

THE IMPACT OF COVID-19 AND GOVERNMENT MITIGATION REGULATIONS ON ATTENDING CUSTOMARY INITIATION SCHOOLS IN SOUTH AFRICA

Lerato Rudolph Ngwenyama [†]

ABSTRACT

Initiations in South Africa ordinarily take place in June and December every year. However, initiations were suspended in March 2020 when South Africa went on national lockdown necessitated by the Covid-19 pandemic. The ban on initiations was only applicable at alert level two and five. At alert level one, the Department of Co-operative Governance and Traditional Affairs (“COGTA”) issued a statement stating that initiations would remain suspended in an attempt to prevent the spread of Covid-19 and to save the lives of initiates. However, the Eastern Cape Province was an exception because initiation conductors made submissions to COGTA that they would comply with all health protocol measures. This paper evaluates the South African government’s

[†] Dr. Lerato Rudolph Ngwenyama, Lecturer, College of Law and Management Studies, School of Law, University of KwaZulu-Natal, Howard College ngwenyamal@ukzn.ac.za / ngwenyama@ymail.com, First Floor, Howard College Building, Suite A, Room 104, Mazisi Kunene Road, Durban, 4001 Cell number: 082 662 7276

I would like to acknowledge the South African Research Chair in Property Law, funded by the Department of Science and Technology, administered by the National Research Foundation (NRF), and hosted by Stellenbosch University, where I was based when an earlier draft of this article was written. The financial assistance of the NRF is acknowledged. This article is an extended version of a paper presented at the African Customary Law Conference under the theme “Customary Law in a Changing Africa”. It was organised by the Center for African Legal Studies at the University of Professional Studies Law School and the Leitner Center for International Law and Justice at Fordham Law School, on 29 January 2021. I would like to extend my appreciation to Siyabonga Sibisi and David Barraclough for their helpful editorial suggestions. The opinions expressed in this article are those of the author and should not be attributed to any of the above-mentioned institutions and persons. All shortcomings are those of the author.

legislative and regulatory response to the Covid-19 pandemic – especially in the context of customary practices such as initiation. In order to undertake an evaluation of the government's legislative and regulatory response to the pandemic, the paper considers the following aspects: (1) which measures were put in place to regulate initiation schools; (2) were the measures due to governmental regulation or did initiation school conductors simply recognise the need to prevent the spread of Covid-19 by shutting down initiation schools; and (3) more importantly, what are the constitutional implications (if any) of the government's legislative and regulatory response to the Covid-19 pandemic in terms of prohibiting initiation. The paper concludes that the government adopted far-reaching measures to prevent the spread of the Covid-19. These measures involved a restriction on the right to participate in cultural initiation. However, in a national state of disaster such as has been the case with the Covid-19, these measures are justifiable limitations of the right to enjoy cultural initiation.

Key words: Initiation, Government mitigation regulations, Constitutional implications

1 INTRODUCTION

Every year in South Africa, young men and women are excited to undergo initiation. In South Africa, initiation refers to any customary, cultural rituals or ceremonial practices that take place at an initiation school in line with the customs and traditions of a particular

community.¹ The customary practice of initiation further includes teachings that relate to ideals, values, aspirations and respect.² Many communities in South Africa undergo initiation as a sacred and respected customary practice that marks the passage of young men and women into adulthood.³ Initiation practices therefore aim to prepare initiates to become responsible adult men and women in society.⁴ Male initiates are taught important aspects of life such as providing for their families and becoming leaders in their respective families.⁵ Female initiates are taught how to take care for their families and taught about the role that women generally play in the household.⁶

In relation to young men, initiation generally entails circumcision.⁷ Circumcision refers to the surgical removal of the foreskin (either wholly or partially) as part of the customary initiation practice.⁸ In relation to young women, initiation refers to the removal of the clitoris.⁹ Sadly, during 2020–2021 all young men and women did not get an opportunity to undergo the customary practice of initiation because of the national lockdown necessitated by the Covid-19 pandemic.¹⁰ In this regard, the South African government was compelled to promulgate regulations that could, among other things, ensure that

¹ Section 1 of the Customary Initiation Bill. See, also, DK Mabena *The Role of Initiation Schools in the Identity Formation of Southern Ndebele Adolescent Boys* Masters dissertation, University of South Africa (1999) 12.

