



LESOTHO

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CONSTITUTIONAL CASE NO: 02/2022

In the matter between:

CHRISTIAN ADVOCATES AND AMBASSADORS 1st APPLICANT

JUSTICE AND DEMOCRATIC AMBASSADORS' ASSOCIATION 2nd APPLICANT

SEJELA 'MEKELELI 3rd APPLICANT

KOANTLANE MOLEFI 4th APPLICANT

TEELE NTS'ONYANE 5th APPLICANT

THE LESOTHO PUBLIC SERVICE STAFF ASSOCIATION 6th APPLICANT

and

THE PRIME MINISTER OF LESOTHO 1st RESPONDENT

NATIONAL COVID - 19 SECRETARIAT (NACOSEC) 2nd RESPONDENT

MINISTER OF HEALTH 3rd RESPONDENT

ATTORNEY - GENERAL 5th RESPONDENT

Consolidated with

CONSTITUTIONAL CASE No: 03/2022

KABELO NTITSANE

APPLICANT

and

PRIME MINISTER

1st RESPONDENT

MINISTER OF HEALTH

2nd RESPONDENT

BOARD OF THE DISASTER MANAGEMENT
AUTHORITY

3rd RESPONDENT

MINISTER OF LAW, HUMAN RIGHTS AND
CONSTITUTIONAL AFFAIRS

4th RESPONDENT

ATTORNEY- GENERAL

5th RESPONDENT

Neutral citation: Christian Advocates and Ambassador Association v The Prime Minister of Lesotho; Ntitsane v Prime Minister [2022] LSHC ... Const (02 February, 2023)

CORAM : S.P. SAKOANE CJ

T.E. MONAPHATHI J

F.M. KHABO J

HEARD : 09th MARCH, 2022

DELIVERED : 06th FEBRUARY, 2023.

SUMMARY

- *Constitutional law - COVID-19 vaccine mandates - Validity of the Government vaccine mandate policy contained in the Public Health (COVID-19) (Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021;*
- *Validity of the Disaster Induced State of Emergency (Extension) Notice, 2021;*
- *Constitutionality of the Regulations - Alleged violation of fundamental human rights protected by the Constitution in that the need to produce proof of one's vaccination status for engagement in work, performance of duties, provision or acquisition of services at any institution or place of work, study or business encroaches on people's personal liberty by depriving them the freedom to choose, Sub - regulation 23 and 24 of the Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021 is declared inconsistent with Section 18 (7) of the Constitution of Lesotho, 1993 to the extent of providing exemption against vaccination only on medical grounds and seeking only the production, upon request, of a vaccination certificate and not a COVID-19 negative certificate in the alternative.*

ANNOTATIONS

Cases cited:

LESOTHO

Attorney - General v. 'Mopa No.3 of 2002 LAC (2000-2004), 427

Boloetse and Tuke v. His Majesty, The King and 5 Others [2022] LSHC 216 Const (12 September, 2022)

Lesotho Medical Association and Another .v Minister of Health and 4 Others Const. CC No.19/2019 [2020] LSHC 14 (24 JUNE, 2020)

Lesotho National General Insurance Co. Ltd. v Nkuebe LAC (2000 - 2004), 877

Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others (C of A (CIV) 29/2013) [2014] LSCA 22 (17 April, 2014)

Thahane and Others v. Specified Officers Defined Contribution Pension Fund and Others (Constitutional Case No.10/2015) [2016] LSHC 9 (26th JULY, 2016)

CANADA

R v. Big M Drug Mart Ltd (1985) 1 SCR 295

Law Society of British Columbia v. Trinity Western University and Another (Lawyers' Rights Watch Canada and Others intervening) (2018) 44 BHRC 667

EUROPE

X v. Finland [2012] ECHR 1371 (03 July 2012)

INDIA

Directorate of Film Festivals v. Gaurav Ashwin Jain (2007) 4 SCC 737

Jacob Puliyeel v Union of India Writ Petition (Civil) No. 607 of 2021 (02 May, 2022)

Justice K.S. Puttaswamy (Retd) vs Union of India (2017) 10 SCC 1 (26 September, 2018)

NEW ZEALAND

Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320 (15 October 2021)

Kassam v Hazzard; Henry v Hazzard [2021] NSWCA 299 (08 December 2021)

Yardley v Minister for Workplace Relations and Safety [2022] NZHC 291 [25 February 2022]

SOUTH AFRICA

Bernstein and Others v. Bester NO and Others 1996 (4) BCLR 449 (CC)

Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)

Esau and Others v Minister of Co - Operative Governance and Traditional Affairs and Others 2021 (3) SA 593 (SCA) (28 January 2021)

Minister of Home Affairs v. NICRO 2005 (3) SA 280 (CC)

Prince v President of the Law Society of the Cape of Good Hope (CCT36/00) 2002 (2) SA 794 (25 January, 2002)

UNITED KINGDOM

Airdale NHS Trust v. Bland [1993]1 A11 ER 821

UNITED STATES OF AMERICA

Biden v. Missouri 595 U.S. ____ (2022) Nos. 21A240 and 21A241 (13 January, 2022); 211 L. Ed. 2d 448

Cruzan v. Director, Missouri Dept. of Health 497 U.S 261 (1990)

Jacobson v. Massachusetts 197 U.S. 11 (1905)

National Federation of Independent Business v Occupational Safety and Health Administration 595 U.S. ____ (2022) Nos. 21A244 and 21A247 (13 January, 2022); 211 L. Ed. 2d 448

Roman Catholic Diocese v. Cuomo 208 L.Ed.2d 206 (U.S. 2020)

West Virginia State Board of Education v. Barnette 319 US 624 (1943)

Statutes and Regulations cited:

Constitution of Lesotho, 1993

Declaration of COVID - 19 Disaster - Induced State of Emergency (Extension)

Notice, 2021

Disaster Management Act, 1997

Disaster Induced State of Emergency (Extension) Legal Notice No.115 of 2021

Public Health (COVID-19) (Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021

Public Health (COVID-19) (Risk Determination and Mitigation Measures) (No.10) Regulations Legal Notice No.119 of 2021

Public Health Order No.12 of 1970

Societies Act, 1966

Books cited:

Harris, O' Boyle & Warbrick, *Law of the European Convention on Human Rights* 3rd edition (Butterworths)

Articles cited:

Center for Disease Control & Prevention (CDC). Science Brief: COVID-19 Vaccines and Vaccination. Updated Sept, 15, 2021

Frazer, J. (2021). The Risk of Vaccinated COVID Transmission Is Not Low.

Klatt, M. and Meister, M. (2012). The Constitutional Structure of Proportionality cited in Rautenbach, I. M. (2014). Proportionality and the limitation clauses of the South African Bill of Rights. Potchefstroom Electronic Law Journal (PELJ), 17(6), 2229 - 2267

World Health Organisation (WHO) (2022) - Statement for healthcare professionals: How COVID - 19 vaccines are regulated for safety and effectiveness (Revised March 2022) - Joint Statement from the International Coalition of Medicines Regulatory Authorities and World Health Organization, 17 May, 2022

JUDGMENT

KHABO J.

1. INTRODUCTION

Background to the litigation

[1] Following the outbreak of the Corona Virus (COVID - 19) in 2019, the World Health Organisation (WHO) provided guidelines aimed at helping Member States contain its spread. Many States adopted these policies mainly through Public Health Regulations (PHRs). Some of the recommended best practices adopted at the time to help prevent the spread of the COVID - 19 virus included the following:

- (a) regular handwashing;
- (b) use of face masks;
- (c) physical distancing; and
- (d) COVID -19 vaccines.

[2] The matter before this court sitting in its constitutional jurisdiction concerns two separate applications, namely, Constitutional Case No: 02/2022 and Constitutional Case No: 03/2022, which were consolidated because they impinged on the same subject matter. Both these cases included the

constitutional challenge on the *Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) No. 4 Regulations, 2021* which amended the *Public Health (COVID - 19) (Risk Determination and Mitigation Measures) (Amendment) (No. 10 Regulations 2021)*. Applicant in the second application Advocate *Ntitsane* going further to attack the Declaration of COVID - 19 Disaster Induced State of Emergency (Extension) Notice, 2021. Essentially, Applicants were lodging constitutional cases against the adoption of vaccine mandates by the Government of Lesotho (the Government).

- [3] Aligning itself with these international norms, the Government of Lesotho adopted the *Public Health (COVID - 19) (Risk Determination and Mitigation Measures) (Amendment) (No. 4) Regulations, 2021*¹ which provide, *inter alia*, that:

A person who in accordance with Schedule 1, is identified under a category of persons who are required to be vaccinated by a health vaccinator, nurse, or medical practitioner, shall not engage in work, perform duties, provide or acquire services at any institution or place of work, study or business unless -

- (a) *the person has received at least one dose of a COVID - 19 vaccine;*

¹ Regulation 3 (20)

- (b) *the person has received or has evidence of a booking to receive a second dose of the approved COVID - 19 vaccine within two months of the first dose.*

Applicants' case

Relief Sought

[4] Applicants in Constitutional Case No.02 are before court seeking the following reliefs:

- (a) *Dispensing with the Rules of Court relating to service and time frames in relation thereto on account of urgency hereof, and the court to issue directions for the matter to be dealt with at such time and in such manner and place in accordance with such procedure as to promote convenient, expeditious and cheap hearing of the matter;*
- (b) *That the implementation of **Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021** be put to a halt pending the finalisation of this application;*
- (c) *That the Respondents be jointly and/ or severally directed to provide admissible, verified and competent expert medical evidence/ report to prove the existence of the COVID-19 PANDEMIC, necessity to vaccinate, safety and effectiveness of the mandatory COVID-19 vaccine/s and attendant risks to Applicants' lives and health;*
- (d) *That the **Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021** as amended be declared invalid in their entirety and/ or the offending regulation/ clauses for:*
- (i) *being ultra vires the enabling Act/Order i.e. the Public Health Order, 1970;*
- (ii) *being invalid for forcing Applicants to vaccinate and denying them the right of access to shops, public and private essential services i.e. health care to the threat and/ or violation of their fundamental rights to life, health, labour and livelihood, freedom from discrimination, right to equal protection and benefit*

of the law, right of access to courts for redress, freedom of religion, physical bodily integrity, privacy and right to an informed consent to medical treatment i.e. COVID vaccination;

- (e) That Regulation 25 of the Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021 as amended be declared unconstitutional for substantial "overbreadth" and/ or "vagueness" in that it imposes a positive duty on "any" health officer and/ or "any" medical officer i.e. "any" Health Inspector, "any" Public Health Nurse, or "any" law enforcement officer e.g. "any" Mosotho man with powers to enforce law, "any" Police or Soldier to do what is necessary" to assure that a child or person gets injected with or without consent;*
- (f) That Regulation 25 of the Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021 as amended be declared unconstitutional for substantial "overbreadth" and/ or "vagueness" in that it imposes a positive duty on the Chief Accounting Officer, Manager, an owner or a person who is in charge of an institution, enterprise, facility, entity, place of work, study or business or an organiser of an activity to deny an unvaccinated person the right to enter, remain, provide or acquire services;*
- (g) That Applicants be granted further and/ or alternative appropriate and effective relief.*
- (h) That Respondents be directed to pay costs of this Application.*

[5] Whereas Applicant in Constitutional Case No. 03 is before court seeking the following reliefs:

- 1. That Declaration of COVID - 19 Disaster - Induced State of Emergency (Extension) Notice, 2021 be declared inconsistent with Section 3 (1) read with*

Section 15 (1) of the enabling legislation the Disaster Management Act, and therefore invalid;

2. *That Declaration of COVID - 19 Disaster - Induced State of Emergency (Extension) Notice, 2021 be declared inconsistent with Section 23 (1), (2) and (5) of the Constitution of Lesotho 1993 and therefore invalid;*
3. *That Section 18 (m) of the Public Health Order, 1970 is inconsistent with Section 23 (1) of the Constitution of Lesotho 1993 and, therefore, invalid to the extent of its inconsistency;*
4. *That Regulation 2 (c) of the Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021 is inconsistent with Section 11 (1) of the Constitution of Lesotho 1993 and, therefore, invalid;*
5. *That Regulation 2 (c) of the Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021 is inconsistent with Section 18 (1) and (7) of the Constitution of Lesotho 1993 and, therefore, invalid;*
6. *Costs of suit in the event of an unsuccessful opposition to the application;*
7. *Further and/ or alternative relief.*

II. Jurisdiction

[6] The Respondents raised the preliminary objection to the jurisdiction of the court. They submitted that the 6th Applicant in Constitutional Case No. 02/2022, has no direct and substantial interest in the matter because it is an Association strictly limited to collective bargaining and ethical conduct of its members who are public servants.

