2) of the DMA and was therefore general and objective.

The High Court was divided on the question of whether section 27(2) constitutes an unlawful delegation of law-making power. The majority of the High Court found that section 27 does not constitute an unlawful delegation of legislative power, while the minority held that section 27 does in fact constitute an unlawful delegation of legislative power owing to the overly broad discretion granted to the Minister to issue regulations. Although the Supreme Court of Appeal (SCA) unanimously held that section 27 does not constitute an unlawful delegation of legislative power, the minority did part ways with the majority on the question as to whether there was nevertheless sufficient parliamentary oversight built into the scheme of the DMA to save section 27 from constitutional invalidity.

The SCA, therefore, temporarily resolved the specific question of whether section 27 of the DMA constituted an impermissible delegation of legislative power. In this regard, it provided valuable insights for considering when delegation would be appropriate. This case note considers both the High Court and SCA decisions to further tease out the appropriate safeguards that should be in place for any delegation of Parliament's law-making power to the executive authority to be considered lawful. As Parliament's delegation of law-making powers to the executive authority raises sensitive separation-of-powers concerns, this note shows that although it is generally accepted that Parliament can delegate its law-making powers to the executive authority, the extent to which it can do so is strictly considered by the courts.

The courts also dealt with the question of whether the DMA was unconstitutional in that it does not expressly provide for parliamentary oversight. As a result, this case note also briefly considers the courts' reasoning on whether the absence of an express provision providing for parliamentary oversight rendered the DMA unlawful. This case note shows at the general level that the question about an express provision of parliamentary oversight where Parliament has delegated some law-making power is clearly separated from the question of whether a particular delegation is lawful. In the specific case of the DMA, however, the lack of provision for parliamentary oversight raised serious concerns about the constitutionality of the DMA, which would be relevant if the case were to be taken on appeal to the Constitutional Court.

Before turning to the discussion of the two decisions, a general overview of key court decisions regarding the delegation of Parliament's law-making powers is provided.

2 The delegation of law-making powers: general overview

Section 43(*a*) of the Constitution of the Republic of South Africa, 1996 (1996 Constitution) vests national legislative power in Parliament, which consists of the National Assembly and the National Council of Provinces. Members of the national executive authority are involved in the law-making process owing to their membership in the National Assembly, resulting in no strict separation of personnel in the executive and legislative branches (see De Vos and Freedman (eds) *South African Constitutional Law in Context* 2ed (2021) 62–63). However, in the South African understanding of the separation-of-powers doctrine, it is generally accepted that the functions assigned to one branch of government cannot be usurped by another branch of government unless justified based on the Constitution, which is supreme (see *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC) par 51). In this regard, plenary legislative power falls to Parliament and cannot be taken over by any other branch of government. However, members of the executive have limited law-making powers in that members of the executive can be granted the power in primary legislation to make subordinate legislation within the framework of the primary legislation (De Vos and Freedman *South African Constitutional Law in Context* 63). Since the making of subordinate legislation through delegation can be considered an affront to the separation-of-powers doctrine, the courts have given guidance as to when delegation to make subordinate legislation will be acceptable. The courts have since carefully scrutinised the limits and boundaries relevant to the exercise of delegated law-making power in order to consider its lawfulness.

As highlighted in the *Executive Council* case, there is no express constitutional prohibition on delegating legislative power. Chaskalson P subsequently argued that the difference between "delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body" (*Executive Council supra* par 51) becomes vitally important, as the former may be permissible, while the latter is not. In *Executive Council*, Chaskalson also stated that in order to give effect to its primary law-making power, it may at times be necessary for Parliament to delegate subordinate law-making powers to the executive authority (*Executive Council supra* par 62). As such, the Constitution (in that case, the Interim Constitution Act 200 of 1993) provides the authority for the delegation of subordinate law-making powers to the executive. Although Mahomed DP agreed with Chaskalson P that limited law-making powers may be delegated to the executive, Mahomed stressed that the question whether Parliament can delegate its law-making function must be considered in the specific context in which it occurs, and not in the abstract (*Executive Council supra* par 136). Mahomed

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DP set out certain factors that could guide the determination of whether a lawful delegation of law-making power is at play. According to Mahomed DP:

> "It depends inter alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally." (par 136)