² Section 1 of the Customary Initiation Bill. See, also, Mabena (n 1) 12.

³ Preamble of the Customary Initiation Bill. See, further, C Chikunda and P Shoko 'Exploring the Relevance and Quality of the VaRemba Initiation School Curriculum and its Impact on Formal Schooling in a Rural District in Zimbabwe' (2009) 26 *Southern African Journal of Environmental Education* 193 199; see, also, Mabena (n 1) 12.

⁴ Preamble of the Customary Initiation Bill. See, further, Chikunda and Shoko (n 3) 193 199.

⁵ Chikunda and Shoko (n 3) 193 199.

⁶ *ibid.*

⁷ Mabena (n 1) 12.

⁸ Section 1 of the Customary Initiation Bill. See, also, Chikunda and Shoko (n 3) 193 199.

⁹ *ibid.*

¹⁰ Regulation 38(1)(a) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002.

young men and women did not undergo the customary practice of initiation – in order to keep them safe and sufficiently protected from Covid-19 while in their respective homes.¹¹ It is certain, however, that many of the regulations and directives issued by the government have limited fundamental rights such as the cultural right to initiation.

The aim of this paper is to evaluate the government's response to the Covid-19 pandemic, particularly in the context of initiation. The research problem is whether the regulations that prohibited the attendance of initiation were unreasonable and unjustifiable infringements of the fundamental right to initiation. In order to evaluate the government's response to the Covid-19 pandemic, the paper considers the following aspects: (1) the measures put in place to regulate initiation schools; (2) were the measures due to governmental regulation or did initiation school conductors recognise the need to prevent the spread of Covid-19 by shutting down initiation schools; and (3) more importantly, what are the constitutional implications of the government's legislative and regulatory response to the Covid-19 pandemic in terms of prohibiting initiation.

The article first evaluates the government's response to the Covid-19 pandemic.

2 SOUTH AFRICA'S RESPONSE TO ATTENDING INITIATION SCHOOL DURING THE COVID-19 PANDEMIC

¹¹ *ibid.*

In response to the Covid-19 pandemic, the South African government implemented various measures. These measures includes a nationwide lockdown during which time everyone was required to stay at home, observe social distancing and ensure regular handwashing or sanitising.¹² However, these measures are extremely difficult to implement in initiation schools, where initiates are closely packed and where, in order to wash their hands regularly, they only have access to running water in rivers.

The government promulgated Regulation 38 relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 (“DMA”). Regulation 38(1)(a)-(e) provides that:

“(1) For the duration of the national state of disaster -

- (a) male and female initiation practices are prohibited;
- (b) a person may not arrange or hold an initiation school or conduct an initiation practice;
- (c) a prospective initiate may not attend an initiation school;
- (d) an owner of land may not provide consent for the use of his or her land for the holding of an initiation school; and
- (e) a traditional surgeon or medical practitioner may not perform circumcision as part of an initiation practice.

¹² Regulation 11B relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN R398 in *GG* 43148 25-03-2020.

(2) The National House of Traditional Leaders and provincial houses of traditional leaders must take steps to ensure that traditional leaders are aware of the content of this regulation.”

Regulation 38 compelled the government to ban arranging or holding initiation schools or conducting initiation practices. In this regard, the government implemented further measures, especially in the context of customary practices, to regulate initiation schools. These measures included: (a) a person could not arrange or hold an initiation school or conduct an initiation practice; (b) a prospective initiate could not attend an initiation school; (c) an owner of land could not provide consent for the use of his or her land for the purpose of holding an initiation school; and (d) a traditional surgeon or medical practitioner could not perform circumcision as part of an initiation practice.¹³ These measure were only applicable at alert levels five to two.

At level one of the lockdown, the government developed Regulation 73 relating to Covid-19, issued in terms of section 27(2) of the DMA. Regulation 73(1)-(6) provides that:

“(1) Initiation practices are prohibited nationally, except that initiation practices will be allowed in the Eastern Cape Province, excluding Nelson Mandela Bay, with effect from 17 December 2020.

¹³ Regulation 38(1)(b)-(e) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN R480 in *GG* 43258 of 29-04-2020; Regulation 38(1)(b)-(e) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 608 in *GG* 43364 of 28-05-2020; Regulation 57(1)(b)-(e) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 891 in *GG* 43620 of 17-08-2020.