[7] Applicants submitted, in counter, that they have sued both personally and in their representative capacities. It is common cause that the 6th Applicant is an Association duly registered in terms of the *Societies Act, 1966*. Section 11 (1) (a) of this Act provides that once a Society is validly registered, it can sue and be sued. In *Lesotho Medical Association and Another v The Minister of Health and 4 Others*² the court held that in respect to Associations “*all the applicant had to show was a sufficient interest of its members in the relief sought and that its members were directly affected by the impugned conduct.*” It is our considered view that the 6th Applicant has *locus standi* to safeguard the interests of its members in relation to the measures put in place by the Government in curbing the spread of COVID - 19 to ensure that in the process the rights of its members are not violated.

III. Merits

Facts

Constitutional case No. 02/ 2022

[8] The Applicants in this case contend that the Minister of Health acted *ultra vires* in promulgating *Public Health (COVID-19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021*. Reason being that when

² CONST.CC NO.19/2019 at para 14

applying the golden rule of interpretation, the words of the *Public Health Order, 1970* ought to be interpreted as is and that when observing Section 16 of the Order which lists communicable diseases, COVID-19 does not make the list. Meaning COVID-19 does not fall within communicable diseases envisaged by the Legislature. Under the same line of thought Counsel for the Applicants further submitted that the Declaration does not necessarily mean promulgation of the Regulations in question.

Constitutional case No. 03/ 2022

[9] On the other hand, Applicant in the above case alleged that on or around 07th January, 2021 he visited a Government health care facility at *Qoaling, Maseru* district where he was requested to produce a COVID - 19 vaccination certificate in order to gain access to the facility as well as services. Since he was not vaccinated, he was denied entry thereto. Applicant alleges he was informed that the denial was in terms of the *Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021*.

[10] As stated earlier, for the most part both applications seek to impugn the same law, namely, the *Public Health (COVID - 19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021*. Further, there

is little to no factual dispute in both matters apart from the fact that in Constitutional Case No. 03 the Applicant specifically alleges that he was denied entry into a Government health facility on account of failing to produce a COVID -19 vaccination certificate. Hence, the two matters were consolidated.

The Law

[11] Section 18 (7) of the Constitution of Lesotho, 1993 (the Constitution) provides that:

No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

[12] Section 16 of the *Public Health Order, 1970* provides in part on prevention and control of communicable diseases that:

The Minister may make regulations applicable to all communicable diseases or only to such communicable diseases as may be specified therein regarding the following matters -

- (a) *the imposition and enforcement of isolation or of medical observation and surveillance in respect of persons suffering from communicable diseases who are not removed to a hospital or place of isolation, the premises in which such persons are accommodated, those in charge of or in attendance on such persons and other persons living in or visiting such premises or*

who otherwise may have been exposed to the infection of any such disease;

- (b) the duties, in respect of the prevention of communicable diseases and in respect of persons suffering or suspected to be suffering therefrom, of occupiers of land on which persons reside and of employers of labour, and of chiefs and headmen and others;*
- (c) the measures to be taken for preventing the spread of or eradicating smallpox, typhus fever, typhoid fever, cholera, yellow fever, plague, poliomyelitis, tuberculosis or any other communicable disease requiring to be dealt with in a special manner...*

[13] Section 3 (1) and (2) of the *Disaster Management Act, 1997* states that:

- (1) If at any time it appears to the Prime Minister, on the advice of the Board, that any disaster in any area is of such a nature and extent that exceptional measures are necessary to assist and protect the public of such area or that circumstances are likely to arise making such measures necessary, he may declare that with effect from a date specified by him in such declaration, a state of disaster exists within the area defined in such Declaration and such declaration shall be published in the gazette;*
- (2) The declaration of a state of disaster shall remain in force for a specific period as set out in the declaration and may be extended accordingly.*

Issues

[14] From the reading of the pleadings, the main issues boil down to the following:

- (a) Does the Government have power to promulgate the Regulations and/or whether it acted beyond its scope or *ultra vires* in promulgating the Regulations?
- (b) Did the Regulations offend or violate the Constitution? Put differently, is the limitation on the constitutional and/ or fundamental human rights both justifiable and reasonable?
- (c) Do the Regulations impose vaccine mandates?

[15] The matters further raise the following incidental sub - issue, namely:

The role of courts in terms of judicial review of public/ State policies relating to public health?

IV. DISCUSSION

Does the Government have power to promulgate the Regulations or did it act beyond its scope or *ultra vires* in promulgating the Regulations?

[16] In getting to the bottom of this enquiry, certain concessions need to be laid down. Firstly, it cannot be denied that the novel Coronavirus (COVID - 19) had devastating effects and posed a serious threat worldwide. Secondly, this unprecedented pandemic called for emergency measures, some novel in nature. Thirdly, it cannot be denied that vaccinations against COVID - 19 were

accepted as one of the necessary measures to avoid infection. Lastly, the State is entrusted with ensuring the public health of the nation. Meaning the State has power to take action when confronted with a public health emergency, and in the case of the novel COVID-19, action such as insisting on isolations, setting quarantines and other restrictive measures. This position is fortified by both statutory provisions as well as judicial decisions.

[17] That being said, as novel as the Coronavirus is and the measures placed to counter its spread, this does not mean that constitutional individual rights should be encroached upon or violated. Further, that those enjoined to protect public's health should not take unprecedented acts or overreach in the execution of their duties or decision - making. Citing its own previous decision, the US Supreme Court in *National Federation of Independent Business v Occupational Safety and Health Administration*³ held that:

This “lack of historical precedent,” coupled with the breadth of authority that the Secretary now claims, is a “telling indication” that the mandate extends beyond the agency’s legitimate reach ...

Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.”

³ National Federation of Independent Business v Occupational Safety and Health Administration 595 U.S. ____ (2022) Nos. 21A244 and 21A247 (13 January 2022); 211 L. Ed. 2d 448

The right to privacy and family life

Constitutional provisions

[18] Sections 7 (1), (3) (a), 11 (1) and (2) of the *Constitution of Lesotho, 1993* (the Constitution) on freedom of movement:

“7(1) Every person shall: be entitled to freedom of movement, that is to say, the right to move freely throughout Lesotho, the right to reside in any part of Lesotho, the right to enter Lesotho, the right to leave Lesotho and immunity from expulsion from Lesotho.

.....

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) for the imposition of restrictions in the interest of defence, public safety, public order, public morality or public health on the movement of residence within Lesotho of any person or any person’s right to leave Lesotho;

Provided that a person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in this paragraph except to the extent to which he satisfies the court that the provision or, as the case may be, the thing done under the authority thereof does not restrict the movement or residence within Lesotho or the right to leave Lesotho of the person concerned to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in this paragraph;

.....

11 (1) Every person shall be entitled to respect for his private and family life and his home.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that law in question makes provision-

- (a) in the interests of defence, public safety, public order, public morality or public health; or*
- (b) for the purpose of protecting the rights and freedoms of other persons.”*

Protecting public health

Statutory provisions

[19] Section 43 (1) (c) of the *Public Health Order, 1970* on “powers to enforce precautions” provides that:

When it is considered necessary for the purpose of preventing the introduction of communicable diseases into Lesotho, the Minister may by notice in the Gazette

impose the requirements or conditions as regards the medical examination, detention, quarantine, cleansing, vaccination, isolation or medical surveillance or otherwise of persons entering Lesotho, or the examination, detention or cleansing or otherwise of any article or thing introduced into Lesotho at its borders or any part thereof.

[20] It, therefore, goes without saying that the Executive has been entrusted with the authority to limit freedom of movement and privacy rights on public health

grounds and impose medical examinations, detention, quarantine, cleansing, vaccinations, isolation and/ or medical surveillance on individuals as a means of curbing the impact of communicable diseases.

Judicial decisions

[21] In the long - standing decision of *Jacobson v Massachusetts*⁴ the US Supreme Court was of the opinion that the mandate of the Local Government for compulsory vaccination was binding on every individual. The case involved vaccination mandates or laws during the smallpox outbreak, which required individuals to be vaccinated or face penalties. The Supreme Court recognised that States had absolute authority, granted under the 10th Amendment to police power, and enforce compulsory vaccinations. The decision articulated the principle that individual liberty must be subordinate to the welfare of the general public as well as the collective good of the nation. Thus, liberty in relation to public health, may be subordinate to the power of the State.

[22] Mr Henning Jacobson, the applicant therein, refused to comply with the order that all adult citizens be vaccinated. Jacobson claimed that while he was a child a vaccine had made him seriously ill. He was ordered to pay a fine of US\$5,

⁴ 197 U.S. 11 (1905)

but refused to pay it, claiming that compulsory inoculation violated both the State and Federal Constitutions. The courts rejected this argument. Thus, maintaining the position that the safety and health of the people lie within the parameter of the Government's obligations, a factor confirmed by Adv. *Moshoeshoe* for the Respondents.

[23] In attacking the Regulations, Adv. *Ramaili* for the Applicants, insisted that the basic canon of interpretation is that words should be interpreted as is. He submitted that under Section 16 of the **Public Health Order, 1970** the Minister of Health "may" make Regulations applicable to all communicable diseases. And that a communicable disease is not necessarily a disaster.

[24] The basic tenor of the argument is that the Regulations were not supported by any law. In terms of section 18 (m) of the Public Health Order the Minister had power to issue the Regulations.

[25] Having established that the Minister did have authority to make the Regulations, the next point of the enquiry is whether the Minister's exercise of the power encroached on the Constitution or overreached on the constitutional rights of Applicants? On this issue it is worth starting with the position of the learned

Justice Gorsuch of the US Supreme Court in *National Federation of Independent Business v Occupational Safety and Health Administration* (*supra*)⁵ where he authoritatively held that “(T)here is no question that state and local authorities possess considerable power to regulate public health.”

This position is embodied locally within our statutory provision under *Section 18 (m) of the Public Health Order*, which provides that:

Whenever Lesotho or part thereof appears to be threatened by any of the diseases mentioned in Section 17, the Minister may make regulations for all or any of the following purposes -

For any other purpose whether of the same kind or nature as the foregoing or not, having for its object the prevention or control of communicable diseases; and may by order declare all or any of the regulations so made to be in force within the whole or any part or parts of Lesotho.

This goes to show that even though the Minister is bestowed with power to regulate public health, it is limited and must submit to constitutional observance, which leads us to the next issue articulated below.

[26] As stated earlier, Adv. *Ntitsane* took his attack further by impugning the *Declaration of COVID - 19 Disaster Induced State of Emergency Extension Notice, 2021*. He argued in this regard that the constitutional process laid down

⁵ Footnote 22 above.

was not followed as the Prime Minister erroneously declared this state of emergency in terms of *Sections 3 and 15 of the Disaster Management Act, 1997*.

