REPORTABLE

CASE NO: SA 53/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PRESIDENT OF THE REPUBLIC OF NAMIBIA	**First Appellant**
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	**Second Appellant**
MINISTER OF LABOUR, INDUSTRIAL RELATIONS AND EMPLOYMENT CREATION OF THE REPUBLIC OF NAMIBIA	**Third Appellant**
MINISTER OF HEALTH AND SOCIAL SERVICES	**Fourth Appellant**
LABOUR COMMISSIONER OF THE REPUBLIC OF NAMIBIA	**Fifth Appellant**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**Sixth Appellant**

and

NAMIBIAN EMPLOYERS' FEDERATION	**First Respondent**
NAMIBIAN EMPLOYERS ASSOCIATION	**Second Respondent**
HUAB SAFARI RANCHES (PTY) LTD	**Third Respondent**

JOHN MEINERT PRINTING (PTY) LTD	**Fourth Respondent**
FP DU TOIT TRANSPORT (PTY) LTD	**Fifth Respondent**
JET X COURIERS (PTY) LTD	**Sixth Respondent**
SKYCORE AVIATION (PTY) LTD	**Seventh Respondent**

Coram: DAMASEB DCJ, MAINGA JA and SMUTS JA

Heard: **6 July 2022**

Delivered: **2 September 2022**

Summary: In terms of Art 26(1) and (5) (a) and (b) of the Namibian Constitution (the Constitution), when the Namibian nation is confronted by a national disaster, a state of national defence, or a public emergency threatening the life of the nation or its constitutional order, the President of Namibia (the President) has the power to declare a state of emergency (SOE) and to make regulations to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by the Constitution, 'for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency.'

After declaring a SOE in the wake of the outbreak of the Covid-19 pandemic, in terms of Art 26(1) of the Constitution, the President of Namibia proceeded to impose a nationwide lockdown restricting the movement of people, save those performing 'essential services'. The President did so purporting to act in terms of Art 26(5)(b) of the Constitution. The lockdown affectively stopped all economic activity, and workers were required to stay at home with the likelihood they would lose income. To protect workers' salaries, the President, purporting to act in terms of Art 26(5)(b) suspended certain provisions of the Labour Act 11 of 2007 (ss 12, 23 and 34) which could be relied upon by employers to mitigate their losses due to the outbreak of the pandemic and the imposition of the lockdown. These

provisions, if not suspended, would allow employers to retrench workers, reduce their working hours at reduced remuneration or to compel them to take leave without pay.

The President also made certain Regulations 14 and 15 to delegate to ministers his
regulation–making power under Art 26(5)(b) of the Constitution.

Two employers' organisations challenged Reg. 19, principally on the basis that it was aimed solely at protecting workers' livelihoods and did not meet the constitutional threshold of being 'reasonably justifiable' to deal with the situation that has given rise to the SOE.

The employers' organisations also challenged the President's delegation of directive-making power to ministers on the basis that it was *ultra vires* Art 26(5)(b), as only the President is authorised to make regulations.

The High Court agreed with the employers' organisations and struck down the suspension regulations and the President's delegation of directive-making powers. The Government appealed to the Supreme Court, stating that the High Court failed to interpret Art 26(5)(b) 'broadly and purposively', and that Art 26(5)(b) must be read to contain an implied power for the President to make regulations to mitigate the consequences of measures he takes to deal with a SOE (the pandemic).

As regards the striking down of the delegation regulations, the Government maintained that the challenge was premature as the President had not actually delegated any power to the ministers.

Held that Art 26(5)(b) must be read to include an implied power for the President to make regulations to deal with the situation that has given rise to the SOE, but such regulations must themselves be reasonably justifiable for the stated purpose; that farther removed such a regulation from the situation that has given rise to the SOE, the higher the burden of justification required; such regulations must also be

reasonable and be rationally connected to the legitimate objective of arresting the spread of the pandemic.

Held that Reg 19 was both unreasonable and irrational and therefore the High Court's' order invalidating it is correct;

Held that the challenge to the directive–making power was premature and the High Courts' order declaring Regulations 14 and 15 must be set aside.

Appeal succeeds in part only.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and SMUTS JA concurring):

[1] On 30 January 2020, the World Health Organization (WHO) declared the outbreak of the novel Corona-virus (Covid-19), first reported in China in December 2019, a public health emergency of international concern; and a pandemic on 11 March 2020. Covid-19 did not spare Namibia as it begun to manifest itself on our shores in March 2020 and in a short space of time turned into a worldwide pandemic.

[2] When the Namibian nation is confronted by a national disaster, a state of national defence, or a public emergency threatening the life of the nation or its constitutional order, the President of the Republic of Namibia (the President) has the power to declare a SOE and to make regulations to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by the Namibian Constitution (the Constitution), 'for such period and

subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency'.[1]

[3] The present appeal concerns the constitutionality of subordinate legislative measures implemented by the President in the wake of the outbreak of the Covid-19 pandemic (the pandemic). In response to the outbreak of the pandemic on our shores and beyond, the President declared a SOE and imposed a national lockdown which stopped all economic activity in the country (including the carrying on of business activities) except essential services and trade in essential goods, restricted people's freedom of movement and access to public amenities and places of work (the lockdown).

[4] The outcome of the appeal does not depend on whether the lockdown was 'reasonably justifiable' but whether certain subordinate legislation, enacted by the President to deal with its effects, were. The focus of the inquiry being the President's suspension of certain provisions of the Labour Act 11 of 2007 (the Labour Act) and his delegation of directive-making powers to Cabinet Ministers.

[5] Ostensibly to stem the rising tide of the pandemic, the President issued Proclamation 16[2] titled *'State of Emergency - Covid-19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution'* (the Suspension Regulations). Included amongst the laws that this proclamation suspended were certain provisions of the Labour Act. On 4 May

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[1] Art. 26(1) and (5) (a) and (b) of the Namibian Constitution.

[2] Proclamation 16 of 2020, published in Government Gazette 7194 of 28 April 2020.

2020, the President issued two further Proclamations, namely Proclamation 17[3] titled *'Stage 2: State of Emergency-Covid-19 Regulations: Namibian Constitution'* (the *Stage 2 Regulations)* and Proclamation 18[4] titled 'State of Emergency- *Covid-19: Further Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution*.' (The Further Suspension Regulations*).*

The suspension: Regulation 19

[6] Regulation 19 states:

> '(1) Despite anything to the contrary in any provision of the Labour Act, 2007 (Act No. 11 of 2007) (hereafter "the Act"), an employer may not, during the lockdown –
>
> (a) dismiss an employee or terminate any contract of employment or serve a notice of intended dismissal in terms of section 34 of the Act for reasons related to the actual or potential impact of Covid-19 on the operation of the employer's business;
>
> (b) force an employee to take unpaid leave or annual leave for reasons related to –
>
> (i) the actual or potential impact of COVID-19 on the operation of the employer's business; or (ii) the implementation of a provision of any regulation which is intended to give effect to the lockdown; or
>
> (c) reduce the remuneration of any employee for reasons related to the actual or potential impact of COVID-19 on the operation of the

[3] Proclamation 17 of 2020, is published in Government Gazette 7203 of 4 May 2020.
[4] Proclamation 18 of 2020, is published in Government Gazette 7204 of 4 May 2020

employer's business or to the implementation of a provision of any regulation which is intended to give effect to the lockdown.

(2) Despite sub-regulation (1)(c), if, during the period of lockdown, an employer wishes to reduce or defer payment of full remuneration because of its inability to pay full remuneration due to actual or potential impact of COVID-19, the employer must negotiate in good faith with –

(a) a recognised trade union;

(b) a workplace representative; or

(c) in the absence of a recognised trade union or workplace representative, the affected employee or employees.

(3) If the parties have reached an agreement, the agreement must be filed with the Labour Commissioner, but, in the absence of any agreement, any party may refer a dispute to the Labour Commissioner.

(4) If an employer has, prior to the commencement of these regulations, dismissed an employee or employees or forced an employee to take unpaid leave or annual leave due to the actual or potential impact of COVID-19 on their business operations, that employer must, as soon as practicable –

(a) reinstate such dismissed employees; and

(b) engage the dismissed employees in negotiations about their conditions of employment during the lockdown period.

(5) An employee, insofar as it relates to the care of a family member who has contracted COVID-19 and is unable to care for him or herself, or is under quarantine or under self-isolation in the employee's care, is –

(a) entitled to sick leave provided for in section 24 of the Act; and

(b) where the period of sick leave referred to in paragraph (a) is exhausted, entitled to such extended sick leave benefit as permitted by section 30 of the Social Security Act, 1994 (Act No. 34 of 1994), as may be required to care for such a family member.

(6) If, prior to the commencement of these regulations, an employer has notified his or her employees of an intended dismissal in terms of section 34 of the Act for reasons related to actual or potential impact of COVID-19 on the operations of the employer's business, the date of the intended dismissal is deemed to be 28 days after the end of the lockdown period, unless a later date is specified in the notice.

(7) If, after the period of lockdown, an employer wishes to dismiss employees for reasons related to the actual or potential impact of COVID-19, the employer must do so in compliance with section 33 or section 34 of the Act, including negotiations over the right of the employees to be recalled to their former or comparable positions as the employer's operation recovers.

(8) An employer or any other person who –

(a) dismisses an employee or terminates any contract of employment or serves a notice of intended dismissal in contravention of subregulation (1)(a);

(b) forces an employee to take unpaid leave or annual leave in contravention of subregulation (1)(b);

(c) reduces the remuneration of any employee without following the process outlined in subregulation (2);

(d) fails or refuses to reinstate a dismissed employee or to engage a dismissed employee in negotiations in contravention of subregulation (4); or

(e) dismisses an employee without complying with the requirements of subregulation.

(8) Commits an offence and on conviction is liable to a fine not exceeding N$10 000, or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.

(9) Parts A to C of Chapter 8 of the Act and regulations, rules or codes of conduct made under that Act, insofar as they relate to the time periods or time limits, processes and procedures in respect of conciliation and arbitration of labour disputes and issuance of arbitration awards, appeals and reviews against decisions of arbitrators and the variation and rescission of awards, are suspended for the duration of the period of lockdown.

(10) Section 87 of the Act, and the time periods or time limits specified in section 89 of the Act, and the Labour Court Rules published under Government Notice No, 279 of 2 December 2008, are suspended for the duration of the period of lockdown.