(2) Where initiation practices are prohibited -

(a) a person may not arrange or hold an initiation school or conduct an initiation practice;

(b) a prospective initiate may not attend an initiation school;

(c) an owner of land may not provide consent for the use of his or her land for the holding of an initiation school; and

(d) a traditional surgeon or medical practitioner may not perform circumcision as part of an initiation practice.

(3) Where initiation practices are allowed there must be strict adherence to all health protocols and social distancing measures as provided for in directions issued by the relevant Cabinet member after consultation with the Cabinet member responsible for health.

(4) All post-initiation celebrations (“imigidi”) are prohibited.

(5) The National House of Traditional Leaders and provincial houses of traditional leaders must take steps to ensure that traditional leaders are aware of the content of this regulation.

(6) Failure to adhere to these regulations and any directions that are issued in respect of initiation schools, will result in the closure of initiation schools by the relevant authorities.”

In terms of regulation 73, initiation schools or practices were still prohibited nationally, except in the Eastern Cape Province.¹⁴ The Eastern Cape was treated as an exception because initiation conductors made submissions to the Department of Co-operative Governance and Traditional Affairs (“COGTA”) that they would comply with all health protocols. The holding of initiation schools or conducting initiation practices in the Eastern Cape was subject to strict adherence to all health protocols and social distancing measures.¹⁵ Though initiations were allowed in the province, all post-initiation celebrations were prohibited.¹⁶ This is because celebrations of this kind were identified as being potential super-spreader events of Covid-19. A super-spreader event is an event during which an infectious virus could be transmitted more rapidly during a pandemic. Consequently, the National House of Traditional Leaders and the provincial houses of traditional leaders were tasked to take steps to ensure that traditional leaders were aware of the content of the Covid-19 regulations relating to initiations.¹⁷ It should be mentioned that failure to adhere to the Covid-19 regulations and any directions relating to initiation schools, could result in the closure of the initiation school concerned by the relevant authorities.¹⁸

¹⁴ Regulation 73(1) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1290 in *GG* 43964 of 03-12-2020; Regulation 73(1) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.

¹⁵ *ibid.*

¹⁶ Regulation 73(4) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.

¹⁷ Regulation 73(4) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1290 in *GG* 43964 of 03-12-2020; Regulation 73(5) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.

¹⁸ Regulation 73(5) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1290 in *GG* 43964 of 03-12-2020; Regulation 73(6) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.

It is clear that the measures put in place to regulate initiation schools flowed from the government's response to Covid-19. In this regard, the government recognised the need to save the lives of initiates and to prevent the spread of the Covid-19 pandemic by shutting down initiation schools – except in the Eastern Cape (as mentioned above). It became important to understand what the regulations prescribed in relation to initiations, especially given that initiates are closely packed and there may not be access to running water to wash hands regularly.

The next step in the analysis includes an investigation into the implications of the Constitution in relation to the prohibition of initiation practices during the Covid-19 pandemic.

3 IMPACT OF THE CONSTITUTION ON THE PROHIBITION OF INITIATION SCHOOLS

The purpose of this section is to consider whether the government's legislative and regulatory measures in prohibiting initiation schools because of the Covid-19 pandemic are justifiable under the Constitution of the Republic of South Africa, 1996. According to the courts, the limitation of rights involves a two-stage inquiry.¹⁹ First, a court must

¹⁹ *S v Zuma* 1995 (2) SA 642 (CC) para 21; *S v Makwanyame* 1995 (3) SA 391 (CC) paras 100 and 208; *S v Williams* 1995 (3) SA 632 (CC) para 54; *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison* (CCT19/94, CCT22/94) [1995] ZACC 7 (22 September 1995) para 9; *Moise v Greater Germiston Transitional Local Council* (CCT 54/00) [2001] ZACC 21 (4 July 2001) para 7; *Johncom Media Investments Limited v M* (CCT 08/08) [2009] ZACC 5 (17 March 2009) para 22; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (CCT 36/08) [2009] ZACC 8 (1 April 2009) para 141; *AB v Minister of Social Development* (CCT155/15) [2016] ZACC (29 November 2016); *Minister of Justice and Constitutional Development v Prince*; *National Director of Public Prosecutions v Rubin*; *National Director of Public Prosecutions v Acton* (CCT108/17) [2018] ZACC 30 (18 September 2018) paras 59-82; *Centre for Child Law v Media 24 Limited* (CCT261/18) [2019] ZACC 46 (4 December 2019) paras 52-60; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para

inquire whether the government's legislative and regulatory measures restrict or infringe fundamental rights. Secondly, if the court has established that the regulatory measures restrict or infringe fundamental rights, a court must inquire whether the restriction or infringement is justifiable under section 36 of the Constitution.²⁰ Section 36 of the Constitution provides that:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and