[27] The declaration of a state of emergency under Section 23 of the Constitution contemplates times of war or public emergencies that threaten the life of the nation. Counsel for the Applicants was, however, correct in submitting that the Board of Directors under *Section 3 of the Disaster Management Act* were supposed to have satisfied themselves that the Government has made reasonable arrangements to ensure that there was supply of adequate beds, medical oxygen for patients, appropriate personal protective equipment (PPE) for frontline workers and other similar resources. Applicants have however, failed to show how these Sections were flouted by the Minister in support of their argument that the Minister acted *ultra vires* his powers in making the Regulations.

Did the Regulations offend or violate the Constitution?

[28] In line with previous concessions made above, it is further accepted that limitations may be placed on constitutionally guaranteed rights on public interest. In this regard, the court held in *Senate Gabasheane Masupha v The*

*Senior Resident Magistrate for the Subordinate Court of Berea and Others*⁶

that:

[6] Those rights are listed with others in S. 4 (1) of the Constitution as fundamental rights and freedoms. The Subsection concludes by stating that the listed rights and freedoms are protected by the provisions of the Chapter “subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice ... the public interest.”

I shall refer to this quotation as “the proviso.”

...

[18] There is this essential fallacy in the argument. The question that must be answered is whether the provisions of S.10 conform to the terms of S. 18 (4) (c), not whether they conform to the terms of the proviso. Had the framers of the Constitution intended that every limitation of the fundamental rights and freedoms had to be measured against the terms of the proviso they could simply have caused it to include such wording as “subject to any limitation imposed by or pursuant to a law designed to ensure or having the effect of ensuring...” It would have been unnecessary to specify limitations in the later sections of the Constitution. Every alleged limitation would have had to be judged on a case by case basis tested against the criteria in the proviso. Instead, the framers spelt out specific limitations which the Constitution declared to be designed to ensure absence of prejudice to, inter alia, the public interest. Accordingly, the Constitution itself

⁶ Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others (C of A (CIV) 29/2013) [2014] LSCA 22 (17 April 2014)

affirmatively disposes of the question whether S 18 (4) (c) constitutes a permissible limitation on the S 18 right.

...

[19] This conclusion is consistent with the dictum in paragraph [26] of this court's judgment in Lesotho National General Insurance Co. Ltd. v Nkuebe LAC (2000 - 2004) 877 at 891. It was there held that the limitations in the Constitution were designed to ensure the absence of prejudice to, inter alia, the public interest and that the sections subsequent to the proviso describe the nature, scope and meaning of the fundamental rights and freedoms having regard to the limitations. In other words, the public interest issue is decided, in the instances where there are limitations, by the Constitution, not by construing subservient legislation.

[29] However, that being the case, it is a well - accepted canon of our law that every general rule has an exception and the above proviso is no exemption. As it is accepted that individual rights can be limited, similarly, it is accepted that Government power can also be limited. This was yet again authoritatively articulated by Justice Gorsuch⁷ when he held that:

The federal government's powers, however, are not general but limited and divided. See: McCulloch v. Maryland, 4 Wheat. 316, 405 (1819). Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers.

⁷ See: National Federation of Independent Business v Occupational Safety and Health Administration (*supra*)

[30] Regulation 25 (ii) of the impugned Regulations states that either one of the authorised individuals ranging from a Chief Accounting Officer, Manager, an owner or a person who is in charge of an institution, enterprise, facility, entity, place of work, study or business or an organiser of an activity can deny an unvaccinated person the right to enter, remain, provide or acquire services. This is in direct confrontation with Section 18 (7) of the Constitution, which clearly states that:

No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

[31] Firstly, Section 2 of the Constitution, commonly referred to as the supremacy clause states that the Constitution is the supreme law of Lesotho and that any law that is inconsistent with it shall, to the extent of the inconsistency, be void. Meaning, if the whole Regulations or part thereof were to be inconsistent with the Constitution then either the whole Regulations or part thereof would have to be declared void.

[32] Secondly, it is well accepted that the purposive interpretation should be applied to avoid an interpretation that leads to an absurdity. It is only when Regulation 25 is read with Section 18 (7) of the Constitution that we are convinced that the purpose behind the Regulation was that only when a person is likely to spread the disease to other members of the public does the sub - regulation apply and an authorised person can deny such a person, vaccinated or unvaccinated, access or entry thereof.

[33] The logical question to follow being how would it be ascertained that such an individual is not likely to spread the virus? The answer is by the production of a medical certificate proving that such a person is COVID - 19 negative and not that they are COVID - 19 vaccinated. It follows, therefore, that even if constitutionally guaranteed rights can be limited in this case what is offensive is the denial of access by the very facility that is empowered by law under *Section 43 (1) of the Public Health Order* to conduct medical examinations. That being established, it still needs to be interrogated as to whether the restriction is a permissible limitation? This will be scrutinised in the subheading below.

Are the restrictions imposed by the Regulations justifiable and reasonable and/ or are they proportionate?

[34] Klatt and Meister⁸ define proportionality as:

All in all, proportionality is a structured approach to balancing fundamental rights with other rights and interests in the best possible way. It is a necessary means for making analytical distinctions that help in identifying the crucial aspects and considerations in various cases and circumstances and ensuring a proper argument.

[35] Public interest, in context, implies the protection of public health as well as individual fundamental rights. It is important to determine whether the restrictions placed were proportionate. It is important to be cognisant of the proper debate in this setting, that is, are vaccine mandates the appropriate measure in light of the other less intrusive measures such as social distancing, mask wearing and hand sanitising?

[36] Hence, within the context of proportionality, the general questions to ask is firstly, whether the limitation pursues a legitimate aim? Secondly, whether the limitation is capable of achieving the envisaged aim? Thirdly, whether the act impairs the right even if it is little? Lastly, whether the achievement of the aim

⁸ Klatt, M. and Meister, M. (2012). *The Constitutional Structure of Proportionality* cited in Rautenbach, I. M. (2014). *Proportionality and the limitation clauses of the South African Bill of Rights*. *Potchefstroom Electronic Law Journal (PELJ)*, 17(6), 2229-2267. <https://dx.doi.org/10.4314/pelj.v17i6.01>

outweighs the limitation imposed? In answering the latter question, the initial answer is in the affirmative. The limitation imposed by the Regulation was an attempt of pursuing a legitimate aim of curbing the spread of the global pandemic and saving lives by reducing fatalities.

[37] In as much as it could be said that the limitation was capable of achieving the envisaged aim the answer falls flat in the face of the succeeding question, whether the act or limitation impaired the right? The answer is in the negative since less intrusive measures such as social distancing, mask wearing and hand sanitising were being touted as being best practices as well as being effective in preventing the spread of COVID-9. Meaning the limitation failed to meet the standard of proportionality.

[38] Due to the contradicting or varying positions taken by the respondents in this regard holding on the one hand that vaccinations are voluntary and in another that vaccination is mandatory. It is necessary that this issue be dealt with once and for all to do away with the [debate] and the misinformation. The primary question is whether the right of privacy of individuals can override public health interest of the nation? Put differently, can restrictions on an individual's rights be made in the interest of the larger public health interest? At face value,

the answer would be in the affirmative. However, context is king and the answer will have to be scrutinised more closely in order to do justice to the issue at hand.

[39] The Supreme Court of India in the case of *Justice K.S. Puttaswamy (Retd) vs Union of India*,⁹ laid down three requirements to be fulfilled by the State while placing restraints on the right to privacy to protect legitimate State interests. It held as follows:

310. ... The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappraise or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it

⁹ (2017) 10 SCC 1 (26 September, 2018)

ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

[40] The Supreme Court of India in the case of *Jacob Puliye v Union of India*¹⁰ further held that:

49. The upshot of the above discussion leads to the following conclusions:

- a) Bodily integrity is protected under Article 21 of the Constitution of India and no individual can be forced to be vaccinated;*
- b) Personal autonomy of an individual involves the right of an individual to determine how they should live their own life, which consequently encompasses the right to refuse to undergo any medical treatment in the sphere of individual health;*
- c) Persons who are keen to not be vaccinated on account of personal beliefs or preferences, can avoid vaccination, without anyone physically compelling them to be vaccinated.”*

[41] The above quoted decisions clearly illustrate that an individual has a right to decide against getting vaccinated. The State, however, has a statutory duty to

¹⁰ *Jacob Puliye v Union of India* Writ Petition (Civil) No. 607 of 2021 (2 May 2022)

regulate the interaction of unvaccinated persons within the society in the interest of public health. However, a contrary and distinguishable position to the latter holds equally true that every individual has personal autonomy and cannot be forced to vaccinate contrary to their will.

[42] The case of *Jacob Puliyel v Union of India (supra)*, is quite similar to the case at hand. In that case restrictions on access to resources, public places and means of earning livelihood had been placed by way of a circular dated 18th November 2021 within the competence of the State in exercise of its powers under the *Disaster Management Act, 2005* (hereinafter, the “DM Act”) and the *Tamil Nadu Public Health Act, 1939*. These two sets of legislation empowered the State to make vaccinations compulsory, in the event of a declaration by the Government of an outbreak of a notified disease.

[43] In that case the petitioner was a member of the National Technical Advisory Group on Immunisation who had approached the Court requesting, *inter alia*, for a declaratory order to the effect that the vaccination mandates were unconstitutional, in light them being a precondition to accessing any benefits or services. The Respondent, namely, the Government of India submitted that COVID-19 vaccination has always been voluntary for all. The States of Tamil

Nadu, Maharashtra, Delhi and Madhya Pradesh contended that the restrictions imposed on unvaccinated persons was in the public interest, hence justifiable.

[44] Furthermore, like the current facts before us, the Government of India as with the Respondents in *casu*, had made categorical submissions that vaccines are voluntary. However, the State through Government institutions had also been accused of placing restrictions on unvaccinated people such as the Applicant Adv. *Ntitsane* by denying him access to a public facility. Neither party had adduced any evidence on the efficacy of the vaccines with regards to preventing the spread of the virus. It is, however, accepted by scientific opinion that the risk of transmission of the COVID - 19 virus from unvaccinated individuals is almost on par with that from vaccinated persons.¹¹ In light of this scientific opinion, it goes without saying, that restrictions on unvaccinated individuals imposed through various vaccine mandates, cannot be said to be proportionate as illustrated in the judgment of *Jacob Puliye v Union of India (supra)*.¹²

¹¹ Centers for Disease Control & Prevention (CDC). Science Brief: COVID-19 Vaccines and Vaccination. Updated Sept. 15, 2021 <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html#print>
See also: Frazer, J. (2021). The Risk of Vaccinated COVID Transmission Is not Low. <https://www.scientificamerican.com/article/the-risk-of-vaccinated-covid-transmission-is-not-low/>

¹² Para 89 (v)

[45] Hence, why in the case of *Biden v Missouri*¹³ also related to the enforcement of a rule on vaccination (vaccine mandate) of workers in healthcare facilities. An injunction against the said rule was sought. The US Supreme Court held that the role of courts in reviewing decisions taken by the executive should be to ensure that the executive “*has acted within a zone of reasonableness.*”¹⁴ In order to meet the constitutional muster the limitation must be reasonable and in *casu*, in light of the other recommended best practices such a limitation cannot be said to be reasonable.

[46] The World Health Organisation (WHO) in its 2022 joint statement with the International Coalition of Medicines Regulatory Authorities underscored the critical role played by vaccines in preventing deaths and controlling the spread of the disease. It emphasised that “*Both vaccinated and unvaccinated people also need to be aware of the additional protective behaviours required to control the pandemic locally.*”¹⁵ It can be safely inferred that these additional protective behaviours required to control the pandemic locally include the less intrusive measures such as social distancing, mask wearing and hand sanitising.