Although Mahomed DP was of the view that there were factors in favour of the lawfulness of the delegation, there were important factors that made the delegation unlawful. These included an unbounded power of the delegatee to change basic structures of the primary legislation, which could also undo policy decisions made by Parliament. As the delegation of law-making power raises sensitive separation-of-powers issues, the award of such far-reaching primary law-making power to the executive does not accord with the constitutional dictates that provide for a division of power. Chaskalson P and Mahomed DP therefore agreed that Parliament may delegate law-making power to the executive, but Mahomed DP took a firm view that the lawfulness of the delegation depends on a range of factors, and importantly, whether there is sufficient control or supervision over the person to whom law-making power has been delegated. It also seems clear that although there could be instances where a wide discretion is granted to a delegatee to make secondary legislation within the framework of the primary legislation, a court would not consider as valid a delegation where the delegatee has the possibility of altering the primary legislation.

In *In Re Constitutionality of the Mpumalanga Petitions Bill, 2000* (2002 (1) SA 447 (CC)) (*Mpumalanga Petitions Bill*), Langa DP confirmed that "[a] legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement primary legislation" (par 19). Langa DP also referred to several factors that may be considered in determining whether the delegation of law-making power is competent. These include "the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power" (*Mpumalanga Petitions Bill supra* par 19). Subsequent cases have also confirmed that an arbitrary exercise of delegated power must be prevented. To this end, the discretion of the executive to issue regulations should not be overly broad or vague so that the executive is "unable to determine the nature and scope of the powers conferred" (*Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) par 26; see also *Dawood v Minister of Home Affairs* 2000 (3) SA 935 (CC) par 54, where the court indicated that guidance on the crafting of regulations could be provided in the primary legislation).

From the above, it is clear that Parliament may delegate the power to make regulations to another functionary, provided that such regulations are necessary to give effect to the primary legislation, and as long as the primary legislation sets out a proper framework within which that power may be exercised.

3 *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs: High Court*

3 1 Introduction

The DA instituted proceedings in the High Court attacking the constitutional validity of section 27 of the DMA on three grounds. The first ground argued was that section 27 constituted a delegation of Parliament's legislative power to the executive authority in a manner that provided the executive with "exceedingly broad powers to legislate over almost every aspect of the lives and businesses of South Africans" (High Court par 17). The second ground was that section 27 permitted a situation akin to a state of emergency without the safeguards provided under section 37 of the 1996 Constitution that apply when a state of emergency is declared. The third ground was the failure in section 27 to allow specifically for or require oversight on the part of the National Assembly. This discussion focuses only on the first ground.

3 2 Majority judgment

In line with the jurisprudence of the Constitutional Court discussed above, the High Court accepted that Parliament may authorise members of the executive to make subordinate legislation. The majority pointed to the reasons that it is necessary for law-making powers to be delegated in section 27 of the DMA. It had regard to the suddenness and magnitude of a disaster that may require a quick response that is also sufficiently comprehensive to deal with the disaster. Given that Parliament may not be best placed to know which disasters may strike, when and where, and would not in advance know what it may need to do to deal effectively with the disaster, it would be appropriate to delegate certain functions to the executive to enable the executive to deal quickly and effectively with the effects of a disaster (High Court par 37–40). This accords with Chaskalson P's reasoning (*Executive Council supra* par 62–63), which indicated that in certain contexts the executive may be required to act with urgency. The majority further emphasised that the executive may not amend or alter the DMA but needed to make regulations to deal with the effects of a disaster strictly within the parameters and framework set by the DMA. This again resonated with Mahomed DP's reasoning in *Executive Council* (*supra* par 135–136). Since the nature of the disaster and the effects of the disaster may be multiple, the High Court agreed that the nature and ambit of the "practical regulatory measures … must be flexible, expeditious and wide" (High Court par 45). It should not be taken to mean that the executive generally had the very wide power to craft regulations, but that in this specific context, the nature of the disaster justified the wider scope for the executive to deal effectively with the disaster.