108. See, further, P De Vos, W Freedman, Z Boggenpoel, L Draga, C Gevers, K Govender, P Lenaghan, SM Weeks, CS Namakula, N Ntlama, D Mailula, K Moyo, S Sibanda & L Stone “Limitation” in P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (Oxford University Press Southern Africa 2021) 431.

²⁰ *S v Zuma* 1995 (2) SA 642 (CC) para 21; *S v Makwanyame* 1995 (3) SA 391 (CC) paras 100 and 208; *S v Williams* 1995 (3) SA 632 (CC) para 54; *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison* (CCT19/94, CCT22/94) [1995] ZACC 7 (22 September 1995) para 9; *Moise v Greater Germiston Transitional Local Council* (CCT 54/00) [2001] ZACC 21 (4 July 2001) para 7; *Johncom Media Investments Limited v M* (CCT 08/08) [2009] ZACC 5 (17 March 2009) para 22; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (CCT 36/08) [2009] ZACC 8 (1 April 2009) para 141; *AB v Minister of Social Development* (CCT155/15) [2016] ZACC (29 November 2016); *Minister of Justice and Constitutional Development v Prince*; *National Director of Public Prosecutions v Rubin*; *National Director of Public Prosecutions v Acton* (CCT108/17) [2018] ZACC 30 (18 September 2018) paras 59-82; *Centre for Child Law v Media 24 Limited* (CCT261/18) [2019] ZACC 46 (4 December 2019) paras 52-60; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 108. See, further, De Vos, Freedman, Boggenpoel, Draga, Gevers, Govender, Lenaghan, Weeks, Namakula, Ntlama, Mailula, Moyo, Sibanda & Stone (n 19) 431-432.

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

The impugned regulatory measures to be considered concerned the prohibition of initiation practices at levels five to two, as quoted above.²¹ In the context of the question of whether the government’s legislative and regulatory measures are justifiable under section 36 of the Constitution, the assessment of the regulatory measures becomes relevant in the following case. Everybody has the right, in terms of section 30 of the Constitution, to participate in the cultural life of their choice. This section signals that everybody has the freedom to practise a culture of their own choice.²² Section 31(1)(a)-(b) further states that persons belonging to a cultural community may not be denied the right, with other members of that community, to enjoy their culture and to form, join and maintain cultural associations. However, no one may exercise the right to culture in a manner that is inconsistent with any provision of the Bill of Rights.²³ This would mean that the customary practice of initiation is subject to constitutional control and regulation. Initiation must be practised in a manner that complies with the constitutional rights

²¹ See, Part 2 above.

²² TW Bennett *Customary Law in South Africa* (Juta 2010) 86.

²³ Sections 30 and 31(2) of the Constitution.

contained in the Bill of Rights.²⁴ These rights include the right to human dignity,²⁵ the right to life,²⁶ and the right to sufficient water.²⁷ Clearly regulation 38 restricts or infringes the right to participate in one's cultural initiation by prohibiting the arrangement or holding of initiation schools or conducting an initiation practice. In light of this finding, it becomes important to consider whether the restriction on participating in cultural initiations is reasonable and justifiable under section 36 of the Constitution.

The restriction or infringement on the right to culture is brought about by regulation 38, issued in terms of section 27(2) of the DMA. By its very nature, regulation 38 qualifies as a law of general application.²⁸ This means that it is a provision of law that can be used to limit fundamental rights.²⁹ The right to participate in cultural initiation schools is important in our society. This is because the initiation is regarded as a rite of passage to adulthood and is practised as a transfer of teachings on culture, tradition and respect for women and the elderly in society.³⁰ However, looking at the surrounding circumstances of certain initiation schools, where the only source of water is a river or pond, the lives of

²⁴ Section 3 of the Customary Initiation Bill states that “The customary practice of initiation is subject to the Constitution and must be transformed and adapted so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by —

(a) protecting the lives and dignity of initiates as referred to in sections 10 and 11 of the Constitution;

(b) providing initiates with access to sufficient food and water, health care services and, where necessary, emergency medical treatment as referred to in section 27 of the Constitution; and

(c) protecting and promoting the rights of children as referred to in section 28 of the Constitution”.