¹³ 595 U.S. ____ (2022) Nos. 21A240 and 21A241 (13 January, 2022); 211 L. Ed. 2d 448

¹⁴ *Ibid.* Pg. 8

¹⁵ World Health Organisation (WHO), (2022). Statement for healthcare professionals: How COVID -19 vaccines are regulated for safety and effectiveness (Revised March, 2022) - Joint Statement from the International Coalition of Medicines Regulatory Authorities and World Health Organization, 17 May 2022 <https://www.who.int/news/item/17-05-2022-statement-for-healthcare-professionals-how-covid-19-vaccines-are-regulated-for-safety-and-effectiveness>

Clearly the world body on health issues views these other less intrusive measures as being equally effective as vaccines when it comes to preventing deaths and controlling the spread of the disease.

Is the limitation on the constitutional and / or fundamental right to “respect of private and family life both justifiable and reasonable?”

[47] The primary question to ask in this case is whether the **Public Health Order** authorises the Minister of Health to mandate vaccines? In our view, the reasonable conduct under the Regulations ought to have been to establish or to identify the COVID - 19 status of an individual seeking access to services whether it is positive or negative. This would be a reasonable approach in light of the fact that *Section 43 (1) of the Public Health Order* allows for the imposition of medical examinations, which include COVID - 19 tests. If this is the accepted position, it means the medical examination or test ought to apply to both the vaccinated and the unvaccinated who seek entry into any institution, more so a healthcare facility.

[48] Following that step would justifiably and reasonably mean that if there was a likelihood that either the vaccinated or unvaccinated individuals can contribute to the spreading of the infection to other people or contribute to the mutation of

the virus or burden the public health infrastructure, or affect the community at large then the State would legitimately be expected to take the necessary steps to protect the public health in the battle against the COVID - 19 pandemic in line with **Section 43 91) of the Public Health Order.**

[49] No vaccine mandates are envisaged. In order to regulate public health, the Government is empowered to impose limitations on individual rights in a reasonable and proportionate manner. One thing is clear, forcibly inoculating a person is improper. On a similar issue, the Indian Supreme Court in *Jacob Puliyeel v Union of India (supra)* categorically held that:

Nobody can be forcefully vaccinated as it would result in bodily intrusion and violation of the individual's right to privacy, protected under Article 21 of the Constitution of India.

[50] As this speaks to an individual's personal autonomy within the context of the right to privacy as encapsulated under *Section 11 of the Constitution* on the *right to respect private and family life*. The issue of personal autonomy of an individual involving the right of an individual to determine how they should live their life, which consequently encompasses the right to refuse to undergo any medical treatment in the sphere of individual health was considered in *Jacob Puliyeel v Union of India (supra)*.

[51] The balancing rod to the latter being that if there is a likelihood of such an individual spreading the infection to other people or contributing to the mutation of the virus or burdening of the public health infrastructure, then the Government can regulate such public health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object sought to be fulfilled. Protection of the community is undoubtedly a legitimate State aim of paramount significance in this collective battle against the pandemic. However, in *casu*, the Respondents do not make such an averment. According to their pleadings it is all, or nothing, vaccine mandate and nothing else.

[52] All in all, these decisions support the conclusion that in as much as the 3rd Respondent is bestowed with powers to regulate issues relating to public health including pandemics, what is not given, is power to regulate public health broadly to the extent of its conduct constituting an encroachment or overreach on individuals' constitutional right to privacy and choice. More so, when it has been confirmed that vaccination does not prevent persons from contracting and spreading COVID - 19, particularly the 21 Omicron variant. Denial of access of the unvaccinated is found to be disproportionate and unjustified.

[53] For this proposition reference is had to the case of *Yardley v Minister for Workplace Relations and Safety*¹⁶ in which the High Court overturned the Government's vaccine mandate or the New Zealand Police and Defence Force, finding it was not a justified limitation of right, and therefore, invalid. In deciding the matter, the court held at paragraph 62 and 91 that:

This is a matter I addressed for Four Aviation Security Workers v Minister of COVID - 19 Response and 2 Others. I again proceed on the basis more fully explained in that judgment. I am not convinced that reference to deference, or to a margin for appreciation clarifies the Court's task in the present case. There is an important distinction between the policy decisions made by the Executive, and the legal questions that are addressed by the Court. The choices made by governments on their response to COVID - 19 involve wide policy questions - including decisions on the use of border closures, lockdowns, isolation requirements, vaccine mandates and many other measures. These are decisions for elected representatives to make.

...

[91] I take it from this evidence that vaccination may still have some effects in limiting infection and transmission, but at a significantly lower levels than was the case with the earlier variants. It is clear from the evidence that vaccination does not prevent persons contracting and spreading COVID - 19, particularly with the Omicron variant. It is equally clear that it does still provide protection from serious illness and death,

¹⁶ [2022] NZHC, 291 [25 February, 2022]

although this effect wains after the second dose, and seems to wain in a similar way after the booster. I accept on the basis of Dr Town's evidence that vaccination might contribute to preventing contracting and spreading the Delta and Omicron variants to some extent, although not nearly as much as it did against the original versions of COVID - 19.

[54] In their pleadings, the respondents on the one hand aver that they merely encouraged people to get vaccinated,¹⁷ but on another they aver that though people are not forced to inject vaccines vaccination is mandatory.¹⁸ This sort of pleading is both contradictory and mind boggling because mandatory in itself means compulsory and/ or obligatory. Now, if that is given, it means the averment by the Respondents flies in the face of the Constitution and *Sub - Regulation 25 (ii) of the Risk Determination and Mitigation Measures Regulations* and is, therefore, unconstitutional. For violating individuals' right to access of essential services and/ or means to a livelihood by pain of denial to access in general when it reads that "*Chief Accounting Officer, Manager, an owner or a person who is in charge of an institution, enterprise, facility, entity, place of work, study or business or an organiser of an activity to deny an unvaccinated person right to enter, remain, provide or acquire services.*"

Reference being made to the Regulations themselves as well as the Cabinet

¹⁷ See: paragraph 10.3 of Respondents' Answering Affidavit.

¹⁸ See: paragraphs 52.3 & 52.4 of Respondents' Answering Affidavit.

approval to the introduction of mandatory proof of vaccination (vaccination certificate) in the workplace (source of livelihood) and for access to health services (a right to life) as under Respondents' annexure "DRNLI."

The role of courts in terms of judicial review of public/State policies relating to health

Judicial intervention

[55] The general rule is that the judiciary is not competent to interfere with decisions taken in the interest of public health. However, the court can interfere by way of judicial review of legislative action in matters of public health only when there is no real or substantial relation to the object of the legislation or when there is plain, palpable invasion of rights secured by fundamental law under the Constitution.

[56] This position is evident even in more recent decisions such as in *Kassam v Hazzard*¹⁹ where the applicant having been aggrieved by certain orders of the Minister for Health and Medical Research, which required people working in the construction, aged care and education sectors to be compulsorily vaccinated. Al - Munir Kassam and three others, along with Natasha Henry

¹⁹ *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320

and five others, approached the New South Wales (NSW) Supreme Court challenging the constitutional validity of the decision. While considering the grounds of challenge, the NSW Supreme Court was of the view that *“it is not the Court’s function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the court to choose between plausible responses to the risks to the public health posed by the Delta variant.”*²⁰

[57] The NSW Supreme Court further observed that it is not the court’s function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID - 19 vaccines, especially their capacity to inhibit the spread of the disease, which are all matters of merits, policy and fact for the decision maker and not the court. The NSW Supreme Court emphasised that its only function is to determine the legal validity of the impugned orders. The said view of the NSW Supreme Court was approved by the New South Wales Court of Appeal in *Kassam v Hazzard; Henry v Hazzard*.²¹

²⁰ Ibid. at para 7.

²¹ *Kassam v Hazzard; Henry v Hazzard* [2021] NSWCA 299 (08 December 2021)

[58] It is well settled that courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of *mala fide*, unreasonableness, arbitrariness or unfairness etc. This means that the scope of judicial review is to examine Government policy, namely, to check whether it violates the fundamental rights of the citizenry or whether it is opposed to the Constitution, or any statutory provision or manifestly arbitrary. The case in point is *Directorate of Film Festivals v Gaurav Ashwin Jain*,²² the reason being that the duty of the court is to safeguard the fundamental rights of individuals.

[59] Thus, the role of the Constitutional Court in public health crisis is not to take over the role of the executive or step over the executive's toes. Rather its role is to ask the hard questions or put the difficult questions to the Executive as to whether the Government or its branches had power to do the things they did during the pandemic? The court is entitled to ask such a question, namely: has the Executive acted within the zone of reasonableness?²³

²² (2007) 4 SCC 737

²³ Footnote 14 above.

[60] In line with the above, the US Supreme Court in *Roman Catholic Diocese v Cuomo*²⁴ granted an injunctive relief on being satisfied that the executive order struck at the very heart of the First Amendment's guarantee of religious liberty. Amid the rising infections of COVID - 19 and in an effort to curb the infections, New York Governor *Andrew Cuomo* issued an executive order identifying clusters of COVID - 19 cases and restricting the surrounding area. The Order imposed limits on in - person religious gatherings for worship.

[61] It classified area zones in terms of colours. The “red” zone, limiting attendance of worship services to 10 people. The “orange” zone, limiting attendance to 25 people and within the “yellow” zone attendance was limited to 50% of the building's capacity. However, in contrast, certain secular businesses deemed “essential” were permitted to remain open in these zones, subject to different restrictions. While doing so, the US Supreme Court observed that the members of the Court are not public health experts and they should respect the judgment of those with special expertise and responsibility in this area.

²⁴ 208 L.Ed.2d 206 (U.S. 2020)

[62] Holding that the Constitution “*principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States.*” However, the Constitution cannot be put away and forgotten even in a pandemic. *Gorsuch, J.*, who wrote a concurring opinion, observed that *Jacobson (supra)* hardly supports cutting the Constitution loose during a pandemic. This case was distinguished by *Gorsuch, J.*, who held that the Court did not interfere with the challenged law in *Jacobson (supra)* only because it did not “contravene the Constitution of the United States” or “infringed any right granted or secured by” it. Essentially, the Court held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

VI. Conclusion

[63] As mentioned earlier, the role of the court is to scrutinise the challenged decisions and Regulations made in terms of the *Disaster Management Act, 1993* for their regularity and not their wisdom as this court is not a public health authority. This was seminally expressed by *Plasket JA* in the South African Supreme Court decision of *Esau and Others v Minister of Co - Operative Governance and Traditional Affairs and Others*²⁵ where the court held that:

²⁵ *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 at para [7]

[7] The point must be stressed that the function of the court is to vet the challenged decisions and regulations made in terms of the DMA for their regularity and not their wisdom. The reason for this was highlighted by Laws J in R v Somerset County Council, ex parte Fewings and Others, a case concerning the review of a decision by a local government to prohibit stag hunting on land owned by it, and which had elicited intense public responses in favour of and against the decision. He said:

'Although judicial review is an area of the law which is increasingly, and rightly, exposed to a good deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, "Is this decision right or wrong?" Far less does the judge ask himself whether he would himself have arrived at the decision in question. It is, however, of great importance that this should be understood, especially where the subject matter of the case excites fierce controversy, the clash of wholly irreconcilable but deeply held views, and acrimonious, but principled, debate. In such a case, it is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, "Which view is the better one?" Otherwise, justice would not be seen to be done: those who support the losing party might believe that the judge has decided the case as he has because he agrees with their opponents. That would be very damaging to the imperative of public confidence in an impartial court. The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did.'