Owing to the unpredictability of a disaster, and the wide scope the executive had in forming regulations to deal effectively with the disaster, the applicant argued that section 27 of the DMA provided the executive with

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"unbridled powers" (High Court par 46) and was unconstitutional on that basis. The majority of the High Court found that although the executive might have wide powers to respond to a disaster, there were sufficient constraints on the executive, particularly on the relevant Minister, that would prevent the usurpation of Parliament's legislative power. For instance, before the Minister could make regulations in terms of section 27, a disaster – as defined in the DMA – must have occurred. The disaster should further have been classified as a national disaster by the National Disaster Management Centre before being formally declared by the relevant Minister. The Minister cannot, of their own conviction, declare a disaster. Irrespective of whether a state of disaster has been formally declared, the executive authority must deal with the disaster in terms of "existing legislation and contingency arrangements" (s 26(2)(*a*) of the DMA). If a disaster has been formally declared, the Minister, together with other members of the executive with whom executive power is shared, must deal with the disaster in terms of "existing legislation and contingency arrangements *as augmented* by regulations or directions issued by the Minister" (High Court par 52, own emphasis). Furthermore, a national state of disaster may only be declared "if existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster or when special circumstances warrant the declaration of a national state of disaster" (High Court par 53). The Minister must therefore be satisfied that the effects of the disaster are of such scale and magnitude that they cannot be dealt with effectively in terms of existing legislation and contingency arrangements (s 27(1) of the DMA). As executive authority is shared, the Minister cannot make regulations on their own but is specifically required to consult with other ministers if a contemplated regulation relates to or affects an area for which another Minister is responsible (s 27(2) of the DMA).

Apart from these negative constraints, the regulations would only be competent if they served the positive goals as set out in section 27(3) of the DMA. The regulations must therefore be carefully crafted to reach the goals in section 27(3). Although these goals, which include "assisting and protecting the public" and "preventing or combating disruption", are broad, regulations that do not serve the purpose of section 27(3) will not be considered valid (see also *Helen Suzman Foundation v Speaker of the National Assembly* [2020] ZAGPPHC 574 par 70; *Esau supra* par 16). Apart from pressure from opposition parties and civil society on the executive authority for issuing regulations perceived as irrational, there are also formal legal pathways to ensure that the powers given to the Minister in terms of the DMA are not abused. For instance, the regulations issued by the Minister are reviewable in terms of the Promotion of Administrative Justice Act (3 of 2000) (PAJA) and on the basis of legality (High Court par 80). Furthermore, as the operation of the National Assembly was not suspended during a national state of disaster, the normal mechanisms were at the disposal of the National Assembly to exert control and place checks on the exercise of executive authority. Although the operation of the National Assembly may have been hamstrung at the start of the COVID-19 outbreak, in terms of section 55 of the 1996 Constitution, the National Assembly should still have complied with its constitutional obligation to exercise oversight over the national executive authority.

In conclusion, the majority held that "[t]he negative constraints, positive objectives, judicial review and parliamentary oversight constitute sturdy banks that ensure the Minister's power is sufficiently limited" (High Court par 86). As such, the majority found section 27 to be constitutionally valid. The majority, although agreeing that the DMA provided the Minister with wide powers to issue regulations to deal with the sudden effects of a national disaster, was satisfied that there were sufficient safeguards in place to prevent that wide power from being abused. The majority decision of the High Court appears to be in line with the jurisprudence of the Constitutional Court on the lawful delegation of law-making powers to the executive.

3 3 Minority judgment

While the majority indicated that the powers granted to the Minister in section 27(2) were "wide", the minority, per Matojane J, found that the granting of the powers "constitutes an excessive delegation of legislative power by Parliament to the Minister" (High Court par 91). Unlike the majority (which, although accepting that section 27(2) gave wide powers to issue regulations, focused more on the constraints and objectives in order to save section 27(2) from constitutional invalidity), the minority focused precisely on whether the actual delegation was permissible. Matojane J's main concern with section 27 seems to have been the fact that the section grants the Minister plenary legislative power without any input from Parliament. Matojane J found it unacceptable that the Minister had the sole power to declare a state of disaster, issue far-reaching regulations that might violate fundamental human rights, permit directions to be issued by other Ministers, and extend the state of disaster indefinitely, all without the input of Parliament.

According to the minority, there was no deliberation by Parliament when these regulations were contemplated. As such, Matojane J held

> "section 27(2) of the DMA grants the executive excessive regulation-making power to legislate, interpret and execute legislation that has wide-ranging limitations on the fundamental rights of all citizens without requiring that such legislation first be tabled in Parliament and approved by Parliament to ensure accountability and openness in Government." (High Court par 92)

As a result, Matojane J found section 27 to be unconstitutional on the basis that it "delegates wide [plenary legislative] powers to the Minister" (High Court par 112).