(11) Despite subregulations (9) and (10), the Chief Justice may regulate the Registrar's office hours for the purpose of issuing of any process or filing of any document or for the purpose of filing a notice of intention to oppose a matter in the Labour Court by issuing directions for the duration of the period of lockdown.

(12) The computation of any time period or time limit or days required for the completion of any process or the doing of anything as contemplated in this regulation, where interrupted by the period of lockdown, resumes after the expiry of the period of lockdown, and commences after the expiry of that period.

(13) For the purposes of subregulation (11), the provisions of section 39 of the High Court Act, 1990 (Act No. 16 of 1990) and section 119 of the Act which relate to the making of rules of the Labour Court by the Judge-President with the approval of the President, are suspended.'

The delegation

[7] Regulations 14 and 15 empower the President to authorise a minister to issue directives for a specified purpose. Regulation 14 of the Regulations and regulation 15 of the *Stage 2* Regulations are identically worded. They state:

'14(1) The President may authorise a minister to issue directives for the purpose of-

(a) supplementing or amplifying on any provision of these regulation; or

(b) ensuring that the objectives of these regulations are attained.

(2) A directive issued under this regulation has the force of law and may deal with any matter that is within the ambit of any legislation or other law that is administered by the Minister concerned.

(3) Any directive issued under this regulation must be –

(a) referred to the Attorney-General for approval; and

(b) published in the *Gazette*,

for it to have the force of law.

(4) A directive issued in terms of these regulations becomes effective on the date of its publication in the *Gazette*.

(5) A directive may create offences for contraventions of, or failure to comply with, the directive and provide for penalties of a fine not exceeding N$2 000 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.'

The scheme of the suspended provisions

[8] Section 12(6) of the Labour Act allows an employer to reduce, unless a provision in a contract of employment or a collective agreement says he or she may not, an employee's agreed number of ordinary hours of work and to

correspondingly reduce that employee's remuneration. That power is subject to the following conditions:

(a) The reduction must be by written notice to the employee;

(b) It must be for operational reasons or other reasons recognised by law. In other words, it is not a power to be exercised vengefully or whimsically;

(c) It must not be for a period longer than three months; and

(d) If the period is to be extended, it cannot be for a period longer than three months; and

(e) an extension must be agreed to by the employee or his or her registered trade union.

[9] In terms of s 23(2) read with subsec (3) of the Labour Act, an employee is entitled to at least four consecutive weeks' annual leave with full remuneration in respect of each annual leave cycle. Section 23(5) allows an employer to force an employee to go on annual leave.

[10] Section 34 permits an employer to retrench an employee in order to reduce the workforce because of re-organisation or transfer of the business or the discontinuance or reduction of the business for economic or technological

reasons. The employer may only do so by (a) informing the Labour Commissioner and the employees' recognised exclusive bargaining agent of the intended dismissal, the reasons for the reduction of the workforce, the number and categories of the affected employees and the date of the dismissals. The information to the Labour Commissioner and the recognised exclusive bargaining agent must be given at least four weeks before the intended dismissal. In the absence of a recognised exclusive bargaining agent, that information must be given to an elected workplace representative and the employees.

[11] In terms of s 34(10), an employer who contravenes or fails to comply with s 34 commits an offence and is liable to a fine not exceeding N$10 000, or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.

[12] The invocation of the above provisions, as long as the employer adheres to the in-built safeguards, is at the discretion of the employer. In other words, the employer may act unilaterally and does not require the consent of the employee. Except in respect of violation of s 34, a violation of ss 12 and 23 does not constitute a criminal offence.

[13] Regulation 19 alters the position in favour of the employee in the sense that the employer's ability to act unilaterally is removed and consensus is required for the employer to invoke those provisions. If there is no consensus, the matter may be referred to the Labour Commissioner for conciliation. In addition, all violations of the relevant provisions constitute a criminal offence.

The challenge

[14] The applicants (respondents on appeal) challenged the regulations on two bases. Firstly, that the President acted *ultra vires* his powers under Art 26(5)(b) by suspending the provisions of the Labour Act and that the suspension was irrelevant to stemming the pandemic. The central plank of that argument is that the power under Art 26(5)(b) does not authorise the President to make regulations to mitigate the consequences that would result from his imposition of the lockdown. On this view, the President was only authorised to make regulations to deal with the situation that had given rise to the pandemic and that he could thus only introduce measures to combat the pandemic. Therefore, the President's suspension of the relevant provisions of the Labour Act is unconstitutional.

[15] The second challenge concerns the President's delegation of directive-making power to ministers. According to the employers, the Constitution confers the power to make regulations during a SOE on the President alone and as such he impermissibly delegated his powers when, by regs. 14 and 15, he purported to authorise ministers to issue directives to supplement or amplify any provision of the regulations; or for the purpose of ensuring that the objectives of the regulations are attained.

Government's justification

[16] In justification of the Regulations, the Government maintained that at the time of the President's declaration of the SOE and his issuing of the Regulations, just like the rest of the world, Namibia experienced much uncertainty about the

nature, spread and effect of the COVID-19 virus. It is contended that at the time, it had become clear to the President that the COVID-19 virus was likely to have widespread negative impact across all spheres of life and that it was thus necessary to act to deal with the uncertainties.

[17] The Government maintains that 'lockdown' was necessary to prevent the spread of COVID-19 and that for the lockdown to be effective, it was necessary to strictly control and reduce people's movement. On the other hand, for people's movement to be effectively controlled and restricted, it was necessary for employees to stay at home. For the employees to stay at home, they needed some support and, at least, the peace of mind of income until the end of lockdown. According to the Government, worker protection in the interim was an absolute necessity to prevent the spread of COVID-19. It is asserted that the President was therefore well within the powers conferred on him by Art 26(5)(b) to promulgate the impugned regulations.

[18] As regards the contention that the regulations retrospectively criminalised the employers' conduct, the Government maintained that the language in which the regulations are crafted is in the present and future tenses, thus conveying that they were intended to operate prospectively. The Government thus denied that the impugned regulations violate Art 12(3) of the Constitution.

[19] Concerning the challenge that the President by regs. 14 and 15 impermissibly delegated to ministers, powers conferred on him by the Constitution, the defences are (a) that the challenge is premature because the President never

actually effected any delegation and (b) that it was in any event a lawful exercise of the President's power.

The evidence

The applicants

[20] The first respondent, Namibian Employers' Federation (NEF) who was first applicant *a quo*, and the second respondent, Namibian Employers Association (NEA) who was second applicant *a quo*, are voluntary associations not for gain representing the interests of Namibian employers. They are both registered as employers' organisations in terms of s 57 of the Labour Act. Together with third to seventh respondents (who in those respective numbers were applicants *a quo*), the employers' associations made common cause in challenging the impugned regulations.

[21] All the applicants deposed to affidavits in support of the challenge. In the affidavits, they set out the legal bases and the facts supporting the challenge. I will set out their salient allegations in support of the challenge and only name a particular deponent where the circumstances justify doing so. They will henceforth be referred to as the 'employers' unless the context requires otherwise.

[22] In the founding affidavits in support of the challenge against the impugned regulations, the employers maintain that NEF and NEA never consented to the impugned regulations, contrary to what has been claimed by Government

representatives in correspondence prior to the litigation and (as will be shown) in the answering affidavits. All there was consensus on, according to the employers, was that it would be in the interest of employees that, as far as possible, retrenchments be avoided during the lockdown.

[23] The employers took issue with the fact, as they see it, that Proclamation 16 of 2020 (State of Emergency – Covid -19- Suspension of Operations of Provisions of certain Laws and Auxiliary Matters, published on 28 April 2020) operates retroactively and with effect from 28 March 2020 in respect of the suspension of certain provisions of the Labour Act. The employers' grievance is that rights which they enjoyed under the Labour Act until 28 March 2020 had, by virtue of reg. 19, become retroactively prohibited. As a result, they assert, any action lawfully taken by employers under the Labour Act, which created vested rights, became retroactively unlawful. According to the employers, because of the retroactive effect of the provisions of reg. 19:

(a) Retrenchments lawfully done prior to 28 April 2020, with the required payment of retrenchment packages became unlawful in terms of reg.19(1);

(b) An employer is forced to reinstate any employee lawfully dismissed prior to 28 April 2020 without any corresponding obligation on the employee to repay any retrenchment package received (reg. 19(4));

(c) Any retrenchment date lawfully determined prior to 28 April 2020, is by operation of law extended to 28 days after the end of lockdown; a provision exacerbated by the fact that lockdown may be extended from time to time (as it had actually happened) (reg. 19(6));

(d) Lawful acts or omissions by employers before 28 April 2020 were rendered criminal offences, including attracting criminal penalty which did not exist when these acts or omissions occurred (reg. 19(8)).

[24] The employers state that contrary to the intent of Art 26(5)(b) of the Constitution, the provisions of reg. 19 are unrelated to the situation that had given rise to the SOE but are intended to deal with the consequences resulting from the lockdown. It is said that the power under Art 26(5)(b) does not permit the President to mitigate 'the consequences of the lockdown on Labour relations as a result of the declaration of the SOE.

[25] According to the employers, the suspension of the relevant provisions of the Labour Act is not necessary for the protection of national security, public safety and the maintenance of law and order; and viewed objectively is not 'reasonably justifiable'.

[26] It is further stated, without much elaboration, that the suspension provisions 'impermissibly breach Constitutional rights'. The complaint is made that such suspensions breach Art 22 of the Constitution 'because they are not of

general application' as they 'only protect employees'[5] and the 'extent of the limitations is also not specified'.

[27] According to the employers, the suspension provisions are indifferent to whether or not some employers 'will not be able to ride out the effect of the impugned provisions'. It is alleged in that regard that the dignity of those employers who might become insolvent because of the effect of the impugned provisions will be violated contrary to Articles 8[6] and 98(1)[7] of the Constitution.

[28] It is also claimed by and on behalf of the employers that the suspension provisions in so far as they only protect employees, 'impermissibly take away property rights of employers to save the employees, in circumstances where Art 16 property rights have not been suspended'.

[29] To draw attention to the hardship suffered by employers on account of the outbreak of the pandemic and the imposition of the lockdown, the deponents to the employers' founding affidavits place reliance on responses received from members of NEF and NEA in a survey. I will refer only to the most salient ones.

