

Constitutional implications of COVID-19

*Access to justice and the functioning
of the courts during lockdown:*

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This new contribution seeks to provide a weekly analysis of constitutional issues arising from COVID-19 and the responses to it. In this instalment, I consider the role of the courts.

In my first contribution a fortnight ago, I considered the broad constitutional implications of COVID-19 for the functioning of government and constitutional rights. My second instalment considered the crucial role of Parliament and the efforts to reopen the legislature and its committees virtually. This week, I focus on the courts.

Like Parliament, the judiciary's initial response involved urgent restrictions, followed by adjustment and refinement to enable access to courts while safeguarding public health. The principle of 'open justice' is embedded in the right of access to courts in s 34, which guarantees a 'fair public hearing'. The principle requires that court proceedings be open to the public and court

records available to all, unless a court restricts access to either for a compelling reason. How far have the new restrictions on courts limited open justice? What are the challenges to ensuring that court proceedings are 'fair'?

On 17 March 2020, two days after the executive declared a state of national disaster, Chief Justice Mogoeng issued Directives adopted by the Heads of Court to 'curb the spread of COVID-19 in all courts'. These Directives restricted attendance at court hearings to those with a 'material interest in a case' (defined more broadly than merely a legal interest). They also imposed a range of safety measures relating to cleaning, sanitation and congestion. These Directives empowered Heads of Court to make proposals to the executive to issue regulations on the functioning of the courts, and stated that the executive shall 'avail the necessary resources' to ensure that the measures in the directives are implemented.

Soon afterwards, South Africa went into full lockdown, beginning on 26 March 2020. On 26 March, Legal Aid South Africa closed all its offices, including the Legal Aid Advice Line. LASA represents indigent accused persons in criminal proceedings, and provides limited civil legal aid in certain types of matter. It appears, as of 27 April 2020, that they remain closed. The public interest sector, approximately 10–15 organisations that provide mainly civil legal services to those who

need them, did not shut operations, but only physical offices. They also set up a joint national hotline to provide legal assistance to those whose rights are violated during lockdown. As I have argued elsewhere, one aspect of the right of access to courts is the right to civil legal aid if it is necessary to ensure a 'fair' hearing (*Magidiwana* para 22ff). The ability to access legal services is crucial to enabling any blind spots or abuses in the government's measures to be remedied.

On 31 March 2020, after full lockdown, Minister of Justice and Correctional Services, Ronald Lamola, issued Directions under regulation 10 of the Disaster Management Regulations. These Directions imposed further restrictions on physical access to the courts. These Directions also provided that most criminal and civil matters that were due to be heard will be postponed until after the lockdown period. Reportedly, the Minister's intention to issue the Directions caused tensions with the Chief Justice, who considered it unconstitutional for the executive to assume this function, and was unwilling to be consulted on the draft Directions. However, in the Directions themselves, the Minister records that he made them 'after consultation with the Chief Justice'. Presumably, the Minister and Chief Justice resolved the impasse.

On 17 April 2020, the Chief Justice himself issued new Directives. Though they do not refer to the Minister's Directions, the Chief Justice's 17 April Directives are largely to the same effect, requiring the postponement of most criminal and civil matters and providing that only 'urgent matters and urgent applications arising from the activities associated with disaster management' may be heard in open court and that even these matters

may be conducted virtually. The 17 April Directives also delegate the power to all Heads of Court to take further action and issue their own directions to give effect to the Chief Justice's Directives. The individual Heads of Court have been issuing such directions since mid-March, either of their own volition or pursuant to delegations from the Chief Justice.

This composite of directives constitutes a drastic limitation of the right of access to courts in s 34 and the right to a fair criminal trial in s 35. Various elements of both rights are limited, including the 'open justice' requirement that proceedings be held in open court and accessed by anyone; the requirement that proceedings be concluded without unreasonable delay, especially in criminal proceedings, and the right to have a matter decided at all. It is possible that some matters will fall outside the scope of the cases permitted to be heard under the Directives, for example because they are not strictly urgent applications, but require to be heard if relief is to be effective. Some of the limitations are mitigated by specific provisions of the various directions issued. For example, the Supplementary Directive for Pretoria and Johannesburg directs courts to condone non-compliance with rules relating to service and filing if the non-compliance is due to the lockdown.

If the general restrictions on legal services and courts remain in place for an extended period, they may invite challenge. Overall, the general restrictions are not obviously disproportionate, but specific problems are emerging as events unfold. If not remedied by amendments to directives, they may be challenged in court. Under government's proposed phased approach to ease the lockdown from 1 May, phases 5 down to 2 only allow 'services

related to the essential functioning of courts' and services designated by Heads of Courts (para 2(c) and (e)). Accordingly, it appears that court functions will remain restricted and many cases will not be able to be launched or set down. The deployment of virtual hearings in urgent and COVID-19-related matters, if it is successful, may well demonstrate that 'less restrictive means' are available, which could tip the balance in a limitations enquiry to the exclusion of particular types of case being heard.

Another major concern is the restrictions on lawyers' ability to consult clients and prepare cases, especially the requirement that they secure an essential services permit from their provincial Legal Practice Council. Several public interest centres have written to the Minister, expressing general support for the measures, but explaining why this provision and others impede their ability to provide services.

The partially open courts have now seen several COVID-19-related cases, mainly involving challenges to lockdown measures. The early cases included challenges to the lockdown itself (dismissed by Constitutional Court), the exclusion of baby clothes from essential goods (regulations amended to include them), and a complaint by NEHAWU of a failure to provide adequate PPE (dismissed by Labour Court). A threatened challenge to the ban on liquor sales by the Gauteng Liquor Forum was delayed while government was considering easing the

lockdown. The Forum is now considering its next move. With the various High Courts now setting up to conduct virtual proceedings, litigation over the lockdown restrictions should become easier.

However, potential litigants would do well to heed the warning implicit in the Constitutional Court's refusal of direct access in the Khosa case brought in response to the alleged killing of Collins Khosa by soldiers and metro police in Alexandra. The Khosa family sought relief beyond the individual case, proposing an SANDF code of conduct for the lockdown and a process for reporting and investigation of complaints. The court dismissed the application, concluding that it was 'not in the interests of justice to hear, as there are insufficient grounds for direct access to this Court.' The Khosa family is taking the application to the High Court. The message of the Constitutional Court, however, is clear: it will not become the first port of call for COVID-related litigation.

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