Although Matojane J's reasoning appears persuasive, Matojane J seems to lose sight of the fact that the Minister may only declare a state of disaster after certain conditions have been met, and can only issue regulations that are strictly within the framework of the Act. The Minister is not vested with plenary law-making power; she cannot make laws on any matter, but only regulations within the confines of the DMA. Matojane J's judgment also seems to focus on the apparent excessive delegation of plenary law-making

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power as opposed to the absence of parliamentary oversight over implementation of the DMA.

4 *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs: Supreme Court of Appeal*

4 1 Introduction

The DA, aggrieved by the decision of the High Court, appealed to the SCA. Although the SCA dismissed the appeal and found that there was no unlawful delegation of plenary law-making power on the part of Parliament, the minority judgment does add some complexity to the finding, given its position regarding the lack of parliamentary oversight in the crafting of regulations. This may be relevant when the DA considers appealing to the Constitutional Court.

4 2 Majority

The majority of the SCA considered three questions. First, it considered whether section 27 was unconstitutional in that it "constitutes an impermissible delegation of plenary legislative power by Parliament" (SCA par 7). Secondly, it asked whether the section was unconstitutional because it permitted a situation akin to a state of emergency without the safeguards of section 37 of the Constitution. Thirdly, it considered whether section 27 was unconstitutional as it did not require oversight by the National Assembly.

The DA argued that section 27 granted untrammelled discretionary power to the Minister and thus constituted an unlawful delegation of plenary law-making power. This was supported by the fact that even though the Minister was generally accountable to the National Assembly, the DMA does not specifically ensure parliamentary oversight over the declaration of a state of disaster or the crafting of regulations. The DA also maintained that it was not concerned with any specific regulation made in terms of section 27, but that on a general level, section 27(2) permitted "an impermissible delegation of power and in effect an abdication of Parliament's oversight role", and also permitted a "simulated state of emergency" (SCA par 11).

According to the majority, the factors relevant to determine whether delegation was permissible included:

> "the constitutional provision in question, the power that the provision confers on the legislature, the nature and degree of the purported delegation, the subject matter to which it relates and, perhaps more importantly, the impact of the delegation on the fundamental principles on which the Constitution is based." (SCA par 15; see also *Mpumalanga Petitioners Bill supra* par 19)

According to the majority, section 27(2), which grants the Minister the power to issue regulations, could not be viewed in isolation. Instead, it was part of a broader legislative scheme whose object was to augment existing measures that had proved to be ineffective in dealing with the disaster, given the magnitude of the disaster. Accordingly, the majority first set out the

scheme of the Act – specifically, those jurisdictional elements that must be met or satisfied before a disaster was declared and that guide and limit the issuing of regulations to deal with a disaster. Against this background, the majority considered whether section 27 led to the delegation of plenary legislative power.

The majority had regard to the fact that the national executive authority was responsible for managing and coordinating efforts to address a national disaster, regardless of whether a national state of disaster had been declared. Once a state of disaster was declared, the Minister could make regulations to deal with the disaster. Importantly, the Minister was designated by the President in terms of section 3 of the DMA. The executive authority of the Republic was vested in the President (s 85 of the Constitution), which he exercised together with members of the Cabinet. The Cabinet was "collectively and individually accountable to Parliament" (s 92(2) of the Constitution). Therefore, the majority was of the view that there were significant constraints on the exercise of the Minister's power to issue regulations.

In the majority's view, 10 factors led to the conclusion that section 27 of the DMA did not confer overly broad delegated powers on the Minister.

First, the DMA provided a detailed framework for the exercise of the Minister's discretionary power to issue regulations in terms of section 27(1). The Minister also had to exercise their power by engaging all relevant role-players, which further restrained the Minister's power to issue regulations.

Secondly, the Minister was unable to declare a state of disaster of their own will. An occurrence or event that was considered to be disastrous must first be classified as a national disaster by the head of the National Disaster Management Centre (s 23 of the DMA). The classification of such an occurrence as a national disaster by the Centre was an important step in activating the machinery in the DMA to deal effectively with the disaster. Without such a classification by the Centre, the Minister was unable to utilise section 27 of the DMA.