[30] The employers allege that the survey revealed that some of the employers in the 'essential service' category stated that retrenchment and the other avenues available to reduce costs had not by their being classified essential services (and

[5] Contrary to Ar. 10(1) & (2) of the Constitution.

[6] Respect for Human Dignity.

[7] Stating: 'The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians.'

thus being authorised to carry on business during the lockdown) become unnecessary or had the effect of limiting their 'financial predicaments'. According to some of the surveyed employers, because of the dire straits they found themselves in, they (by agreement with employees or unilaterally) utilised the annual leave provision of the Labour Act 'to minimise/negate adverse effects for their employees'. It is said that but for the suspension regulations, most employers were desirous of utilising the provisions of the Labour Act permitting reduction in remuneration to alleviate their hardship, to save jobs and to minimise the need for retrenchments.

[31] It is alleged that of the employers surveyed, a majority stated that since the outbreak of the pandemic and the imposition of lockdown, they no longer had sufficient funds to pay employees' full remuneration and therefore contemplated closing down business or parts thereof due to low or no income. That was frustrated by their inability, because of the suspension regulations, to apply s 12(6) of the Labour Act that allows for the unilateral reduction of working hours and commensurate reduction in remuneration up to 50 per cent of an employee's remuneration. As a result of the lockdown and the associated regulations some employers, especially in the hospitality and tourism industries, just closed their businesses during March and April without even trying to retrench or to reach agreements with employees on reduction of remuneration due to no longer having any funds to pay remuneration even at reduced rates.

[32] The impact of the pandemic and the lockdown is further highlighted by how it affected especially the tourism industry. The survey results show that the

tourism industry relies heavily on international tourism which would remain in distress even after lockdown as long as tourists do not come to Namibia. It is alleged that because of cancellation of bookings, lodges, hotels and similar businesses must repay deposits on bookings made prior to the pandemic – money which had already been spent at least on remuneration and fixed costs. The implication is that even with the best of intentions, some of these employers had no choice but to retrench and, because the pre-condition for Government's financial assistance is a commitment not to retrench, they became disqualified from receiving any assistance.

[33] One of the tourism operators, third respondent, confirmed on affidavit through its financial director, that by January 2020, the company's reserves had been depleted because it was low season. The company therefore had no funds to pay salaries. Because of the financial dire straits the company found itself in, he informed the employees that they had the option to go on unpaid leave for the months of April, May and June 2020 or to be retrenched. Although naturally unhappy with the proposed arrangement, the finance director deposed, the employees opted to go on unpaid leave and confirmed as much in writing. The deponent stated that Huab did not apply for Government's promised financial assistance because it would cover only 17 per cent of the total wage bill and the company simply did not have the means to meet the balance of the wage bill liability. The finance director was emphatic that Huab was in no position to retain any employee and that the company would have to commence retrenchment proceedings soonest. That was so as they did not expect to get any guests until the following year even if the lockdown were lifted.

[34] Employers in the aviation sector also highlighted their challenges. The industry is said to operate on low margins and high operating costs. To survive in the short-term, the industry required a cash injection from government in the order of N$177 million in the form of grants as aviation operators would not be able to service even soft loans (even at zero interest) because of low margins and high operating costs. Without financial support, aviation operators would have to drastically reduce overheads by making use of the mechanisms of the Labour Act which were suspended by reg. 19. Faced with the uncertainty of having to reduce labour costs, such operators are, out of necessity, unable to commit not to retrench and therefore became disqualified from receiving government's financial assistance. As is poignantly stated by an aviation operator about the requirement not to retrench:

> 'there are simply too many variables to allow such guarantees, and without such flexibility, operating in an extremely sensitive, specialized and potentially dangerous space such as the aviation industry, would be irresponsible and impossible.'

[35] The employers paint a very bleak picture on affidavit about the ineffectiveness and inadequacy of the financial assistance programs announced by the government in the wake of the lockdown. The roll out of the subsidies is said to be way too slow or inadequate. It is clear from the affidavits that the requirement to undertake not to shed or reduce the cost of labour was a critical barrier to access government's financial assistance. Not only that, what assistance

was available was nowhere near meting the actual cost of employee retention while the pandemic and lockdown persisted.

[36] In the wake of the lockdown, some employers had begun to deal with the negative impact of the pandemic and that of the lockdown. Those who deposed to affidavits set out some of these consequences and the remedial measures they took. A common thread running through the responses is that revenues dropped without matching revenue inflows. A cloud of uncertainty hung over businesses. Important decisions needed to be taken urgently to contain costs and to save businesses where possible. Deponents explain the existential threats they faced. In most cases, their entire value chains disappeared. Those on whom a particular business depended for business themselves faced ruin. Being classified an essential service did not necessarily save the day. Even for an employer classified as an essential service, full output was not possible because, to comply with the suspension regulations, employers had to function with reduced staff and those who did not work still had to be paid. The fact that a business operated did not guarantee income because, often, there was no business to be had as regular customers themselves had either closed down or were unable to pay.

[37] The relief available to an employer under the suspended provisions of the Labour Act in most cases represented the best available means to cut costs. Some employers had closed shop because there was no business to conduct. Others started engaging their employees in order to find solutions that would save the business and jobs, where possible. Although not entirely happy, some employees understood the employers' predicament and accepted reduced

remuneration, shorter working hours or forced leave (the proverbial short-term pain for long-term gain). In some cases, retrenchments took place and were paid for.

[38] According to the employers, it is not a plausible justification of the suspension regulations to suggest that because of the lockdown and the restriction on movement of persons, access to the Labour Commissioner's office had become impractical. According to them, the communication sector was declared an essential service and it was perfectly possible to conduct meetings virtually.

[39] Based on the above, we have, on the part of the employers, a factual backdrop depicting:

(a) dire financial consequences thrust upon employers by the consequences of the lockdown – consequences which, for most, posed an existential threat;

(b) efforts made by some employers within the framework of the existing law, to stay afloat so that they can resume operations post lock down; and

(c) the Government being made aware by the employers, prior to the suspension, about those consequences.

[40] The suspensions had the effect, the employers contend, that employers could not use remedies available under existing law to mitigate the hardship they found themselves in. The suspensions had even far more pernicious

consequences: mitigation steps already taken were reversed. As Mr Heathcote for the employers put it in the written submissions (para 88):

> '[T] hose employees who were already sent on annual leave (with pay) must get their leave back (without repaying).
>
> [I] f any employer made use of section 12(6) some 30 days ago, and someone worked reduced hours, payment for hours not worked by the employee must be paid (retrospectively that is).'

The respondents

[41] The answering affidavits represent a cross section of the Government and demonstrate the collective nature of the Covid-19-related decision making process. The third respondent *a quo* (the Minister of Labour) deposed to the main affidavit in which he sets out the processes that led to the President making the suspension regulations. The second respondent *a quo* (the Attorney-General) explains the advice he gave to the Cabinet, and to the President in particular, on the issues germane to the declaration of the SOE, the lockdown and the regulation-making process. The fourth respondent *a quo* (the Minister of Health) confirms the allegations relating to his role in the matter. An official from the Ministry of Finance explains the role played by his ministry particularly the stimulus package and other forms of financial assistance given by the government to deal with the fallout from the lockdown. Other functionaries such as the Executive Director of the Ministry of Labour and the Labour Commissioner also deposed to supporting or confirmatory affidavits. The President elected not to depose to any affidavit or to confirm any of the allegations attributed to him.

Minister of Labour

[42] The Minister of Labour records the extensive discussions in Cabinet concerning the SOE declaration and the promulgation of the impugned Regulations. He asserts that Covid-19 'represented the gravest health risk faced by the world in more than 100 years . . . and that it was clear to government that the disease was likely to have tremendous widespread impact across all spheres of life.' According to the deponent 'the President urgently needed to deal with the overall risks constituted by the disease'. That, he says, called 'Naturally . . . for measures primarily aimed at preventing the spread of the disease and for those without which either the spread was not going to be properly contained or which were going to make it possible for the spread of the disease to be more effectively contained. All this represented the situation which the President had to deal with. The Regulations issued pursuant to the declaration were all aimed at dealing with this situation, inclusive of all its expected direct and indirect consequences. The Regulations therefore incorporated measures aimed at directly arresting the spread and making it possible for those direct measures to be implemented practically.'

[43] The Minister of Labour adds that the 'President's decision should be seen in the light of the anticipated severe risks faced by world leaders, the uncertainties then existing, the absence of the luxury of time for assessment or procrastination and the overriding importance of immediate action. In short, it was necessary for the President to take such action as the uncertainties of the situation demanded and to do so with the caution that the situation required.'

[44] According to the Government, the President was thus entitled to take all steps necessary including making regulations to maintain law and order and to effectively govern the country in the face of the disruptive and deadly virus. The Minister of Labour asserts that if the employees' employment and benefits were not protected, they could cause social unrest which could in turn hamper containment of the spread of the pandemic.

[45] The Minister of Labour deposes that an 'Economic Stimulus and Relief Package' totalling N$8,1 billion was the Government's response to support core economic activities both formal and informal. He says that the stimulus package was aimed at 'addressing the negative effects arising from the public emergency prevailing and other incidental impacts caused by the pandemic.' These measures, the Minister of Labour maintains, 'were not aimed at protecting employees only, as the Applicants seem to suggest.'

[46] According to the Minster of Labour, the stimulus package totalling N$8,1 billion comprised N$5,9 billion 'in direct and indirect support to business, households and cash flow acceleration payments for services rendered to Government, and N$2,3 billion off-balance sheet Government liabilities'. The Minister of Labour asserts that an aspect of the stimulus package was intended to assist businesses 'directly affected by the lockdown measures' in the form of wage subsidy aimed at avoiding further retrenchments in the hardest-hit sectors of tourism, hospitality, aviation and construction. The wage subsidy was intended to aid businesses to keep employees on board. Government set aside N$400 million for this subsidy in the form of advances (not loans) to qualifying businesses.

[47] Government also announced, as part of the assistance, 'Accelerated repayment of overdue and undisputed VAT refunds' totalling N$3 billion and 'Accelerated payment of overdue and undisputed invoices for goods and services provided to Government'. Another facility was the 'National Employment and Salary Protection Scheme for Covid-19' in terms of s 37 of the Social Security Act 34 of 1994. According to the Minister of Labour, this scheme's purpose was to 'dissuade employers from retrenching employees in the short term and to support individuals who have suffered a loss of income as a result of the Covid-19 pandemic'. The scheme targeted employers in the 'hardest-hit industries' of tourism, hospitality, construction and aviation. The subsidy was based on 'total wage bill' and was conditional upon a commitment by the applicant employer not to retrench staff for the months of April, May and June 2020 and not to seek to reduce staff salaries by more than 50 per cent. An agreement was to be entered into with the State to ensure compliance with the conditions.