[64] The US Supreme Court in *National Federation of Independent Business v Occupational Safety and Health Administration*²⁶ quoting *BST Holdings, L.L.C. v Occupational Safety and Health Admin*,²⁷ answered the above question when it held that:

(t)he mandate likely exceeded OSHA's statutory authority, raised separation- of -powers concerns in the absence of a clear delegation from Congress, and was not properly tailored to the risks facing different types of workers and workplaces.

[65] It follows that even if empowered by the Legislature to protect the health of the public, the 3rd Respondent is not empowered to issue sweeping health Regulations or standards, which do not take into account legitimate religious and / or other philosophical beliefs even under the new hazardous conditions brought about by the COVID - 19 pandemic. The Regulations failed to draw distinctions based on different industries and different risks of exposure. They were otherwise issued and intended to operate as a blunt instrument.²⁸ Hence Adv. Sehapi's submission that the Regulations ought to have had more than

²⁶ 595 U.S. ___ (2022) Nos. 21A244 and 21A247 (13 January 2022); 211 L. Ed. 2d 448

²⁷ 17 F. 604, 609 (CA5 2021)

²⁸ Footnote 2 above.

one exemption. The only exemption provided being for medical reasons to the effect that:

Notwithstanding the provisions of subsection (2), a person may engage in work, perform duties, provide or acquire services at an institution or place of work or on business, or the child may not be vaccinated if –

a) the person or child has a medical certificate issued by a legally qualified and licensed medical practitioner, certifying that the person has a medical condition which exempts him from receiving the COVID - 19 vaccine or either a temporary or permanent basis...

[66] Similarly in *Prince v President of the Law Society of the Cape of Good Hope*²⁹

matter, where the court was called upon to decide whether the impugned provisions were overbroad as opposed to the broad challenge to the constitutionality of the prohibition on the use or possession of cannabis. In arriving at its decision, the court had to interrogate a parallel question, namely, whether a religious exemption could be granted without undermining the purpose of the prohibition? The court held that the prohibition is too extensive.³⁰ However, the *Prince case*, unlike in the current matter, found that the prohibition was justified and reasonable.

²⁹ *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) 2002 (2) SA 794

³⁰ *Ibid.* at paras [74] and [139]

[67] In *casu*, the failure by the 3rd Respondents to incorporate or to make provision for an exemption based on other grounds including a legitimate religious and/or philosophical belief is both unjustifiable and unreasonable. More so, when there are other less intrusive measures identified that are also recommended as effectively curbing the spread of the coronavirus. The court therefore finds merit on this ground.

[68] One thing is certain as was articulated by Justice *Gorsuch* that:

this Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

This principle was also enunciated in *National Federation of Independent Business v Occupational Safety and Health Administration (supra)*.

[69] From his submission Adv. *Ramaili* was quick to admit that there would be no need to interrogate prayer (d) (i) on declaring the *Public Health (COVID-19) Risk Determination and Mitigation Measures (Amendment) (No. 4) Regulations, 2021* invalid in their entirety and/ or the offending Regulation / clauses as being *ultra vires* the enabling legislation, the *Public Health Order, 1970*. He insisted on prayer (d) (ii) on declaring the Regulations invalid on the ground of attempting to force individuals to vaccinate and/ or deny them the

right of access to shops, public and private essential services such as health care.

[70] That COVID-19 exists and has devastating effects on human lives and that action had to be taken to curb its effects is unquestionable. Whilst **Section 11 (1) of the Constitution** guarantees respect for private and family life, such right shall not infringe upon among others the interests of public health³¹, which cover measures aimed at curbing COVID - 19. The section, however, has to balance with section 18(7) of the Constitution which provides that:

No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

[71] That vaccination is one of the measures to contain COVID - 19 is also undeniable. However, the fact that Regulation 23 only provides exemption from vaccination to persons with a medical condition flies in the face of Section 18 (7) of the Constitution. The provision is too restrictive in that it

³¹ Section 11(2) (a) of the Constitution

excludes other people who may not be able to vaccinate for other reasons such as religion or other philosophical considerations.

[72] Sub-regulation 25 provides that:

Where a person or child fails to comply with sub-regulation (24) [requiring proof of vaccination status to gain access to work, acquire services at any institution or place of work, study or business] a public health or law enforcement officer may direct the person to do such things as are reasonably necessary to comply with the sub-regulation (emphasis added).

The phrase “such things as are reasonably necessary” is not clear. In our view, those who prefer to vaccinate have a choice to do so, hence, Sub-regulation should make room for those who may produce a COVID - 19 negative certificate. This will cater for those who wish not to vaccinate for various grounds, including religion.

[73] Applicants pray, among others, that the Regulations be declared invalid in their entirety and / or the offending clause. Sub-regulation 23 offends Section 18 (7) of the Constitution by only exempting people with certified medical conditions from vaccinating. Furthermore, Sub-regulation 24 should incorporate access to persons or a child who produces a COVID - 19 negative

certificate in the alternative, in order to guarantee access to public facilities and workplaces whilst ensuring protection of others.

Costs

[74] This being a matter of constitutional litigation and, raising profound constitutional issues there will be no order as to costs - *Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)*.

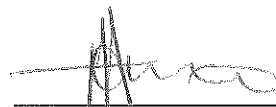
Order

[75] In the result, the following order is made:

1. Sub - regulations 23 and 24 are declared invalid but not the Public Health COVID – 19) (Risk Determination and Mitigation Measures (Amendment) No. 4) Regulations, 2021 in their entirety;
2. The rest of the prayers are dismissed;
3. No order as to costs.



F.M. KHABO
JUDGE



T.E. MONAPHATHI
JUDGE

I agree

SAKOANE CJ (PARTIALLY DISSENTING)

INTRODUCTION

[76] I have read with pleasure the judgment of my Sister *Khabo J.* I, however, regret that I do not share part of her reasoning and conclusion to strike down sub-regulations (23) and (24). I, therefore, write separately to articulate my disagreements.

[77] The applicants' rejection of the COVID-19 vaccine mandate rests on the following propositions:

77.1 Absence of scientific or medical proof that vaccines prevent infection by the virus.

77.2 Unconstitutional declaration of a state of emergency to contain the spread of COVID-19.

77.3 Unjustifiable limitations of constitutionally protected rights and freedoms.

[78] The following legal measures are under attack:

78.1 The Public Health (COVID-19) Risk Determination and Mitigation Measures (Amendment) (No.4) Regulations, 2021.

78.2 The Declaration of COVID-19 Disaster-Induced State of Emergency (Extension) Legal Notice No.115 of 2021.

78.3 Section 18(m) of the Public Health Order No.12 of 1970.

[79] The Public Health (COVID-19) Risk Determination and Mitigation Measures (Amendment) (No.4) Regulations 2021 are attacked on the bases that:

79.1 They are ultra-vires the Minister of Health under the Public Health Order No.12 of 1970.

79.2 Regulation 2 (c) is inconsistent with sections 11 (1), 13 and 18 (1) and (7) of the Constitution.

[80] The Declaration of COVID-19 Disaster Induced State of Emergency (Extension) Notice, 2021 is attacked³² on the grounds that:

80.1 It is inconsistent with section 3 (1) read with section 15 of the Disaster Management Act No.2 of 1997.

³² The attack on Regulation 25 was abandoned during oral submissions

80.2 It is inconsistent with section 23 (1), (2) and (5) of the Constitution.

[81] The attack directed at the **Public Health Order, 1970** is that section 18 (m) thereof is inconsistent with section 23 (1) of the Constitution.

Interpretation

[82] In order to get a sense of the full appreciation of the legal issues and their interconnectedness, it proves convenient to start by interpreting the Constitution first, followed by the relevant provisions of the **Public Health Order** and the **Disaster Management Act** and then conclude with the **Declaration of the Covid-19 Disaster Induced State of Emergency Regulation** and the **Public Health (Covid-19) Risk Determination and Mitigation Measures Regulations**.

A. Constitutional Provisions

[83] The sections of the Constitution which are pleaded as the bases for attack by the applicants are sections 11 (1), 13, 18 (1) and (7) and 23. Since the Prime Minister's Declaration of the Disaster Induced State of Emergency triggered the Minister of Health's promulgation of the COVID-19 vaccine mandates, it is in order to first interpret section 23 as the emergency provision in the Constitution and thereafter interpret the pleaded sections of the Bill of Rights.

Emergency Powers

[84] Section 23 (1), (2) and (5) read as follows:

“Declaration of Emergency

(1) In time of war or other public emergency which threatens the life of the nation, the Prime Minister may, acting in accordance with the advice of the Council of State, by proclamation which shall be published in the Gazette, declare that a state of emergency exists for the purposes of this Chapter.

(2) Every declaration of emergency shall lapse at the expiration of fourteen days, commencing with the day on which it was made, unless it has in the meantime been approved by a resolution of each House of Parliament.

.....

(5) A resolution of either House of Parliament passed for the purpose of this section shall remain in force for six months or such shorter period as may be specified therein:

Provided that any such resolution may be extended from time to time by a further such resolution, each extension not exceeding six months from the date of the resolution effecting the extension.”

[85] These sub-sections were interpreted by this Court in **Boloetse and Tuke**³³ to mean that:

85.1 The Prime Minister is obliged to declare an emergency in time of war or other public emergency when advised by the Council of State.

³³ Boloetse and Tuke v. His Majesty The King and Others [2012] LSHC 216 Const (12 September 2022)

85.2 To qualify as a constitutionally acceptable public emergency, the emergency must have the following four features:

- (i) it must be actual or imminent;
- (ii) its effects must involve the whole nation;
- (iii) the continuance of the organized life communities must be threatened; and
- (iv) the crisis or danger must be such that it cannot be adequately be dealt with by normal measures or restrictions permitted by law for the maintenance of public safety, health or order.

85.3 The lifespan of the declared emergency is fourteen days but may be more if approved and extended by resolution of Parliament.

85.4 The resolution of Parliament approving and extending the period of the declared emergency remains in force for six months or any shorter period but may be further extended from time to time for periods not exceeding six months.

[86] To qualify as an emergency the situation must have the four features discussed in *Boloetse and Tuke*. It is, however, not the applicants' case that the

COVID-19 induced state of emergency declared by the Prime Minister has the four features and, therefore, was a matter for advice by the Council of State and ultimate approval by Parliament. Rather, their case is that the declaration made in terms of the Disaster Management Act, 1997 was not extended by Parliament upon its expiry fourteen days thereafter nor approved by Parliament, yet it survived and continues to limit constitutional rights and freedoms. The question is whether section 23 requires all forms and gravity of emergencies to be declared on the advice of the Council of State and subjected to the approval and extension by Parliament. Section 23 declaration of emergency is triggered by the advice of the Council of State which the Prime Minister is obliged to act in accordance with. The declaration is then brought to Parliament for its approval and extension. On the other hand, the impugned disaster induced emergency is triggered by the advice of the Disaster Management Board. Parliament deliberately created this statutory body to advise the Prime Minister in disaster-induced states of emergency as defined in the Act. The contention of the applicants that such an emergency must be subjected to the strictures of section 23 begs the question “Who advised for its declaration?”

[87] The applicants contend that the Prime Minister continued the emergency via the mechanism of the **Declaration of the Covid-19 Disaster Induced State of Emergency Regulations (Extension) Notice, 2021**. The applicants are right. The extension was made on 15 October, 2021 for a period of six months running from 30 October, 2021 to 30 April, 2022. The Minister of Health promulgated the impugned Regulations on vaccine mandates on 31 December 2021 and they operated from 1 January 2022.

[88] This proposition defies logic. If the state of emergency came to an end fourteen days from 18 June 2020 because Parliament never resolved to approve and extend it, it stands to reason that constitutional rights and freedoms, cannot be limited by a non-existent emergency.