Thirdly, even if a disaster were classified as a national disaster, the Minister could only officially declare a national state of disaster if "existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster" (s 27(1)(*a*) of the DMA). It was clear that there had to be extenuating circumstances that required additional measures to be implemented to deal effectively with the disaster. The Minister was therefore unable to declare a national state of disaster for purposes of issuing regulations in terms of section 27 if existing legislation and contingency arrangements were sufficient to deal with the disaster.

Fourthly, the SCA had regard to the purpose of the DMA, which required "urgent measures to address the disaster" (SCA par 44), which Parliament might not be able to deal with, given the time it takes to conclude parliamentary procedures. This factor spoke to the reason for the DMA and

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specifically section 27 and did not relate to limitations or boundaries on the exercise of the Minister's power.

Fifthly, when the Minister responsible for the Act sought to make regulations that have an impact on the portfolio of another Minister, the former had to consult with the latter. As alluded to above, this placed a restriction on the Minister in making regulations.

Sixthly, the DMA only allowed for a national state of disaster declared in terms of the DMA for a short period of time – namely, three months. It was therefore only to serve as a temporary measure to deal effectively with a disaster.

Seventhly, any extension of a disaster would only be for one month at a time. Importantly, the extension should also be necessary to allow the executive to deal effectively with the disaster on the basis that existing legislation and other measures were not sufficient to deal with the disaster.

Eighthly, section 27(3) placed an important limitation on the Minister's ability to issue regulations in terms of section 27(2). Section 27(3) required the regulations issued in terms of section 27(2) to be *necessary* only to the extent that they assisted and protected the public, provided relief to the public, protected property, prevented and combated disruption, and dealt with the destructive effects of the disaster. Section 27(3), therefore, required a rational link between the regulations issued in terms of section 27(2) and their purpose in dealing effectively with the disaster. In the absence of a rational link, the regulation could be set aside upon review.

Ninthly, given that the issuing of regulations in terms of section 27(2) was an exercise of public power, the regulations could not be inconsistent with any provisions of the DMA or go beyond the power conferred by the DMA.

Lastly, section 27(2) and (3) did not permit the Minister to pass, amend or repeal an Act of Parliament. The fact that section 27(2) of the DMA did not allow the Minister to amend or alter the Act was seemingly a weighty factor in determining whether there had been an unlawful delegation of law-making power to the executive, and aligned with the view of Chaskalson P and Mahomed DP in *Executive Council*.

Given the factors above, the majority concluded that section 27 did not constitute a delegation of plenary powers. The majority also referred to the Constitutional Court's judgment in *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance* (2024 1 SA 567 (CC)) (*Nu Africa*) to further support its conclusion. Importantly, in *Nu Africa*, the Constitutional Court stated that to determine whether a delegation of law-making powers to the executive is valid:

> "the enquiry should be context-specific, and consideration should be given to the scope of the delegation, the subject matter to which it relates, the degree of delegation and the sufficiency of the constraints on the exercise of the discretionary powers conferred by the section." (*Nu Africa supra* par 95)

The majority comprehensively justified its finding that although section 27(2) might confer wide powers on the executive authority to issue regulations, there were sufficient safeguards in place to support a conclusion that it constituted a lawful delegation of Parliament's law-making power. The

question as to whether there was a lawful delegation of Parliament's plenary law-making power was therefore confined to a consideration of several factors, most notably the positive and negative constraints on the exercise of the delegated law-making power.

The majority also considered whether the DMA was unconstitutional as it did not provide for parliamentary oversight. The question as to whether there was sufficient parliamentary oversight over the exercise of the delegated law-making power had not until now been considered as relevant to the question whether the actual delegation of Parliament's plenary law-making power was constitutional. In this regard, the majority kept these two questions separate. In the majority's view, Parliament's oversight role was not suspended when a state of disaster was declared, and as such, Parliament would have had to comply with its constitutional obligations in terms of section 42(3) and 55(2)(*b*) of the 1996 Constitution. As such, it was necessary for the DMA to allow specifically for parliamentary oversight. Therefore, the majority also dismissed the contention that the DMA was unconstitutional for not expressly providing for parliamentary oversight.