[48] The Minister of Labour states that the raft of financial measures 'would only have had a considerable positive impact on businesses including the first and second Applicants' members' businesses'.

[49] Addressing the lockdown and the suspension regulations, the Minister of Labour states that restriction of people's movement constituted the most viable way of limiting the spread of the pandemic. The restriction on people's movement directly affected employment and if normal business activity continued and

employees were allowed to go to work, the spread of the pandemic 'was unlikely to have been contained.'

[50] According to the Minister of Labour, his Ministry 'soon' learnt that employers 'immediately started taking certain steps adverse to employees (largely in a manner incompatible with the law and International Labour Organisation (ILO) labour standards). There were, he says, reported cases of forced retrenchment, forced placement of employees on leave, and unilateral reduction of employees' salaries. He informed the President about it and that led to the passing of reg. 19. According to the Minister of Labour, the frequency of reported cases of retrenchment and reduction in remuneration compelled the President to replicate the penal provisions of s 34(10) of the Labour Act into reg. 19.

[51] The Minister of Labour states that the impugned regulations do not 'altogether take away the right of employers to retrench employees, reduce employees' remuneration or place employees on leave for Covid-19 related reasons. Rather, the Regulations simply provide for the manner in accordance with which such steps are to be taken. (The requirements for negotiations with employees are compatible and consistent with the ILO standards and the Labour Act).'

[52] As regards the delegation of directive-making power to Ministers under regs. 14 and 15, the Minister of Labour deposed that its purpose was to practically implement the object of the declaration of the SOE. Such directives, he maintains, amounted to subsidiary means of implementing what was enacted by the

President in the Regulations and were incidental to the execution of specific provisions of the Regulations.

[53] According to the Minister of Labour, reg. 19 represents a tripartite consensus between employers, trade unions and the Government. (I have already shown, and it is further elaborated in the employers' reply below, that this allegation is denied by the employers and no proof of the tripartite agreement is provided by the Minister of Labour).

[54] According to the Minister of Labour, the restriction on people's movement made the Labour Commissioner's oversight function over retrenchments under s 34 of the Labour Act impractical as both employers and employees could not readily access that office. In other words, that it became necessary that employers seek consensus directly with employees. That allegedly also necessitated the extension of any retrenchment notice to 28 days after the end of lockdown (that is of course disputed by the employers as I previously mentioned and as will be shown in the summary of the employers' reply).

Other deponents

[55] The Attorney-General (A-G) deposed to a supporting affidavit wherein he states that he actively participated in all deliberations that resulted in the issuance of the impugned Regulations. The A-G reiterates the evidence of the Minister of Labour on the consultations and that the President's main objective with the declaration of the SOE and the resultant regulations was at all times to prevent the spread of the Covid-19 virus.

[56] According to the A-G, all SOE related Regulations were issued by the President in consultation with representatives from various ministries. The A-G maintains that the aim of the regulations was not only to protect employees, but to retain some sort of status *quo* while at the same time balancing the rights of both the employee and employer as part of the measures taken to prevent the spread of the pandemic. The A-G further deposed that the measures employed were all necessary in the President's endeavor to strike a balance between the interests of different parties, and that the President did not exceed his constitutional powers.

[57] In a further supporting Affidavit deposed to by the head of the Case Management National COVID-19 Task Force, Dr Kandetu, it is asserted that the fight against a pandemic is not waged with measures that are only directly aimed at addressing the spread of the pandemic itself. The government is required to adopt a holistic approach that also addresses the spillover effects of any measures it takes to arrest the spread pandemic.

[58] A Senior Technical Economic Advisor in the Ministry of Finance, Mr Ithindi, filed a supporting affidavit wherein he deposed that he assisted the Minister of Finance in attending to issues related to COVID-19. The deponent refutes the employers' suggestion that the health containment and suppression measures implemented to prevent the spread of the disease presented business hardships without any remedy. He maintains that the government and the Social Security Commission (SSC) provided a remedy intended to sustain businesses and to support employment retention in the hardest-hit sectors of the economy for three

months. Mr Ithindi reiterates that the measures implemented were all necessary to prevent large-scale negative impacts on society and for creating an environment for the future resumption of economic activity in the country.

[59] Mr Ithindi states that the financial relief offered by the government to employers was intended to cover up to 25 per cent of an employer's wage bill during the three-month period and employees in the affected industries were provided a wage support cash subsidy of up to 50 per cent of their total costs to employer. He explains that even if the affected employers opted to negotiate a wage reduction with their employees of up to 50 per cent, the cash injection from the relief packages allowed for both, employers and employees, financial windfall to retain jobs.

Employers' reply

[60] According to the employers, Government in its answering affidavits failed to furnish concrete facts to support the view that it was necessary for the President to effectively take over all functions of governing and legislating for the country.

[61] The employers contend that they at no point agreed to the impugned directives as is alleged by the Government. According to them, the discussions at the Tripartite Committee meetings centered on guidelines as opposed to compulsory directives. The employers maintain that the impugned regulations were not arrived at by consensus, especially when regard is had to the fact that their proposed guidelines were not incorporated into what became the impugned regulations.

[62] On 22 April 2020, the impugned proclamation was circulating on social media platforms. It was upon sight of it that they objected to the draft directive in writing and sought a meeting with the office of the Labour Commissioner. A date was subsequently set for the meeting, being 27 April 2020 but this meeting did not take place.

[63] The employers do not dispute that government attempted through the stimulus package to alleviate the problems caused by the pandemic. However, where the stimulus package could not save a business because the package was too little, too late or both, contend the employers, why should an employer be compelled to continue operating or paying its employees at tremendous costs to it?

[64] According to the employers, the onerous condition attached to the government assistance served as a disincentive for employers to apply for it.

[65] The employers point to the absence in the government's affidavits of any primary facts on the severity of the impact the pandemic and the lockdown had on employers and the degree to which the stimulus package could ameliorate the hardships faced by employers. The employers demonstrated this by way of a comparison of the aviation and tourism industries. Mr Mark Dawe of the aviation industry pointed out that the contribution towards salaries in the industry of 25 per cent would be of little to no value to the aviation industry as employers in that industry are burdened by significant fixed and variable costs, leaving very low

margins. Most employers in the aviation industry have had little to no revenue since the onset of the pandemic making it impossible for them to pay salaries, even at reduced levels.

[66] On behalf of the tourism industry, Mr Bernd Schneider, stated that numerous employers applied for stimulus support once it was announced but the final modalities for such applications were only announced at the end of May 2020. The condition attached to the payment of the wage subsidy was that an applicant employer commits not to retrench any staff during April, May and June 2020. However, by 28 May 2020, contends Mr Schneider they had not received any information from the wider tourism industry that payments in terms of the wage subsidy had been made.

[67] The employers also delivered a supplementary replying affidavit deposed to by Ms Carolan Sharpe of Huab. According to Ms Sharpe, the Government does not appreciate the real impact of the lockdown as well as the worldwide restrictions on the movement of people on the tourism industry in Namibia. According to her, the problem faced by Huab was not temporary in nature. Besides, she avers, the business relies almost entirely on foreign tourists who make up to 85 per cent of their guests. So devastating was the impact on Huab that bookings for the entire period of April 2020 to August 2020 were cancelled and indications were that it would be so until March 2021. Government's interventions would therefore not mitigate the impact on Huab. Although she did submit applications on behalf of those employees earning below N$50 000 per annum to benefit from the Salary

Protection Scheme, this did not materialise as there still had been no response from the authorities by the end of 14 days which was the maximum response time.

[68] According to Ms Sharpe she did not apply for the wage subsidy because it would cover only 17 per cent of the wage bill and the business simply did not have the means to cover the remaining 83 per cent of the wage bill - especially because the stimulus package did not provide for any overheads. According to Ms Sharpe, there was no other viable option than to close down permanently as the problems they encountered were not for a limited period and it did not make any business sense to stay open.

[69] With respect to the closure of the office of the Labour Commissioner, the employers contend that the allegation that meetings during the lockdown could not take place is incorrect as meetings in terms of s 34 of the Labour Act could and did take place. According to the employers, in any event, that did not justify a blanket ban on negotiations when physical and teleconference meetings could take place safely. Further, during lockdown persons could leave their homes for any 'reason that is justifiable in the circumstances' and meetings in terms of s 34 could thus take place.

<u>The High Court</u>

*Did the President exceed the powers conferred on him by Art 26(5)(*b*) of the Constitution?*

[70] The High Court held that in order for the power conferred on the President by Art 26(5)(b) to be lawfully exercised, the regulations that the President makes

must be for a specified period, subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the SOE.

[71] The High Court held that in making the suspension regulations the President exceeded his power under Art 26(5)*(*b*)* because the regulations do not deal with the situation that necessitated the declaration of the SOE but with the consequences arising from the President's imposition of the lockdown. The Full Bench wrote:

> '[75] In this matter the applicants furthermore do not dispute that, objectively viewed, the outbreak and spread of the Coronavirus in Namibia is an emergency which threatens 'the life of the nation or the constitutional order of the Republic'. The applicants, however contend that the President exceeded his power under Article 26(5)(b) by making regulations prohibiting employers to dismiss an employee; or terminate any contract of employment; or serve a notice of intended dismissal in terms of section 34 of the Labour Act; force an employee to take unpaid leave or annual leave; or to reduce the remuneration of any employee for reasons related to the actual or potential impact of COVID-19 on the operation of the employer's business during lockdown. They say this is so because these regulations do not deal with the situation that has necessitated the President to declare a state of emergency.
>
> [76] . . .
>
> [77] The Meriam Webster dictionary amongst other definitions, defines the phrasal verb 'deal with' as to be about (something) **or** to have (something) as a subject, or to do something about (a person or thing that causes a problem or difficult situation). Mr Marais conceded that these regulations[8] deal with labour related matters and that the President only interfered to the extent that employers

[8] Regulation 19 of Proclamation 16 of 2020 (the Suspension Regulations) and regulation 12 of Proclamation 18 of 2020 (the Further Suspension Regulations).