[89] The answer turns on the purposive interpretation of section 23 of the Constitution and its interplay with sections 13 and 15 of the Disaster Management Act, 1997. That is an exercise I embark on hereinafter in paragraphs [118] to [124].

Right of Privacy

[90] Section 11 guarantees the right of privacy, family life and home. Limitations of this right can be made by laws made in the interests of public health or for

protecting the rights and freedoms of other persons. But such laws limiting the privacy right must “not abridge” it “to a greater extent than is necessary in a practical sense in a democratic society”.

[91] The reach and operation of the right to privacy is propounded by the Constitutional Court of South Africa in **Bernstein**³⁴ where Ackermann J said:

“ [65] It would nonetheless be appropriate, I believe, to venture some preliminary observations on the scope of this right. The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate. The scope of privacy has been closely related to the concept of identity and it has been stated that “rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s own autonomous identity.

[66] In expanding upon this notion Forst acknowledges that communal bonds are not to be substituted with abstract relations, but argues beyond this for a multi-levelled recognition of identity. Besides the concrete and abstract realms, this thirdly also pertains to societal membership and fourthly to the community of humanity itself.

[67] The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute, implies that the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”

³⁴ *Bernstein and Others v. Bester NO and Others* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC)

[92] The Supreme Court of India³⁵ has laid down the following propositions in relation to the dynamic between protection of the right of privacy and its limitation by enforcement of vaccine mandates:

“a) Bodily integrity is protected under Article 21 of the Constitution of India and no individual can be forced to be vaccinated.

b) Personal autonomy of an individual involves the right of an individual to determine how they should live their own life, which consequently encompasses the right to refuse to undergo any medical treatment in the sphere of individual health.

c) Persons who are keen to not be vaccinated on account of personal beliefs or preferences, can avoid vaccination, without anyone physically compelling them to be vaccinated. However, if there is a likelihood of such individuals spreading the infection to other people or contributing to mutation of the virus or burdening of the public health infrastructure, thereby affecting communitarian health at large, protection of which is undoubtedly a legitimate State aim of paramount significance in this collective battle against the pandemic, the Government can regulate such public health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object sought to be fulfilled.”

[93] Commenting on the enforcement of vaccination for smallpox, the Supreme Court of the United States of America had this to say:

“If the mode adopted by the Commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient or objectionable to some – if nothing more could be reasonably affirmed of the statute in question – the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human

³⁵Jacob Puliyel v. Union of India & Ors Writ Petition (Civil) No.607 of 2021 para 49 (2 May 2022)

government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

.....

Until otherwise informed by the highest court of Massachusetts we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death. No such case is here presented. It is the case of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and public safety, confessedly endangered by the presence of a dangerous disease.”³⁶

[94] Implicit in the right to privacy is the right to refuse to undergo medical treatment. On this right the High Court of New Zealand has held³⁷:

“[46] ... Whilst the right to refuse medical treatment is substantively limited by the Order because of the coercion involved in affected workers being faced with the decision to either get vaccinated or have their employment terminated, it does not literally compel the medical treatment. But the associated pressure to surrender employment involves a limit on the right to retain that employment, which the above principles suggest can be thought of as an important right or interest recognised not only in domestic law, but in the international instruments. So in that sense the right to refuse to undergo medical treatment is not the only right (or significant interest) that is being limited.”

³⁶ *Jacobson v. Massachusetts* 197 US 11 (1905)

³⁷ *Yardley v. Minister for Workplace Relations and Safety* [2022] NZHC 291 (25 February 2022)

[95] The proposition that a person does not have an absolute right to refuse unwanted medical treatment was accepted by the Supreme Court of the United States in *Cruzan*³⁸ where it said:

“But determining that a person has a ‘liberty interest’ under the Due Process Clause does not end the inquiry:

‘whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests’.”

[96] In *Airdale NHS Trust v. Bland*³⁹, the House of Lords approved of the right to refuse unwanted medical treatment in the following words:

“First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that, if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so (see *Schloendorff v Society of New York Hospital* (1914) 211 NY 125 at 129-130 per Cardozo J, *S v S, W v Official Solicitor* [1970] 3 A11 ER 107 at 111, [1972] AC 24 at 43 per Lord Reid and *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 A11 ER 643 at 649, [1985] AC 871 at 882 per Lord Scarman). To this extent, the principle of the sanctity of human life must yield to the principle of self-determination (see p 851 ante, per Hoffmann LJ), and, for present purposes perhaps more important, the doctor’s duty to act in the best interests of his patient must likewise be qualified.” p.8 (866 b-d)

.....

“1. *Consent to bodily invasion* Any invasion of the body of one person by another is potentially both a crime and a tort. At the bottom end of the scale consent is a defence both to a charge of common assault and to a claim in tort. The concentration in most discussions of this topic on this end of the scale has tended to divert attention from the fact that whatever the scope of the civil defence of *volenti non fit injuria* there is a point higher up the scale than common assault at which consent in general

³⁸ *Cruzan v. Director, Missouri Dept. of Health* 497 U.S 261 (1990) @ p. 279

³⁹[1993]1 A11 ER 821

ceases to form a defence to a criminal charge... If one person cuts off the hand of another it is no answer to say that the amputee consented to what was done.

2. *Proper medical treatment* How is it that, consistently with the proposition just stated, a doctor can with immunity perform on a consenting patient an act which would be a very serious crime if done by someone else? The answer must be that bodily invasions in the course of proper medical treatment stand completely outside the criminal law. The reason why the consent of the patient is so important is not that it furnishes a defence in itself, but because it is usually essential to the propriety of medical treatment. Thus, if the consent is absent, and is not dispensed with in special circumstances by operation of law, the acts of the doctor lose their immunity.

3. *Paramountcy of the patient's choice* If the patient is capable of making a decision on whether to permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection, even if it is plain to all, including the patient, that adverse consequences and even death will or may ensue.” (page 889 d-h)

[97] Speaking to the tension between protection of the right to privacy and forced medical treatment, the European Court of Human Rights in *X v. Finland*⁴⁰, makes the following propositions:

“212. The Court reiterates that a medical intervention in defiance of the subject’s will gives rise to an interference with respect for his or her private life, and in particular his or her right to physical integrity (see *Glass v. the United Kingdom*, No. 61827/00, § 70, ECHR 2004-II).

213. The Court also reiterates that any interference with an individual’s right to respect for his or her private life will constitute a breach of Article 8, unless it was “in accordance with the law”, pursued a legitimate aim or aims under paragraph 2, and was “necessary in a democratic society” (see, *inter alia*, *Elsholz v. Germany* [GC], no. 25735/94, § 45, ECHR 2000-VIII). The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aims pursued.

.....

⁴⁰ [2012] ECHR 1371 (03 July 2012)

215. The Court notes that the expression “in accordance with the law”, within the meaning of Article 8 § 2 requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law (see e.g. *Herczegfalvy v. Austria*, 24 September 1992, § 88, Series A no. 244).

.....

217. As to the quality of the law, the Court notes that the requirements of the accessibility and the foreseeability of the law do not raise any problems in the instant case. However, the Court reiterates that Article 8 § 2 also requires the law in question to be compatible with the rule of law. In the context of forced administration of medication, the domestic law must provide some protection to the individual against arbitrary interference with his or her rights under Article 8. The Court must thus examine the “quality” of the legal rules applicable to the applicant in the instant case.

.....

220. The Court considers that forced administration of medication represents a serious interference with a person’s physical integrity and must accordingly be based on a “law” that guarantees proper safeguards against arbitrariness.”

Freedom of religion

[98] Freedom of conscience and religion is guaranteed in section 13 of the Constitution. Relevant to the debate are sub-section (1), (5) and (6) which read as follows:

“Freedom of conscience

13. (1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

.....

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) in the interests of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion.

(6) A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (5) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by this section to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (5)(a) or for the purpose specified in subsection (5)(b).”

[99] The essence of freedom of religion is articulated by the Supreme Court of Canada in *R v. Big M Drug Mart Ltd*⁴¹, where Dickson CJC said:

“94... The essence of the concept of freedom of religion is the right to entertain such religious belief as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious beliefs by worship and practice or by teaching and dissemination.

95... Freedom in a broad sense embraces both the absence of coercion and constraint and the right to manifest beliefs and practices. Freedom means that subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is forced to act in a way contrary to his beliefs or his conscience.”

⁴¹ (1985) 1 SCR 295

[100] In *Law Society of British Columbia v. Trinity Western University and Another (Lawyers' Rights Watch Canada and Others intervening)*⁴², the Supreme Court expounded further on religious freedom by saying:

“[212] We can draw two conclusions with respect to the nature of religious freedom under s 2(a) from this foundational jurisprudence. The first is that religious freedom is based on the exercise of free will. This is because religion, at its core, involves a profoundly personal commitment to a set of beliefs and to various practices seen as following from those beliefs: *R v. Edwards Books and Art Ltd* [1986] 2 SCR 713, at 759; *Syndicat Northcrest v. Amselem* 2004 SCC 47, [2004] 2 SCR 551, at para [39]. The focus of religious freedom, then, is personal choice: *Amselem*, at para [43]. Whether this choice aligns with an official religion is not relevant. For the purposes of s 2(a), what matters is that this choice is made freely.

[213] The second conclusion is a corollary of the first: religious freedom is also defined by the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. Its character is noncoercive; its antithesis is coerced conformity. This understanding of religious freedom is rooted in the philosophical tradition that conceives of freedom in terms of the absence of interference with individual choice: see e.g I Berlin, *Four Essays on Liberty* (1969), at pp 15-22. In the jurisprudence, this freedom applies to believers and nonbelievers alike as the Charter provides both freedom of religion and freedom from it: *Big M* [1986] LRC (Const) 332, at 366, [1985] 1 SCR 295, at 347; *Saguenay*, at para [70].”

[101] In *West Virginia State Board of Education v. Barnette*⁴³ Frankfurter J said in his illuminating dissent:

“The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could

⁴² (2018) 44 BHRC 667

⁴³ 319 US 624 (1943)

set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing - it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the law-making authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.” (pages 653-654)

.....

“Law is concerned with external behaviour and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith-in the language of the Constitution, it may ‘exercise’ it freely-but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.”(pages 655-656)

[102] In relation to resisting vaccine mandate on the basis of freedom of religion, the New Zealand High Court has said⁴⁴:

“[49] I accept Mr Hague’s submission, however, that an obligation to receive a vaccine which a person objects to because it has been tested on cells derived from a human foetus, potentially an aborted foetus, does involve a limitation on the manifestation of a religious belief in ‘observance, practice, or teaching’ of religion

⁴⁴ Footnote 36

contemplated by s 15. It is grounded in a core principle of the particular Christian religion and the objection to abortion. The fact that others observing the same religion do not agree with the stance does not mean that the stance does not involve the observance of a religious belief. Any justification for the limit on that right for reasons of public policy is best then engaged through the justified limits analysis arising under s 5.

[50] I am not satisfied, however, of the applicants' broader claims that requiring vaccination is inconsistent with the manifestation of religion or belief arising from the concept of individual bodily integrity, personal autonomy or similar Christian values. In reaching that conclusion I apply the approach to the identification of stances that involve the manifestation of a religion explained by the majority of the Canadian Supreme Court in *Syndicat Northcrest v Amselem* [2004] SCC 47 at 581 and 859]. This seems consistent with the approach applied in *New Zealand Health Professionals Alliance Inc v Attorney General* [(2021) NZHC 2510, (2021) 12 HRNZ 629]. The relevant belief must be religious and not secular. This involves the applicants' demonstrating that they sincerely believe that a certain practice or belief is required by the religion, or that they believe that it is required by the religion and it has the appropriate nexus with that religion.