4 3 Minority

Makgoka J, writing a minority judgment, agreed with the majority that section 27 did not constitute an impermissible delegation of plenary law-making power from Parliament to the executive. Makgoka J, however, held section 27(2) to be unconstitutional because it did not specifically provide for parliamentary oversight when section 27(2) was being implemented. As with the majority, Makgoka J agreed that the question of whether the DMA constituted a permissible delegation of law-making power to the executive authority had no bearing on whether the DMA was constitutional owing to its failure to provide expressly for oversight of Parliament over the executive authority when a state of disaster was declared.

Turning to the question of whether the DMA was unconstitutional for not providing specifically for parliamentary oversight, Makgoka J pointed out that the Minister responsible for implementing the provisions of the DMA could declare a state of disaster, enact regulations, and extend the state of disaster without any input or oversight from Parliament. Given the wide ambit of section 27 of the DMA, the Minister was able to limit fundamental human rights severely, similar to what would happen when a state of emergency was declared, but without the safeguards in place when a state of emergency was operative. In this regard, a state of disaster was akin to a state of emergency, but without any express parliamentary supervision. Although none of the constitutional rights were suspended during a state of disaster, and although the courts could still review any limitation on a constitutional right, the opportunity to violate constitutional rights severely without parliamentary oversight would render section 27(2) of the DMA unconstitutional. According to Makgoka J, there was the danger that Parliament would not provide effective oversight over regulations that were passed, and that violations of rights owing to the imposition of regulations could continue until such time as a litigant was able to have it set aside

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through lengthy court proceedings. Given that Parliament has often been found wanting in fulfilling its obligation to exercise proper oversight and accountability over the national executive authority (see, e.g., *Economic Freedom Fighters v Speaker of the National Assembly* (2018 (2) SA 571 (CC)), Makgoka J's concerns are worth heeding.

As a result, Makgoka J reasoned that section 27(2) of the DMA was unconstitutional as it achieved an outcome similar to a state of emergency without the safeguards in place when a state of emergency was declared. According to Makgoka J, the "absence of an express provision of Parliament's role in all circumstances in a state of disaster offend the very essence of a democratic state such as ours based on the principles of transparency, accountability, and responsiveness" (SCA par 165). Makgoka J would have provided a reading-in remedy to ensure judicial control like that found in terms of section 37(3) of the Constitution, which expressly requires judicial control during a state of emergency. (Although Makgoka J wrote "parliamentary control" as opposed to "judicial control", section 37(3) does not deal with parliamentary control, but with judicial control.) Furthermore, Makgoka J would have read in a provision allowing Parliament to "disapprove any declaration, regulation or direction" (SCA par 166) in terms of the DMA, provided that, where it was impossible owing to the nature of the disaster, Parliament could ratify it as soon as possible afterwards. However, given the various interpretative difficulties that may arise in relation to when the nature of a disaster would dictate that Parliament's approval could be sought afterwards, a remedy to require the amendment of legislation to expressly provide for parliamentary oversight may have been a more fitting remedy.

5 Discussion

The SCA decision settles, for now, the question as to whether section 27(2) of the DMA permits an impermissible delegation of parliamentary plenary law-making power to the executive authority. Although the court was unanimous on this particular point, the DA nevertheless took the decision on appeal to the Constitutional Court.

Regarding the delegation of Parliament's plenary law-making power, it is settled that the courts will not permit Parliament to delegate its power to pass, amend or repeal an Act of Parliament to any other institution. In the SCA judgment, the SCA – having regard to prior case law, including that of the Constitutional Court – confirmed this point several times.

Where the power to make regulations in terms of an empowering statute has been delegated to the executive authority, a court will carefully consider the limitations placed on the executive in crafting regulations. The High Court aptly referred to these as positive objectives and negative constraints. Importantly, in this context, section 27(2) can only be invoked if existing measures are insufficient to deal with a disaster (as originally declared by the National Disaster Management Centre), and where such regulations are necessary to deal effectively with the effects of the disaster.