> interfered or intended to interfere with employee benefits as a result of the COVID-19 impact. In other words, the obvious intention was to, as far as possible, retain the *status quo* (without final removal of rights, either side) pending termination of the lockdown.
>
> [78] What the concession by Mr Marais in our view means is that the regulations do not deal with (in the sense that they do not do something to control or curtail the spread) the Coronavirus. The determination of the legality of the regulations do not depend on how laudable, as Mr Marais argued, they are. The legality of the regulations, strictly interpreted, is measured by enquiring whether they are authorised by the Article of the Constitution cited as the source of the power to make them. The regulations are therefore not "reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency" and to that extent the President breached the principle of legality. Regulation 19 of the *Suspension Regulations* and regulation 12 of the *Further Suspension Regulations* are therefore unconstitutional.'

[72] The High Court therefore concluded that the suspension regulations were not "reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency" and to that extent the President breached the principle of legality. Regulation 19 of the *Suspension Regulations* and regulation 12 of the *Further Suspension Regulations* were therefore declared unconstitutional.

[73] The following Regulations were consequently declared unconstitutional:

> '2. . . .
>
> 2.1 regulation 12(1)(a);
>
> 2.2. regulation 12(1)(b);
>
> 2.3 regulation 12(2);
>
> 2.4 regulation 12(5); and
>
> 2.5 regulation 16 in as far as it relates to the impugned provisions of Proclamation No 18 contained in the "State of Emergency – Covid-

19: Further Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations”, Proclamation No 18 of 2020 are unconstitutional and thus invalid.

3. The following regulations, namely:

3.1. regulation 19(1)(a);
3.2. regulation 19(1)(b);
3.3. regulation 19(1)(c);
3.4. regulation 19(2);
3.5. regulation 19(4);
3.6. regulation 19(6);
3.7. regulation 19(8); and
3.8. regulation 25, in as far as it relates to the impugned provisions of Proclamation No 16 contained in the “State of Emergency Covid-19 Regulations, Proclamation No 16 of 2020” are unconstitutional and thus invalid.’

Did the President impermissibly delegate his powers?

[74] According to the Full Bench, Art. 26(5)(b) confers on the President regulation-making power, including the power to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by the Constitution. Yet the President had, the court opined, for reasons that have not been properly explained (but presumably for practical reasons), delegated the power to ministers to issue directives for the purpose of supplementing or amplifying any provision of the regulations or ensuring that the objectives of the regulations are attained.

[75] The court *a quo* went on to explain (and make a determination) in respect regs. 14 and 15 as follows:

‘(a) By regulation 14(1)(*a*) the President authorizes a minister to issue directives for the purpose of supplementing or amplifying on any provision of the regulation. The *Oxford South African Concise Dictionary Second edition* defines supplement as ‘a thing added to something else in order to complete or enhance it’. Properly understood, the President is giving power to a minister to add to the regulations made under Art 26(5)(*b*). . . .[This regulation authorises the suspension of rights conferred on citizens by the common law, statute or the Constitution itself. The President is literally speaking abdicating part of his constitutional power and this is impermissible. Regulation 14(1)(*a*) and its equivalent regulation 15(1)(a) breach the presumption against delegation and are therefore unconstitutional.

(b) . . .

(a) By regulation 14(2) the President states that a directive issued under the regulations has the force of law and may deal with any matter that is within the ambit of any legislation or other law that is administered by the minister concerned. This we interpret to mean that the President is giving his ministers ‘*a blank cheque’* to deal with any matter that is within the ambit of any legislation or law (this by implication includes the Constitution). This is the purest example of relinquishing power, unfettered and uncontrolled and is surely impermissible delegation. Regulation 14(2) and its equivalent regulation 15(2) breach the presumption against delegation and are therefore unconstitutional.

(b) By regulation 14(3) the President states that a directive issued under the regulations must be referred to the Attorney-General for approval and must be published in the *Gazette*, for the directive to have the force of law. Art 26(5) confers the powers on the President and the President alone to make laws, including the suspension of rights. Therefore the President and he alone has the final say. It is therefore an abdication of power for him to authorize the Attorney-General to have a final say on what the directives must say. Regulation 14(3) is therefore an impermissible delegation of power. Regulation 14(3) and its equivalent regulation 15(3) breach the presumption against delegation and are therefore unconstitutional.

> (c) . . .
>
> (d) By regulation 14(5) the President states that a directive issued by a minister may create offences for contraventions of, or failure to comply with the directive and provide for penalties of a fine not exceeding N$2 000 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment. This directive in our view may create offences which may at one time or the other, deprive citizens of their liberty. We are thus of the view that this is power that must be exercised by the President himself and this delegation is thus impermissible. Regulation 14(5) and its equivalent regulation 15(5) breach the presumption against delegation and are therefore unconstitutional.'

[76] The court *a quo* therefore invalidated the following regulations as being an impermissible delegation of the President's power under Art 26(5)(b):

> '4. Regulation 14 contained in the "State of Emergency Covid-19 Regulations", Proclamation No 9 of 2020 is unconstitutional and invalid.
>
> 5. Regulation 15 contained in the "State of Emergency Covid-19 Regulations", Proclamation No 17 of 2020 is unconstitutional and invalid.'

Costs

[77] In respect of costs, the High Court ordered that 'first to the sixth respondents must, jointly and severally, the one paying the other to be absolved, pay the applicants' costs of this application. The costs to include the costs of one instructing and three instructed counsel'.

<u>The appeal</u>

[78] Aggrieved by the High Court's judgment and order, the government appealed to this court on the following main grounds:

(a) The High Court erred in holding that answering affidavits deposed to by the Minister of Labour and the Attorney-General and other supporting witnesses, constituted inadmissible hearsay evidence. The appellants maintain that the President's decision to declare a State of Emergency was lawfully done, and thus his reasons for doing so were accordingly irrelevant. Secondly, the government contends that the President's subjective motives and reasons for enacting the regulations were irrelevant as the assessment depended entirely on an objective characterisation of the regulations and an assessment whether they fell within the scope of the President's regulation-making powers under Art 26. In essence they contend that, what was relevant was the objective need for and effect of the regulations, and these were matters on which the Minister of Labour and the Attorney-General gave admissible evidence.

(b) The High Court erred in its finding that the suspension regulations failed to meet the requirements of Art 26(5)(b); and that the interpretation by the High Court of the situation which has given rise to the emergency was unduly narrow and restrictive, whilst the regulations spoke of the situation which has given rise to the emergency. It is not confined to the original trigger event. The minister's evidence was that government adopted and implemented very significant measures to support the business community and

employers in particular to save jobs, whilst the employers did not extend the same support to their employees during the lockdown. The employers dismissed them, forced them to take unpaid leave and reduced their remuneration. The President accordingly promulgated the labour regulations to protect employees during the lockdown. The appellants contend that the pandemic necessitated the lockdown which in turn necessitated the protection of employees by means of the suspension regulations. All of these were components of the situation which had given rise to the emergency and for that reason the suspension regulations were competent.

(c) The High Court erred in its conclusion that Regulation 14 of the Regulations and Regulation 15 of the Stage 2 Regulations constituted impermissible delegation by the President to ministers. The conclusion, it is said, is fatally flawed by its mistaken understanding that the regulations themselves delegate powers to ministers. The appellants contend that the regulations do not in themselves delegate anything, but merely provide that the President may "authorise a minister to issue directives". The appellants contend that the regulation accordingly requires the President to determine whether to authorise any minister to issue directives at all; the subject-matter on which a minister is authorised to issue directives; the constraints on the minister's freedom to determine what directives to issue; the qualifications of the minister's power to issue the directives; and whether the minister must first obtain the

> President's approval before issuing directives of this kind. Whether the President delegates any powers under these regulations and, if so, on what terms he does so, cannot now be determined.

[79] The Government therefore seeks to set aside the High Court's judgment and orders nullifying the suspension regulations and those authorising the President to delegate directive-making power to his ministers. The employers support the judgment and order of the High Court. They do so in respect of that court's conclusion that the suspension regulations were not necessary to deal with the spread of the pandemic. Alternatively, they would support the court *a quo*'s order on the basis that the suspension regulations were unreasonable and irrational. They also maintain that the regulations do not pass the proportionality test. As far as the delegation regs. 14 and 15 go, the employers support the High Court's conclusion that those are constitutionally non-compliant.

[80] On appeal, the Government was represented by Mr Budlender SC. The first, third and fourth respondents were represented by Mr Heathcote while the second respondent was represented by Mr Nekwaya. Each counsel was assisted by one or more juniors.

<u>Issues to be decided</u>

[81] Both *a quo* and in this court, the parties had raised several issues, some of which have since fallen by the wayside and do not require determination on appeal. I find it unnecessary therefore to make any reference to those issues which are no longer live controversies between the parties.

[82] The two core issues which we are concerned with on appeal are whether the President acted within his constitutional mandate to suspend certain provisions of the Labour Act and whether he impermissibly delegated regulation-making powers to Ministers. Although it occupied a great deal of attention *a quo* and resulted in an unfavourable finding against the Government, the question whether the averments contained in the Minister of Labour's and the A-G's opposing affidavits constituted inadmissible hearsay, was not actively debated on appeal by the employers. The employers have not addressed it at all in their heads of argument. The issue was however pursued by the Government and occupied a great deal of attention in its written and oral submissions on appeal. That is not surprising given the precedent-setting significance of the High Courts' decision on the matter.

[83] I will first dispose of the issue of the admissibility of the affidavits.

Declaration that affidavits constitute hearsay

[84] As is common cause, the President did not depose to an affidavit, including any confirmatory affidavit. The High Court held that since what was challenged was the President's power under Art 26(5)(b), the President was the one to depose to the answering affidavit and to explain and justify the manner of exercise of the power. For that reason, the learned judges *a quo mero motu* raised the issue whether the allegations by the Minister of Labour and the A-G, purporting to explain the reasons why the President exercised the authorised power in the

manner he did, constituted inadmissible hearsay. The High Court held it did. It said:

> '[31] There is, in the circumstances, no gainsaying the fact that in the absence of an affidavit by the President, at the least, confirming what is attributed to him by both the Minister and the Attorney-General, regarding what he personally took into account in issuing the measures he did, particularly the measures that form the subject of this application, the statements by the Minister and the Attorney-General, constitute inadmissible hearsay evidence. This precariously leaves the court in a position afflicted by a cloud of darkness as to what it is that the President took into account in exercising the formidable powers imbued on him by Article 26 of the Constitution.'