[51] Ms McCall helpfully referred to decisions of the Canadian Human Rights Tribunal where it was found that claimants did not successfully demonstrate that a refusal to wear a mask was religious in nature. Whilst the objective connection with a religion involves a low threshold, I do not accept that a belief in an individual's bodily integrity and personal autonomy is a religious belief or practice. Rather it seems to me, in the circumstances of this case, to be a belief in the secular concept referred to in s 11 of the New Zealand Bill of Rights Act.

[52] For these reasons I accept that the right to manifest religion under s 15 of the New Zealand Bill of Rights Act is limited for those who object to vaccination with a vaccine that has been tested using cells derived from a human foetus on religious grounds, but not otherwise."

Freedom from discrimination

[103] The last freedom pleaded by the applicants is freedom from discrimination guaranteed by section 18 of the Constitution. Of relevance are sub-sections (1), (2), (3) and 7 which read as follows:

"Freedom from discrimination

18. (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

.....

(7) No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.”

[104] Sub-sections (2) and (3) were interpreted by this court in **Thahane and Others v. Specified Officers Defined Contribution Pension Fund and Others**⁴⁵ where I said:

“44. What section 18 prohibits is subjecting persons who are similarly circumstanced to different disabilities and restrictions or according them different privileges or advantages. The base-line is that the persons should be similarly circumstanced or be part of a group whose characteristics are as described or mentioned in section 18(3). In short, the constitutional command is that the like should be treated alike. The converse command should then be that unlike should not be treated alike. As put by **Moilola J** during oral argument, apples should be compared with apples and peaches with peaches and not mixed on the basis that they are after all fruits.

.....

46. The test of whether the subjection of such persons to any disability or restriction or affording them privilege or advantage constitutes discrimination is whether such

⁴⁵ Constitutional Case No.10/2015 (26 July 2016)

subjection or affording of privilege is based on objective and reasonable grounds. As put by the *UN Human Rights Committee in Wackenheim v France Communication No.854/1999 (19 July 2002)* at para 7.3:

“The Committee recalls its jurisprudence whereby not every differentiation of treatment of persons will necessarily constitute discrimination, which is prohibited under Article 26 of the Covenant. Differentiation constitutes discrimination when it is not based on objective and reasonable grounds.”

.....

52. In *casu*, we are concerned with unequal treatment. It is settled law that equal treatment does not entail prohibition of legislative classifications or differentiation as long as classification or differentiation is rationally connected to a legitimate governmental purpose. That is the principle propounded in the jurisprudence of the Court of Appeal in cases of *Nkuebe* and *Road Transport Board* referred to in para [31] as well as the jurisprudence of the UN Human Rights Committee on Article 26 of the 1966 *International Covenant On Civil And Political Rights* as shown in *Wackenheim* referred to in para [44].”

[105] In respect of sub-section (7), the learned Professors Palmer and Poulter⁴⁶ comment that although all persons have the right of access to both public accommodations and private accommodations on a non-discriminating basis, such access rights may be circumscribed and restricted in the interests of public health by sequestering carriers of communicable diseases during a raging epidemic.

[106] A synthesis of the principles extracted from the aforementioned authorities is this: none of the rights and freedoms pleaded by the applicants is limitless.

⁴⁶ The Legal System of Lesotho (Michie) pp.405 and 412

Each is hedged around with restrictions and may be limited by laws that pursue legitimate goals of public safety, public health and protection of the rights and freedoms of others.⁴⁷ Vaccination for diseases for public health reasons are in order. It is in this context that the utility of vaccine mandate should be understood.

B. Statutory Provisions

Disaster Management Act, 1997

[107] Section 3 of the **Disaster Management Act, 1997** reads as follows:

“3. (1) If at any time it appears to the Prime Minister, on the advice of the Board, that any disaster in any area is of such a nature and extent that exceptional measures are necessary to assist and protect the public of such area or that circumstances are likely to arise making such measures necessary, he may declare that with effect from a date specified by him in such declaration, a state of disaster exists within the area defined in such declaration and such declaration shall be published in the Gazette.

(2) The declaration of a state of disaster shall remain in force for a specific period as set out in the declaration and may be extended accordingly.”

[108] Section 15 reads as follows:

“Functions of the Board

15. The Board shall-

- (a) advise the Minister on disaster management policy;
- (b) advise the Prime Minister, through the Minister, on the requirements for and the timing of a declaration of a disaster-induced emergency in accordance with the Constitution and to declare the country, any district or part thereof to be a disaster area; and

⁴⁷ Harris, O' Boyle & Warbrick, *Law of the European Convention on Human Rights* 3rd edition (Butterworths) pages 594 and 607

(c) ensure that funds are available to meet disaster related and management expenditures.”

Public Health Order, 1970

[109] Section 18(m) of the **Public Health Order, 1970** provides that:

“Whenever Lesotho or part thereof appear to be threatened by any of the diseases mentioned in section 17, the Minister may make regulations for all or any of the following purposes-

.....

(m) for any other purpose whether of the same kind or nature as the foregoing or not, having for its object the prevention or control of communicable diseases; and may by order declare all or any of the regulations so made to be in force within the whole or any part or parts of Lesotho.”

[110] A communicable disease is defined in section 1 as, “any disease which can be communicated directly or indirectly by any person suffering therefrom to any other person.”

[111] Since section 18(m) refers to diseases mentioned in section 17, it is necessary and important to mention that the latter deals with diseases subject to International Health Regulations and in sub-section 4 empowers the Minister by regulation to:

“make such provision as appears to him necessary or expedient for the carrying out of and giving effect to the International Health Regulations;”

[112] Furthermore, section 16 empowers the Minister of Health to “make regulations applicable to all communicable diseases or only to such communicable diseases as may be specified therein regarding (*inter alia*) the following matters:

“....

(c) the measures to be taken for preventing the spread of or eradicating smallpox, typhus fever, typhoid fever, cholera, yellow fever, plague, poliomyelitis, tuberculosis or any other communicable disease requiring to be dealt with in a special manner;

....

(i) the prevention of the spread of any communicable disease by the carrying on of any business, trade or occupation;

(j) the prevention of the spread of any communicable disease by persons who, though not at the time suffering from such disease are “carriers” of and likely to disseminate the infection thereof, and the keeping under medical surveillance and the restriction of the movement of such persons;

(k) the regulation and restriction of any trade or occupation entailing special danger to the health of those engaged therein, whether from communicable disease or otherwise, and the institution of measures for preventing or limiting such danger;”

III MERITS

Applicants’ case

[113] The applicants’ alleged unconstitutionality of the declaration of the disaster-induced state of emergency to contain the spread of COVID-19 is premised on

the Prime Minister's constitutional powers to declare a state of emergency under section 23(1) of the Constitution in contradistinction to his powers to do so under sections 3 and 15 of the **Disaster Management Act, 1997**.

[114] The applicants contend that neither the Prime Minister nor the Minister of Health can exercise statutory powers of dealing with COVID-19 as an emergency outside the section 23(1) constitutional process. In short, they argue that compliance with the section 23(1) constitutional process is a *sine quo non* for the exercise of statutory powers under both the **Disaster Management Act, 1997** and the **Public Health Order, 1970**.

[115] They contend further that the vaccine mandates and their enforcement in terms of the **Public Health (COVID-19) (Risk Determination and Mitigation Measures) (Amendment) Regulations, 2021** violate their rights to privacy, freedom of conscience and religion and freedom from discrimination.

Respondents' answer

[116] The respondents' answer is that:

116.1 The Prime Minister declared a disaster-induced state of emergency in terms of section 3 of the **Disaster Management Act, 1997** as advised by the Disaster Management Board.

116.2 Following on the declaration of a disaster-induced state of emergency, the Minister of Health invoked his own powers under the **Public Health Order, 1970** to make the impugned regulations.

116.3 Enforcement of vaccine mandates in accordance with the regulations is by requesting a person to provide proof of vaccination status. If no proof is provided, the public health officer or law enforcement officer may direct the person to act in compliance with the regulations. No force or duress is anticipated.

116.4 To assist compliance with the regulations, a person is counselled or sensitised about the need and importance of vaccinating. A person's decision to vaccinate or not to vaccinate is made after such counselling and sensitization.

116.5 Before being vaccinated, a person is given medical information and sensitised about side-effects of vaccines. Where side-effects are detected, a person is given treatment.

116.6 Vaccine mandates are not discriminatory as every citizen is encouraged and not forced to vaccinate.

116.7 Vaccine mandates are a rational and proportionate means of protecting citizens and containing the spread of COVID-19.

116.8 The regulations are intended to achieve the constitutional mandate of the Government as stated in section 27 of the Constitution.

Discussion

[117] The issues that arise fall into two categories:

117.1 The constitutionality of the exercise of statutory powers by the Prime Minister and the Minister of Health.

117.2 The constitutionality of the vaccine mandates.

Constitutionality of statutory powers

[118] The Prime Minister is empowered by the **Disaster Management Act, 1997** to declare a disaster-induced emergency on the advice of the Board of the Disaster Management Authority. The declaration remains in force for the specified period and may be extended. An emergency is defined in section 2 as:

“any occasion, instance or event for which, in the determination of the Prime Minister, exceptional assistance from the government is needed to supplement national, district, community or individual actions to save lives, protect property and public health and safety or to prevent or mitigate the threat of a catastrophe or extreme hazard in any part of Lesotho.”

[119] The question arises whether a declaration of a disaster-induced emergency is subject to constitutional processes in section 23 of the Constitution. The declaration of a disaster-induced emergency follows a statutory process in which the Prime Minister is advised by the Board of the Disaster Management Authority. The Board consists of the Government Secretary and ten Principal Secretaries, among whom is the Principal Secretary for Health and Social Welfare. The other five members are representatives of the private sector and non-governmental organisations.

[120] Thus, trigger for the Prime Minister’s declaration is an advice by the Board. This differs from the Prime Minister’s declaration under section 23(1) of the Constitution, which is triggered by the advice from the Council of State. In my judgment, the Board and the Council of State perform distinct roles under different legal frameworks. Thus, the applicability or otherwise of the constitutional process in the Prime Minister’s determination to declare an emergency turns on whence comes the advice.

[121] A disaster may not necessarily be at the level of a threat to the life of a nation as envisaged in section 23(1) to warrant advice from the Council of State and parliamentary approval and oversight. Hence the nuanced definition of the word “emergency” in the **Disaster Management Act, 1997**. Its declaration is a policy matter for the head of the government to handle through the administrative structures of the Board and Disaster Management Teams at district and village levels. Reference to advise on its requirements and timings “in accordance with the Constitution” goes nowhere to suggest that the section 23 processes control the manner of the exercise of the Prime Minister’s statutory powers. What the advisers are called upon to do is to give an advice which is constitutionally compliant and not that no other advice from the Council of State is necessary to kick-start parliamentary oversight of the activities of Government.

[122] The proposition that the definition of the word emergency in section 2 of the **Disaster Management Act, 1997** is narrower than the definition provided for in section 23 of the Constitution finds support in **Boloetse and Tuke** where the four qualifying features of an emergency in section 23 are discussed. The fourth feature is that the crisis or danger must be such that the normal measures

or restrictions permitted by the Constitution for the maintenance of public health are plainly inadequate.

[123] This suggests that the statutory and administrative measures to deal with a disaster must be plainly inadequate for the Council of State to intervene and advise for a section 23 declaration of state of emergency. In *casu*, the statutes are plainly adequate for Government to contain the COVID-19 health emergency. I am not aware of any jurisdiction, and none was pointed out to us by counsel in which a section 2 type of emergency was declared as a measure to contain COVID-19. As examples, in South Africa and New Zealand, the Governments have resorted to statutory instruments of the kind we have in the Kingdom to contain COVID-19. All of them have survived constitutional attack.⁴⁸

[124] I am, therefore, not persuaded by the applicants' contention that the Prime Minister's declaration of a disaster-induced emergency is constitutionally infirm if not made in compliance with the processes in section 23 of the Constitution. The contention falls to be rejected.