The SCA also considered additional factors that provided sufficient safeguards to render the delegation lawful. These factors are not specific to

the context of the DMA but are generally applicable and should not be elevated too much in the consideration of whether the delegation of Parliament's law-making power is appropriately delegated to the Minister in this specific context. The fact that the Minister exercises executive authority together with other members of the Cabinet, and remains individually and collectively accountable to the National Assembly for the execution of their duties, also places restrictions and checks on the issuing of regulations. The accountability mechanisms of the National Assembly are not suspended during a state of disaster, and nothing prevents the National Assembly from exerting its powers to place a check on the executive authority in relation to the crafting of regulations. The regulations issued in terms of section 27 are furthermore susceptible to judicial review. In *Esau*, the court reviewed the process of issuing the regulations in terms of procedural fairness (*Esau supra* par 76–100) and procedural rationality, which stems from the principle of legality, which is an incident of the rule of law (*Esau supra* par 101–103). Furthermore, because none of the rights in the Bill of Rights is suspended during a state of disaster, any regulation that unjustifiably limits a right can be declared unconstitutional (*Esau supra* par 108 onwards). Regarding the question as to whether there was a lawful delegation of plenary law-making power to the executive authority in terms of section 27(2) of the DMA, the decisions of the majority in both the High Court and the SCA cannot be faulted.

The separate issue of the lack of parliamentary oversight when a state of disaster is in effect was also considered by the courts, although this was seemingly not the main line of attack against the DMA. The courts correctly dealt separately with the question on the validity of the delegation of law-making power that section 27(2) of the DMA allows for, and the question as to whether section 27(2) should be considered unconstitutional because it does not expressly allow for parliamentary oversight when a state of disaster has been declared. There may have been a tendency to conflate the two issues, as the regulations issued under the state of disaster to deal with the outbreak of COVID-19 were so far-reaching and without express parliamentary supervision that, on that basis, the case against the initial delegation was attacked more forcefully.

The majority of the SCA dismissed the contention that the DMA was unconstitutional (for its failure to provide an express provision for parliamentary oversight) on the basis that Parliament's oversight obligation was not suspended and that, in the specific case, Parliament had shown that it made use of its existing structures to comply with its oversight obligation. Makgoka J, writing a minority judgment, took a different view. The DMA was used for the crafting of regulations, which were admittedly quite far-reaching and irrational at times. However, the COVID-19 outbreak was unique and unlike a disaster to which the DMA usually applies. In most cases, a national state of disaster is declared after a disaster such as flooding (see the national state of disaster declared due to flooding on 13 February 2023, *GG* 48036 of 2023-02-13), and is often confined to a certain geographical area. However, owing to the uncertainty regarding the spread of COVID-19 and the absence of any other pieces of legislation to deal effectively with the

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outbreak, the DMA was used for the crafting of regulations. Given the context-sensitive nature of a disaster and the varying nature of what can be termed "disasters", it may not be feasible to require parliamentary approval in *all* cases before a state of disaster is declared and regulations made to effectively deal with the disaster, as was suggested by Makgoka J in the SCA judgment. However, it is apparent that some form of express parliamentary oversight will have to be built into the DMA. The possibility of abuse of power, as highlighted by Makgoka J in his minority judgment, is a real risk to the constitutional order in South Africa. Although the executive authority is best placed to deal quickly with the occurrence of an unexpected and unknown disaster, Parliament would have to consider how specifically to build parliamentary oversight into the DMA, where it may be required. If approval from the National Assembly is to be required for both the declaration of a disaster and the regulations, Parliament would have to carefully consider when prior approval is required, and when approval can be sought after the fact. In keeping with the jurisprudence of the Constitutional Court, involving Parliament in these contexts should only be in narrowly defined circumstances. What would be more feasible, it is submitted, is for Parliament to indicate expressly how the National Assembly can exercise oversight over the declaration of a disaster and the crafting of regulations in line with its obligation in terms of section 55 of the Constitution.

6 Conclusion

This note has considered the lawful bounds of the delegation of Parliament's law-making power. It has been shown, through discussion of both the High Court and the SCA decisions in *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs,* that the judiciary strictly considers whether the delegation of Parliament's law-making power is lawful. Importantly, the courts confirmed that plenary law-making power may not be delegated. Furthermore, the presence of negative constraints on the exercise of delegated law-making power serves as an important factor in considering the lawfulness of the delegation. Positive objectives also provide important guidance for the exercise of delegated law-making power.

While the absence in section 27 of the DMA of an express provision requiring parliamentary control over the exercise of delegated law-making power did not render the DMA unconstitutional, Parliament should consider crafting provisions that would allow parliamentary oversight without making it impossible for the executive to deal effectively with the effects of a disaster. This is in light of the abuse that may flow from the exercise of delegated law-making power.

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