[85] The court *a quo* however took the view that the merits of the challenge could still be decided without reference to the inadmissible evidence. It said:

> '[46] In the premises, the court, in the absence of the considerations taken into account, has to decide this matter from an agnostic position, totally devoid of what the President may have had in mind at the material time. With this having been said the court will consider the submissions by the applicants and those of the respondents that do not amount to hearsay evidence.'

[86] The government contends that in enacting the impugned suspension regulations, the President complied with Art 27(3)[9] of the Constitution by acting in consultation with his Cabinet. The Minister of Labour and the A-G states that because they were intimately involved in the preparation of the submissions to the President and acted in collaboration with him in the production of the SOE regulations, they were in just as good a position to give first hand evidence as to

[9] Which states: 'Except as may be otherwise provided in this Constitution or by law, the President shall in the exercise of his or her functions be obliged to act in consultation with the Cabinet.'

the reasons why the President promulgated the impugned Regulations. The Government therefore maintains that the High Court erred by excluding the evidence of the Minister of Labour and the A-G which furnished the facts, advice, considerations and policies underpinning the President's decision-making 'in consultation with the Cabinet'.

[87] There is merit in the Government's contention that because of Art 27(3) of the Constitution the impugned evidence was not hearsay and was perfectly admissible. Mr Budlender reminded us that the President exercises executive power 'in consultation with the Cabinet'. I did not understand the employers' counsel to suggest that the power under Art 26(5)(b) is not such a power. It is precisely on a matter as serious and momentous as declaring a SOE and making regulations arising from it that, in a democratic State which places a premium on accountable government, one would expect the Head of State to act in concert with the Cabinet. As Mr Budlender correctly submitted, the Ministers of Health and Labour, being the experts on the issues at stake, and the A-G as the government's principal legal advisor, played a key role in the formulation of the policy relating to the declaration of the SOE and passing of the associated regulations. They therefore bore direct, first-hand, knowledge of the reasons that prompted the President's declaration of the SOE and the passing of the regulations. The matters they deposed to therefore fell within their personal knowledge as members of the Cabinet on whose behalf and at whose behest the President acted.

[88] As Mr Budlender correctly argued, the Ministers and the A-G were joint decision makers with the President and anyone of them could give evidence on

the matters that fell within their personal knowledge. Therefore, the High Court's conclusion that the evidence of the Minister of Labour and that of the A-G constituted hearsay, cannot be supported.

Was there impermissible delegation?

[89] I proceed to consider the other erroneous conclusion reached by the High Court - that the President impermissibly delegated certain directive-making power to ministers by passing regs. 14 and 15. The High Court reached that conclusion despite the appellants' objection that the challenge was premature. Premature because the President had not made any delegation at the time of the challenge. The High Court overcame that objection by relying on the decision of this court in *Alexander v Minister of Justice & others.* [10]

[90] In Alexander, the applicant who was the subject of an extradition request by his country of origin (United State of America), approached the High Court to seek a declaratory order that a provision in the Extradition Act 11 of 1996 (the Extradition Act)[11] which provided that a person who has been ordered to be extradited may not be admitted to bail, was unconstitutional. The challenge against s 21 of the Extradition Act was met with the objection that it was premature because Mr Alexander had not yet been extradited. This court (Strydom AJA, Maritz AJA and Damaseb AJA) rejected the objection and held that the challenge was not premature because the extradition proceedings had been set in motion by

[10] *Alexander v Minister of Justice & others* 2010 (1) NR 328 (SC).
[11],Section 21.

the provisional warrant and arrest of Mr Alexander and there was no indication that the matter would not run its course from there.[12]

[91] Mr Budlender argued that *Alexander* is distinguishable because in the present case there was no certainty that the President would in fact delegate the powers and whether he would make any delegated power subject to his prior approval before being brought into force. Mr Budlender correctly submitted that one circumstance in which a delegation is permissible is where the delegator retains control over the exercise of the power by the delegate.[13]

[92] That a blanket rejection of the delegation by a repository of a regulation–making power to another functionary is not sound in law is demonstrated by the President granting authority to the Chief Justice[14], as Head of the Judiciary, to issue directives in respect of the functioning of the courts during the lockdown. As Mr Budlender correctly pointed out, who is better placed than the head of the Judiciary to determine how the courts should function during lockdown?

[93] I am satisfied that where the repository of a power places limits on the delegated legislative power and makes it subject to his or her prior approval, such a delegation would not be *ultra vires*. There is no reason to assume that the President would not have adopted such a safeguard and therefore it was premature for the employers to challenge the impugned regulations when they did.

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[12] *Alexander* para [71].

[13] *Du Plessis v Administrateur -General vir the Gebied Suidwes -Afrika en Andere* 1980 (2) SA 35 (SWA) at 45; and L Baxter *Administrative Law* pp346-347.

[14] Reg. 19(11).

Accordingly, the High Court's declaration of unconstitutionality of regs. 14 and 15 was a misdirection and liable to be set aside.

Do the suspension regulations pass muster?

[94] The first disagreement between the parties that calls for resolution is whether the power under Art 26(5)(b) restricts the President to making regulations directly related to addressing the situation that gave rise to the SOE. In other words, was the President restricted or limited to making regulations to stem the spread of Covid-19? This all stems from the High Court's acceptance of the employers' contention that the power under Art 26(5)(b) did not authorise the President to make regulations to deal with the consequences of the lockdown.

[95] The employers contend that the power under Art 26(5)(b) should be narrowly and strictly construed. And that is what the High Court did. The Government criticises that approach on the basis that such an approach is only permissible where there is a challenge to the breach of an enumerated constitutional right or freedom. It is said that the applicants singularly failed to allege and prove any breach of a right or freedom guaranteed in the Bill of Rights. In addition, the Government maintains that emergency powers conferred to preserve the life of the nation and its people should be interpreted broadly, generously and purposively so as to ensure their underlying purpose is achieved.

[96] The criticism is made that although the court *a quo* was alert to the need to interpret the Article broadly and purposively, it fell into error by adopting a dictionary-based approach in interpreting the parameters of the power under Art

26(5)(b) instead of giving the words their widest possible amplitude to avoid the austerity of tabulated legalism. Mr Budlender argued that powers intended to deal with health emergencies must be interpreted expansively so as to empower the Executive to act in the fastest and most direct fashion to address the problem, including dealing with the consequences of measures taken to address the emergency.

[97] According to Mr Budlender, combatting the pandemic of necessity required limiting the movement of persons and their contact with each other. The lockdown served to achieve that objective. The imposition of the lockdown in turn would have very serious economic consequences. The suspension regulations were therefore enacted to limit those consequences *in tandem* with the stimulus and relief packages.

Are there implied powers under Art 26(5)(b)?

[98] Counsel for the government argued that the power to deal with the consequences arising from the SOE is reasonably incidental to the authorised power of declaring the SOE. In other words, that the authorised power would be defeated if the ancillary power (that of dealing with the consequences of lockdown) is not implied or if the authorised power cannot in practice be carried out in a reasonable manner unless the ancillary power is implied. A strict and narrow construction, the employers appear to suggest, will have the effect that a regulation intended to ameliorate the consequences of the lockdown would be *ultra vires* and that the power exists solely for the purpose of arresting the spread

of the pandemic. Conversely, a broader and more purposive interpretation, if I understand Mr Budlender correctly, would produce the opposite result.

[99] In the view I take of the matter as regards implied powers, I do not find it necessary to dwell on the question whether the power must be narrowly or broadly interpreted.

[100] The applicants' resistance to implied powers is unsustainable. As Mr Budlender for the Government correctly submitted, if no implied powers are read into Art 26(5)(b), how can one justify the President for example making regulations for an essential services regime? Yet without such a regime the entire effort of trying to deal with the pandemic would become meaningless. In my view, implied powers are intended in Art 26(5)(b) if, without such powers, tackling the pandemic would be impossible. But they must be reasonably justifiable. The farther removed or distant an intrusion into existing rights from the situation that has given rise to the emergency, the less justifiable it becomes, especially if its effect is to impose burdens which, in and of themselves, do not assist in managing the pandemic. I return to this theme presently.

[101] Because of my finding that, in an appropriate case, an implied power is to be read into Art 26(5)(b) to address the consequences of the situation that has given rise to a SOE, it has to be assumed that if the High Court approached the matter in the same way it would necessarily have considered whether the suspension regulations were unreasonable or irrational since the employers had raised those review grounds.

Is Regulation 19 reasonably justifiable?

[102] The High Court's ratio for invalidating reg. 19 is that it is not aimed at controlling the spread of the pandemic but instead to blunt the impact of the lockdown on workers' livelihoods. That objective, the court *a quo* held, was not to deal with the situation that had given rise to the SOE. It follows that in the manner the High Court approached the matter, it became unnecessary for it to consider whether reg. 19 passed the test for reasonableness or rationality – both of which were relied on as constitutional review grounds by the employers.

[103] By what standard should a court measure whether the regulations suspending the provisions of the Labour Act are 'reasonably justifiable' to deal with the situation that has given rise to the SOE? The employers argue that the applicable test, amongst others, is that of proportionality. They assert that the regulations took away created and vested rights. The Government retorts that the standard of proportionality would only arise if there was alleged and proved breach of a specific right guaranteed in the Bill of Rights. Mr Budlender emphasized that the arguments made by the employers concerning proportionality and derogation and limitation of rights do not avail them because those were not pleaded and therefore not dealt with by the Government in the answering papers. These are therefore new causes of action which do not avail the employers, according to Government's counsel.

[104] Mr Budlender relied on the trite approach that a proportionality inquiry arises where there is at issue, limitation of constitutional rights and, the issue is

whether a law imposes reasonable restrictions. The proportionality test involves the court assessing if limitation and derogation of rights are reasonable. The court looks at the nature of the right, the importance, extent and purpose of the limitation, the relation between the limitation and the existence of less restrictive means to achieve the legitimate purpose. Proportionality means that the infringement of rights should not be more extensive than is warranted by the purpose the limitation seeks to achieve. As has been said in a proportionality inquiry 'The duty of a court is to decide whether or not the Legislature has overreached itself in responding, as it must, to matters of great social concern.'[15]

[105] Since the employers had not met the standard required for the court to engage in a proportionality inquiry, I must agree with Mr Budlender that we cannot engage in such a proportionality inquiry. That said, it is necessary to point out that an exercise of the power under Art 26(5)(b) which does not meet the jurisdictional facts for doing so is a legitimate basis for it to be challenged. The President can only suspend the operation of laws for the purpose stated in the Article. It is a right guaranteed by the Constitution to live under, to be governed by and to exercise rights granted by the ordinary laws of the land. Legality and the rule of law which are the cornerstones of the Constitution demand no less. As has been said:

> 'Constitutionalism is the idea that the government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution.'[16]

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[15] *S v Manamela & another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 34 and paras 65 – 66. See also, *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 104; *Kauesa v Minister of Home Affairs & others* 1995 NR 175; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & others* 2009 (2) NR 596 (SC) paras 65-68; *Medical Association v Minister of Health and Social Services* 2017 (2) NR 544 paras 61-62.