⁴⁸ Footnote 36; *Esau and Others v. Minister of Co-operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA); [2021] 2 ALL SA 357 (SCA)

[125] Section 18(m) of the **Public Health Order, 1970** empowers the Minister of Health to make regulations for any other purpose whether of the same kind or nature or not (as those mentioned in the proceedings sub-paragraphs) whose object is to prevent or control communicable diseases. There cannot be a dispute that COVID-19 is a communicable disease which attracts the Minister's section 18(m) powers.

[126] The applicants contend that the practical effect of this section is to empower the Minister to declare a health emergency contrary to section 23(1) of the Constitution. It is not said why and how this is so. The Court can only surmise that it is so argued because the preamble to the impugned regulation refers to their making being "in respect of the disaster-induced state of emergency declared by the Right Honourable the Prime Minister under sections 3 and 15 of the Disaster Management Act, 1997 against COVID-19 pandemic."

[127] The exercise of the powers of the Minister to declare communicable diseases and make regulations for their prevention and control is not dependent on the Prime Minister's declaration of a disaster-induced state of emergency. It is a statutory power conferred by a law that even precedes that which confers

powers on the Prime Minister to declare a disaster-induced state of emergency. Section 5(2)(a) of the **Public Health Order, 1970** empowers the Minister to “declare that any disease other than those specified in subsection (1) of this section shall be a notifiable disease.” It is incomprehensible to me how by dint of the exercise of the powers, the promulgation of the regulations mutates into a declaration of a state of emergency just because the promulgation is made following a declaration of a COVID-19 disaster-induced state of emergency.

[128] A textual reading and effect of the impugned regulations does not bear out the applicants’ contention that the Minister of Health has declared a state of emergency. He has merely exercised his own powers under a law regulating prevention and control of a communicable disease. The fact that the Prime Minister has made a determination that COVID-19 warrants to be declared a disaster-induced state of emergency does not give colour of declaration of a state of emergency by the Minister as well. I would reject the applicants’ submission that the Minister’s exercise of section 18(m) powers is a declaration of emergency inconsistent with section 23(1) of the Constitution.

Constitutionality of vaccine mandates

[129] The applicants’ complaint about vaccine mandates is caused by the scheme of sub-regulations (20), (21), (24), (25) and (26). I reproduce them below:

“(20) A person who in accordance with Schedule I, is identified under a category of persons who are required to be vaccinated by a health vaccinator, nurse or medical practitioner, shall not engage in work, perform duties, provide or acquire services at any institution or place of work, study or business unless-

- (a) the person has received at least one dose of an approved COVID-19 vaccine;
- (b) the person has received or has evidence of a booking to receive a second dose of the approved COVID-19 vaccine within two months of the first dose.

(21) A parent or guardian of a child who is between 12 to 17 years, shall ensure that the child is vaccinated by a health vaccinator, nurse or medical practitioner.

.....

(24) A person or child shall, on request by a public health or a law enforcement officer, provide proof of their vaccination status or in case of the person who is an employee, on request from the chief accounting officer, manager, an owner or person in charge of an institution, enterprise, facility, entity, place of work, study or business or an organizer of an event.

(25) Where a person or child fails to comply with subregulation (24), a public health or law enforcement officer may direct the person to do such things as are reasonably necessary to comply with the subregulation.

(26) A chief accounting officer, manager, an owner or a person who is in charge of an institution, enterprise, facility, entity, place of work, study or business or an organizer of an activity, shall take all necessary steps to ensure that a person does not enter, remain, provide or acquire services on the premises if the person is not vaccinated in accordance with these regulations and Schedule I.”

[130] These sub-regulations must be read together with sub-regulation (23) which provides that:

“(23) Notwithstanding the provisions of subsection (sic) (20) and (21), a person may engage in work, perform duties, provide or acquire services at an institution or place of work or business, or the child may not be vaccinated if-

- (a) the person or child has a medical certificate issued by a legally qualified and licensed medical practitioner, certifying that the person has a medical condition which exempts him from receiving the COVID-19 vaccine on either a temporary or permanent basis;

- (b) the medical certificate specifies the nature and conditions of the medical condition which exempts the person or child from receiving the COVID-19 vaccine and the basis on which it applies, which the person or child shall comply with; or
- (c) the Director-General, Health Services, has endorsed the exemption.”

[131] Sub-regulations (20) – (21) and (24) – (26) provide that a person falling in the category of persons who are required to be vaccinated should vaccinate and be issued with a vaccinate card. Failure or refusal to vaccinate and produce a vaccination card results in denial of access to services at any place of work, study, business, institution, entity, facility and organized activity.

[132] Sub-regulation (23) provides for exemptions from vaccination for a person who produces a medical certificate certifying that the person has a specified medical condition exempting him from vaccination on either temporary or permanent basis, or the Director-General of Health Services has endorsed the exemption.

[133] The applicants’ attack of the scheme of the sub-regulations is that:

133.1 It does not provide for religious exemptions and thereby violate their freedom of conscience and religion.

133.2 It provides for discrimination in access of institutions and services.

133.3 It invades their bodily integrity and the right to refuse medical treatment.

[134] The touchstone for interrogating the complaints about human rights violations is that none of the asserted rights and freedoms enjoy absolute constitutional protection. Each of them is hedged around with restrictions. The golden thread that runs throughout the limitations is that nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of the guaranteed right or freedom to the extent that the law in question provides for imposition of restrictions in the interest of public safety or public health – which restrictions are necessary in a practical sense in a democratic society in order to secure the fulfilment of obligations imposed on a person by law.

[135] What is uncontestable in these proceedings is that vaccine mandates do indeed violate the asserted right and freedoms. It is so because every person who falls in the category of persons required to vaccinate and refuses to be vaccinated faces adverse consequences of denial of access to work, health services, public services and events, study, business and places of entertainment. But what is also uncontestable is that restrictions with such consequences can be made in

the interest of public safety and public health. The only issue is whether vaccine mandates and denial of access are necessary in practical sense in order to protect public safety and public health.

[136] This necessitates an enquiry of whether vaccine mandates and their enforcement constitute a limitation of rights and freedoms that is reasonable and demonstrably justifiable in a free and democratic society. The test is in two parts as explained by the Court of Appeal in ‘Mopa’⁴⁹:

“The first aspect relates to the objective or purpose of the limitation, and the second to the aspect of proportionality. The objective must be sufficiently substantial and important as to warrant overriding, a constitutionally protected right, while the proportionality test requires that the means are appropriate.”

[137] The Constitutional Court of South Africa points out in **NICRO**⁵⁰ that the limitation analysis involves:

“... the balancing of means and ends. This entails an analysis of all relevant considerations ‘to determine the proportionality between the extent of the limitation of the right considering the nature and, importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.’

In this process, different and sometimes conflicting interests and values may have to taken into account. Context is all – important and sufficient material should always be placed before a court dealing with such matters to enable it to weigh up and evaluate the competing values and interests in their proper context.”

⁴⁹ Attorney General v. ‘Mopa LAC (2000-2004) 427 para [33]

⁵⁰ Minister of Home Affairs v. NICRO 2005 (3) SA 280 (CC) para [37]

[138] The context within which vaccine mandates are legislated for is that the World Health Organisation (WHO) has declared COVID-19 as public health emergency of international concern⁵¹. The virus spreads by social contact and vaccines are determined crucial in curbing its spread and saving lives by boosting a person's immune system. All countries are urged to work towards vaccinating at least 70% of their populations and prioritizing the vaccination of health workers, most vulnerable groups including people over 60 years of age and people who are immuno compromised or have underlying health conditions, essential workers and sociodemographic sub-populations at higher risk of severe COVID-19⁵².

[139] Vaccines provide strong protection against serious illness and death caused by the Omicron and Delta variants that cause COVID-19. Being fully vaccinated also helps reduce the likelihood of new variants emerging. This notwithstanding, a person should not be vaccinated if:

(a) he has a history of severe allergic reactions/anaphylaxis to any of the ingredients of the COVID-19 vaccine in order to avoid possible adverse effects;

⁵¹ <https://www.who.int>

⁵² WHO policy brief: Reaching COVID-19 vaccination targets (14 September 2022)

(b) he has a fever over 38.5°C on the day of vaccine appointment;

(c) he has currently confirmed or suspected COVID-19 and must rather wait until completion of the mandatory isolation period to get vaccinated.⁵³

[140] It takes several weeks after a dose of vaccine for the body to develop maximum levels of immunity. Although it is not known how long protection by vaccines lasts, most people's protection lasts for at least six months.⁵⁴

[141] The respondents contend that Lesotho has adopted the vaccine mandates policy in line with section 27 of the Constitution. Section 27 of the Constitution provides:

“27 (1) Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens, including policies designed to-

- (a) provide for the reduction of stillbirth rate and of infant mortality and for the healthy development of the child;
- (b) improve environmental and industrial hygiene;
- (c) provide for the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) create conditions which would assure to all, medical service and medical attention in the event of sickness; and
- (e) improve public health.”

⁵³ WHO: COVID-19 advice for the public: Getting vaccinated (13 April 2022)

⁵⁴ Op.cit.

[142] Although the policy of vaccine mandates is constitutionally grounded and undoubtedly important, the question is whether there is a less restrictive means of implementing the policy. In other words, is the achievement of herd immunity possible without sanctioning people who refuse to vaccinate by denying them access to health services and other public services and study opportunities.

[143] In my respectful judgment, there is a rational relationship between the sanctions (means) and the end (herd immunity). Available information from the World Health Organisation shows that vaccines provide immunity from COVID-19 and thereby save life. It is, therefore, a good public health strategy of prevention is better than cure to require people to vaccinate for their own good health and also to prevent them from infecting others.

[144] The regulations strike a fine balance between the general requirement to vaccinate and providing exemptions for persons who are medically certified unfit to be vaccinated. Furthermore, no person is compelled to vaccinate if he does not want. But then such a person cannot demand unrestricted access to work and other public services. A refusal to vaccinate without consequences

is to defeat the purpose of the policy of vaccine mandates. There is nothing that unreasonable necessitated by directive to comply with sub-regulations.

[145] The only happenstance in the strategy of implementing the policy that I find problematic is the denial of access to health services to a person who fails to produce proof of a vaccination status. A person may seek health services on an emergency basis before compliance with the sub-regulations. I see no good reason for denying such a person access to health services simply because of absence of proof of vaccination for COVID-19. This strategy detracts from the section 27 constitutional duty of Government to, among others, “create conditions which would assure to all medical service and medical attention in the event of sickness.” However, this is not to say that absent an emergency, a proof of vaccination is not required. It is still good strategy in line with W.H.O recommendations to require such proof so that health workers and health providers are also protected from being infected by patients.

IV CONCLUSION

[146] The applicants have not suggested any less restrictive means of implementing the vaccine mandates and I see none. The thrust of their case is an exemption from vaccine mandates for reasons of privacy, discrimination and religious

objection. I, therefore, find that the limitation of the applicants' rights and freedoms by the regulations is reasonable and demonstrably justified.

[147] Costs

The applicants have raised a matter of public importance to be resolved for the benefit of society at large. There is no reason to mulct them with costs. Each party will pay its own costs.

[148] Order

In the result, I would uphold the sub-regulations in their entirety.



**S. P. SAKOANE
CHIEF JUSTICE**

For the Applicants : Adv. M. Ramaili SC assisted by Adv. F. Sehapi
Adv. K. Ntitsane
For the Respondents : Adv. L.P. Moshoeshoe