[16] I Currie and J De Waal *The Bill of Rights Handbook* 5ed at 8.

[106] It is unarguable that the suspension of the provisions of the Labour Act attenuated rights enjoyed by employers under the Labour Act and correspondingly extended and improved the rights of employees which they would not otherwise have but for the suspension. In so doing, the suspension regulations interfered with the statutorily calibrated balancing of rights (as between employers and employees) in the Labour Act.

[107] Constitutionalism, legality and the rule of law are justiciable principles of the Constitution in that any law or conduct inconsistent with them may be declared invalid.[17] Those tenets dictate that the inhabitants of Namibia and those who find themselves within the boundaries of the Republic shall be subject to the ordinary law of the land both in the burdens it imposes and the benefits it bestows.

[108] The power exercised by the President is to 'suspend' provisions of ordinary laws. By suspending the operation of the ordinary law, the President is, in effect, restricting the full enjoyment of the benefits and protections afforded to inhabitants as well as those who find themselves within the boundaries of the Republic by the laws of the land. Therefore, aggrieved persons have the right under the Constitution to enforce compliance with the strictures of the Constitution.

[109] As Ackerman J put it in *S v Makwanyane*[18] , in a constitutional state:

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[17] *The Bill of Rights Handbook supra* at 7.
[18] *S v Makwanyane* & another 1995 (3) SA 391 (CC) para 156.

> 'We have moved from the past charachterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.'

[110] It is apparent from the written submissions and oral argument advanced on appeal on behalf of the Government that it accepts that to meet the 'reasonably justifiable' standard embedded in Art 25(6)(b), the suspension regulations must be reasonable and rational. Mr Budlender submitted that the suspension regulations satisfied the test for reasonableness. Counsel argued that the impugned regulations are 'highly policy-laden' as they involved weighing of competing interests of employers, employees and society more broadly. For that reason, counsel argued, as long as the President's suspension of the provisions of the Labour Act 'is one of the courses of conduct within the range of reasonable courses of conduct available', it is not for judges to impose the course of conduct they would have chosen.'[19]

[111] The suspension was reasonable, it was argued, because of the Government's concern about the economic and human consequences of the lockdown. Government's concern was heightened by reports that 'many employers dismissed their employees, forced them to take unpaid leave, or reduced their remuneration.' Hence, the need to protect employees during the lockdown. Besides, the argument went, the President only regulated and did not prohibit the

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[19] *Trustco Ltd t/a Legal Shield Namibia & another v Deeds Registries Regulation Board & others* 2011 (2) NR 726 (SC) para 31.

employers' rights under the Labour Act. The prohibition did not apply if those rights were exercised 'following stipulated procedures which were aimed at reaching fair consensus.'

[112] As to rationality, Mr Budlender argued that the impugned decision was policy-laden and would pass the rationality standard if it fell within a range of reasonable courses of conduct open to the decision-maker and was not 'irrational or arbitrary'. The impugned measure is to be tested against the criterion whether it is rationally related to the objective sought to be achieved: In other words, 'the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'[20]

[113] Lord Cooke's approach to unreasonableness in *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd*[21] was endorsed by the South African Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[22]. Writing for the majority, O'Regan J characterised that approach as providing 'sound guidance'.

[114] Lord Cooke said that 'the simple test [is] . . . whether the decision in question was one which a reasonable authority would reach. 'The converse [is] . . .

[20] *Albutt v Centre for the Study of Violence and Reconciliation, & others* 2010 (3) SA 293 (CC) para 51.
[21] *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* [1999] 1 All ER 129 (HL) at 157.
[22] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* and Tourism & others 2004 (4) SA 490 (CC) paras 44-45.

"conduct which no sensible authority acting with appreciation of its responsibilities would have decided to adopt".' Lord Cooke added that in assessing whether a decision is reasonable, the court will consider if the decision maker 'has struck a balance fairly and reasonably open to him.'

[115] In *Bato Star* O'Regan J went on to state (para 45):

> '[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[116] The Bato-Star approach is part of our law as exemplified by *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and others* 2011 (2) NR 726 (SC) para [31] and *New Era Investment (Pty) Ltd v Roads Authority and others* 2017 (4) NR 1160 (SC) para [36]. It is therefore settled that conduct or a decision (in this case a regulation in terms of Art 26(5)(b)) will not be reasonable if no functionary invested with the power to make it, and possessed of all the facts which include its potential harmful consequences, would have taken the impugned decision.

Rationality

[117] The rationality standard was explained as follows by Chaskalson CJ in *Pharmaceutical Manuafacturers Association of South Africa & another: In Re Ex Parte President of the Republic of South Africa & others*[23]:

> '[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.
>
> [86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.'

[118] In determining whether a regulation under Art 26(5)(b) is 'reasonably justifiable' a court will be guided by the following considerations:

(a) Is its stated objective (mischief) legally permissible?

(b) What are its consequences on those affected?

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[23] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex Parte President of the Republic of South Africa & others SA* 2000 (2) SA 674. See also the dictum by Ngcobo CJ in *Albutt v Centre for the Study of Violence, & others* 2010 (3) SA 293 (CC) para 51.

(c) The extent of the harm or intrusion cannot be immaterial, and therefore;

(d) It is an important consideration whether the stated objective or mischief had the potential to cause disproportionate harm to one person or group of persons compared to another. In that inquiry, the test is not what the court considers would have been a better solution to the problem that faced the President but rather whether the measures he adopted to address the problem fall within a range of reasonable solutions to address the problem;

(e) The farther removed the measure implemented by the President from dealing with the situation that has given rise to the state of emergency (in this case the pandemic), the higher the burden of justification;

(f) The more harmful the measure on existing rights, the less reasonably justifiable it becomes;

(g) At all events, the President bears the onus of justification, once a measure has been challenged and sufficient material placed before court on affidavit by aggrieved persons that rights have been infringed.

Application of law to facts

[119] The Government bore the onus to set out the grounds and the reasons that make the suspension reasonable and justifiable. The employers bore no onus to contemplate every possible reason that might have actuated the President in enacting reg. 19 and to counter it unless such reason was objectively obvious based on commonly known facts.

[120] The declaration of the SOE and the attendant lockdown have not been placed in issue by the employers. Besides, objectively viewed, their necessity cannot be placed in doubt. To that extent, the requirements of Art 26(1) and (5)(a) have been met.

[121] The link between the suspension regulations and the control of Covid-19 is however not apparent on the face of it and required justification to comply with Art. 26(5)(b).

[122] The Government's stance is that the suspension regulations were necessary because of the unprecedented nature of the pandemic and the need for the President to act decisively to stem its spread and to deal with the fallout from his effort to do so. The inherent danger in this argument is that there is no guarantee that we will never again be faced with an emergency of the kind the pandemic represents. It is important therefore that the core values of the Constitution are immutable whatever the exigencies of the day.

[123] The pandemic was unprecedented and posed a serious threat to the health of the nation in a way never before experienced. On available medical

knowledge, Covid-19 has no cure and is highly transmissible with deadly consequences. The President had information that employees were being retrenched, forced to take leave for reduced or no remuneration because of the lockdown. He was worried that employees might cause social unrest because of the actions of employers. There was also uncertainty about just how long the pandemic would last. The President felt the need to protect workers by suspending provisions of the Labour Act used by employers to deal with workers in the way that I have described. The Government announced a stimulus package to avail financial assistance to, amongst others, businesses if they qualified and committed not to take adverse actions against employees in terms of the provisions of the Labour Act which the President suspended.

[124] On the other hand, the pandemic and the resultant lockdown which stopped all but essential services and trade in essential goods also adversely impacted employers. They could not trade unless they were declared as an essential service. The suspension of the relevant provisions of the Labour Act would create rights in favour of employees which would be enforceable well after the lifting of the suspension and lockdown regardless of an employer's state of financial health. An employer who is unable to retain an employee is required to reach consensus with the employee and failing agreement to seek conciliation. The employer cannot take unilateral action which it can under the ordinary law.

[125] The employers stated on affidavit that, contrary to the Government's version, it was not necessary to suspend the relevant provisions of the Labour Act for the stated reason that because of the lockdown, the Labour Commissioners'

office could not function for access by employees and employers in situations involving retrenchment, forced leave and reduction in working hours. The employers stated presciently that virtual meetings were possible for that purpose.

[126] In my view, the procedure of consensus first and conciliation in the event of failure as prescribed in reg. 19 as a way for employers to mitigate the hardship of retaining employees is meaningless because it is more probable than not, that employees would not agree – a dilemma aggravated by the stigma created by criminal liability for unilateral conduct however necessary that might be. Therefore, the employers' distress was aggravated by preventing them from adopting measures aimed at mitigating the hardship thrust upon them - measures considered by the legislature as legitimate under the ordinary laws of the land. The suspension went as far as reversing completed remedial steps taken by employers before the suspension regulations took effect. A circumstance to be considered alongside the either non-existing, inadequate or ineffective assistance by the Government to businesses in distress. Also, at the core of the suspension regime, accompanied as it is by criminal sanction in the event of default, is the presumption that employers, regardless of the hardship being experienced, have the means to continue paying.

[127] The suspension regime is therefore indifferent to the harm forced upon employers by the pandemic and the lockdown.

[128] Against that backdrop, is reg. 19 reasonably justifiable?

Unreasonableness

[129] We know from *Bato Star* that the reason for the decision, the competing interests involved and the decision's impact on those affected by it are important considerations in determining if it is reasonable.

[130] The refrain adopted in the answering affidavits and in argument on appeal is that the effect of the impugned suspension regulations is not to prohibit the invocation of the relevant provisions of the Labour Act, but only to require consensus and pursuing conciliation failing consensus.

[131] The Government downplays the significance of the suspension regulations which effectively removed flexibility in the joints of an employer. Flexibility which is so critical if an employer is able to effectively manage and control costs and overheads in a situation of crises. In my view, the significance of the suspension regulations lies elsewhere. Ordinarily, absent employee agreement, the employer may act unilaterally under the Labour Act, subject to the Labour Act's in-built safeguards in favour of an employee.

[132] The sting in the suspension Regulations is that they have effectively given the employee the veto power. If he or she does not agree, the employer may not, acting with expedition, employ the relevant provisions of the Labour Act so as to save the business as he or she sees fit. As one of the employers' deponents observed:

> 'it will . . . based on my past experience, not be possible to obtain an agreement from all staff.'

[133] That observation is not far-fetched as to be rejected on the papers. Retrenchment, reduction in working hours or going on forced leave are processes which, by their very nature, are unwelcome to employees – and rightly so. Negotiation over them is bound to be uncertain as to outcome even under the best of times in normal circumstances. That it will be accompanied by acrimony and result in deadlock in times of lockdown under conditions of a pandemic such as Covid-19 is an academic proposition.

[134] In my view, an important criterion by which to measure whether the suspension measure is reasonable, is to consider its impact on the employer such as Huab that finds itself in the most vulnerable position. The employers' evidence shows that some employers were so desperate that they simply closed shop, regardless of the adverse legal consequences on them - even prior to the suspension regulation, because they had no means to continue. Yet reg. 19 requires them to retain their employees and to pay them their usual benefits, on the pain of criminal sanction if they did not.

[135] Another feature of the impugned regulation which demonstrates absence of reason is its requirement that transactions already completed before its coming into force be reversed. Reversed to the extent of not even requiring that benefits already paid to employees be made good. As the employers' evidence demonstrates, in some cases employers and employees had reached agreement on how to save the business and jobs in view of the dire straits the business found

itself in. One is then left to ask: What is the legitimate objective of reversing those transactions? I see none.

[136] As the summary of the Government's evidence amply demonstrates, a substantial part of the Government's affidavits placed reliance on the stimulus and financial relief package as government's effort to ameliorate the hardship visited upon employers by the pandemic and compelling them not to invoke the suspended provisions of the Labour Act. But on appeal counsel for the government made it clear that it is not the appellants' case that those relief measures are the reason why reg. 19 passes muster. In other words, the financial relief measures introduced by the government in the wake of the lockdown are an irrelevant consideration whether or not reg. 19 passes muster.

[137] The substantive justification then for reg. 19 is to protect workers' income during lockdown and to avoid potential social unrest. Whether the employers would have the means and the ability to assist government in achieving that objective was not a consideration the President took into account in enacting reg. 19. The failure to take into account the adverse consequences that the suspension regulations would have on employers' financial viability, while not denied, negates the reasonableness of reg. 19: unreasonableness that is heightened by the employers' uncontested evidence that what government assistance was available was either inadequate or inaccessible because of the conditions attached to it.

[138] When everything is considered, what emerges clearly is a policy designed to protect the income and livelihoods of employees in the face of the lockdown

without regard to the ability of an employer - equally weakened both by the impact of the pandemic and the lockdown - to afford the burden passed on to it by a well-intended government policy. That policy came on the back of an escape route which, for all practical purposes, rendered the employer powerless because it hinged on agreement of the employee as it eschewed unilateral action by the employer which would be possible under normal circumstances.

[139] The policy paid scant regard to the harmful effects it engendered on employers: If an employer is unable to meet its commitments to its employees, it would attract liability in favour of the employee, regardless of its inability to pay. It would also have to reverse and make good to the employee any liability that would arise from reversing completed actions such as retrenchment.

[140] Because of the impact a decision has on those affected is, as shown in *Bato Star*, a relevant consideration in a reasonableness inquiry, the retroactive civil liability visited upon employers is relevant to the inquiry whether the decision maker met the test for reasonable conduct.

[141] For all the reasons that I have set out above, the policy underpinning reg. 19 fails to strike a balance fairly and reasonably between the competing interests of employers and employees. Given the disproportionate harm it caused to employers in order to assist employees it is one which no reasonable decision maker would have adopted.

Rationality

[142] Even on the lower threshold of rationality, the policy undergirding reg. 19 does not, because of its disproportionate harm occasioned to employers, fall within a range of reasonable courses open to the President. The underlying policy's single-minded focus on the short-term gain of securing employees' income during lockdown, considered against its disregard for the long-term pain to employees from the probable collapse of an employer on account of the impact of the suspension regulations, demonstrates its irrationality.

[143] In addition, the regulation in effect imposed on an employer an obligation to assume liabilities which it may not be in a position to meet. It is not a good enough answer to say that the employer could obtain the employee's agreement and failing that to seek conciliation because those avenues have no practical benefit for the employer. The indifference to the plight of the employer is in my view evidence of the policy's arbitrariness and therefore its irrationality.

[144] The consequence of an employer's non-compliance with reg. 19 carries with it the stigma of a criminal conviction even where the employer is unable to meet the financial burden arising from an inability to make use of the processes available under the Labour Act. I can conceive of no rational connection between that and the stated objective of protecting employees, let alone curtailing the spread of Covid-19 pandemic.

[145] I am satisfied, for the reasons I have given, that reg. 19, laudable as its objective is, bears no direct relationship to the control of the pandemic and

therefore the Government bore a higher burden of justification that it passed scrutiny under Art 26(5)(b), which it failed to do.

[146] For all of the above reasons, the High Court's order striking down reg 19, albeit for different reasons, cannot be faulted.

Condonation application

[147] At the hearing of the appeal, Mr Namandje on behalf of the Government moved an unopposed application for condonation seeking the following order:

> '1. Condoning the Appellants' late filling of the affidavit of Peter Kiel which has since been filed with the Registrar of this Court on 18 November 2020.
>
> 2. Conditionally, in the event that the Court being of the view that the late filing of the affidavit of Pieter Kiel amounted to failure to file a substantial part of the record and that such failure had the effect of the Appellants' appeal being deemed withdrawn, reinstating the Appellants' appeal.'

[148] The judgment being appealed was delivered on 23 June 2020. The appeal was noted on 20 July 2020 and the appeal record was filed on 21 September 2020. It is common cause that the appellants filed the appeal record within the time required by the rules of court, but had omitted to file the supplementary affidavit of the employers' witness Peter Kiel, with the appeal record which made the appeal record incomplete and resulting in its lapsing, hence the application for condonation and reinstatement. The respondents did not claim any prejudice on account of the omission.

[149] The explanation for the non-compliance need only be briefly stated. It is said that it was not due to any gross negligence or wilful default on the part of the appellants. The legal practitioner for the appellants *a quo* who prepared and filed the record, due to human error and oversight on her part at the time of preparing the appeal record, omitted to include the supplementary affidavit in the record. The omission of the affidavit from the record only came to the attention of the appellants' legal practitioner when the respondents' counsel on 7 October 2020, in a letter, alerted them to the omission. It is explained that upon receipt of the letter, appellants' legal practitioner perused the appeal record and confirmed that the affidavit was indeed inadvertently not part of the appeal record filed. She immediately submitted a service requisition to the transcription services for the preparation of the additional supplementary appeal record, and caused same to be filed as soon as it was received from the transcribers.

[150] The court has an unfettered discretion to condone non-compliance with its rules. In the exercise of that discretion two broad considerations come into play, namely, whether there is an acceptable explanation for the non-compliance and secondly whether there are prospects on the merits of the intended appeal.[24] The public importance of the issue to be ventilated on appeal is also a weighty consideration. These factors are not individually decisive, but must be weighed one against another. The court must on the facts and circumstances decide whether it would be in the interests of justice to reinstate an appeal. [25]

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[24] *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia* 2014 (2) NR 464 (SC) para 28.

[25] *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 68.

[151] The issues at stake in this appeal are of grave public importance and it would not be in the public interest that the relief sought be denied. We are also satisfied that a full and satisfactory explanation was given for the non-compliance and that the relief sought in the interlocutory application should be granted.

Costs

[152] Although the employers ought to have been unsuccessful in their challenge of regs. 14 and 15, they remain substantially successful because reg 19 does not pass muster. The issue of the inadmissibility of evidence was raised *mero motu* by the court *a quo* and this court's disapproval of the High Court's approach should not be to the disadvantage of the employers. The cost order *a quo* should therefore not be interfered with. For the same reason, the employers are entitled to their costs in the appeal.

The order

[153] Appellants' late filling of the affidavit of Peter Kiel filed with the Registrar of this Court on 18 November 2020, is hereby condoned and the appeal reinstated. The appeal succeeds in part only and the judgment and order of the High Court are set aside and replaced with the following:

'1. The applicants' non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 73(4) of the Rules of Court.

2. The following regulations, namely:
   2.1. regulation 19(1)(a);
   2.2. regulation 19(1)(b);

2.3. regulation 19(1)(c);
2.4. regulation 19(2);
2.5. regulation 19(4);
2.6. regulation 19(6);
2.7. regulation 19(8); and
2.8. regulation 25, in as far as it relates to the impugned provisions of Proclamation No 16 contained in the "State of Emergency Covid-19 Regulations, Proclamation No 16 of 2020" are unconstitutional and thus invalid.

3. The applicants' relief aimed at invalidating the following regulations is dismissed, namely:

3.1 Regulation 14 contained in the "State of Emergency Covid-19 Regulations", Proclamation No 9 of 2020.

3.2 Regulation 15 contained in the "State of Emergency Covid-19 Regulations", Proclamation No 17 of 2020.

4. The first to the sixth respondents must, jointly and severally, the one paying the other to be absolved, pay the applicants' costs of this application. The costs to include the costs of one instructing and three instructed counsel.'

[154] The appellants, jointly and severally, the one paying the other to be absolved shall pay the respondents' costs of appeal, to include the costs of one instructing and two instructed legal practitioners for each of the respondents.

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DAMASEB DCJ

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MAINGA JA

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SMUTS JA

APPEARANCES

APPELLANTS:	GM Budlender SC with him Dr S Akweenda and S Namandje Instructed by the Government Attorney
1st and 4th – 6th RESPONDENTS:	R Heathcote with him R Maasdorp Instructed by Köpplinger Boltman Legal Practitioner
2ND RESPONDENT	E Nekwaya With him L Ihalwa Instructed by EnsAfrica|Namibia