²⁵ Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

²⁶ Section 11 of the Constitution states that “[e]veryone has the right to life”.

²⁷ Section 27(1)(b) of the Constitution provides that “[e]veryone has the right to have access to ... sufficient ... water”.

²⁸ *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 119.

²⁹ *ibid.*

³⁰ Preamble of the Customary Initiation Bill.

initiates could be endangered during the Covid-19 pandemic. Initiates might not be able to regularly wash their hands because of a lack of running water. It could be difficult for initiates to source and use personal protective equipment such as face masks and to observe health protocols such as hand sanitising – because of a lack of funding in certain initiation schools. It could also be difficult for initiates to maintain social distancing because they are usually closely packed at the schools.

Regulation 38, in prohibiting initiation practices, is arguably justifiable in an open and democratic society based on human dignity, equality and freedom. This is because the government – in promulgating regulation 38 – acted in a manner that fulfils its obligation in terms of section 7(2) of the Constitution. In this regard, the government had an obligation towards initiates to respect, protect, promote and fulfil their fundamental rights to life (in terms of section 11 of the Constitution) and to security of their person (in terms of section 12 of the Constitution).³¹ This is because the initiates' fundamental rights to life and security of their person are threatened by the Covid-19 pandemic. Thus it was necessary for the government to prohibit the practice of initiation in order to reduce the risk of transmission of Covid-19, so preserving the lives of initiates.³²

The importance of the purpose of the limitation of the fundamental right to participate in cultural initiation is clear. The government prohibited initiation practices in terms of the stringent regulations to slow and prevent the spread of Covid-19.³³ More importantly,

³¹ *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 112.

³² *ibid.*

³³ *ibid* paras 130-131.

the purpose of the limitation of the right to participate in cultural initiation is to protect the right to life and health of initiates, who could have died if preventative measures had not been taken against Covid-19.³⁴ It was important for the government to take drastic and far reaching measures that invade the right to cultural initiation, in order to deal with the destructive and other effects of the Covid-19 pandemic.³⁵ Therefore, the prohibition on attending initiation schools should not be seen by young men and women as an unreasonable limitation to the exercise of their cultural right to initiation.

Considering the nature and extent of the limitation of the right to participate in cultural initiation, the impact of regulation 38 must be considered as a whole. Regulation 38 restricted both male and female initiation practices. This regulation did not allow any person to arrange or hold an initiation school or conduct an initiation practice, and a prospective initiate could not attend an initiation school. Under the same regulation, an owner of land could not provide consent for the use of his or her land for the holding of an initiation school. In the final instance, regulation 38 prohibited a traditional surgeon or medical practitioner from performing circumcision as part of an initiation practice. Regulation 38 offered no exceptions regarding the practice of initiation. However, the restriction or infringement on the right to cultural initiation is qualified against the

³⁴ *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56 para 9; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 132.

³⁵ Section 27(2) and (3) of the Disaster Management Act 57 of 2002. See, further, *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 131.

backdrop of ensuring that initiation schools do not become infection sites and super spreaders of Covid-19.³⁶

Despite a number of factors mentioned in section 36, in practice, for a limitation to be justifiable the court ordinarily applies the proportionality test, which involves a balancing of rights and interests.³⁷ In this regard, the right to participate in cultural initiation is weighed against the regulatory measures that restrict or infringe that right. This is in order to assess whether the regulatory measures are permissible in an open and democratic society based on human dignity, equality and freedom.³⁸ In other words, the last two factors listed in section 36 of the Constitution relate to reasonableness and questions as to whether there is a relationship between the restriction and its purpose, and whether the means taken were proportionate.³⁹ The seriousness that Covid-19 has posed (and continues to pose) in relation to prospective initiates' right to life and security of their person cannot be over-emphasised. Covid-19 has (and continues to have) the potential to destroy the lives of prospective initiates on a large scale. Thus, the government had to respond drastically by prohibiting initiation practices, while cautiously protecting the lives of initiates from the severe consequences of Covid-19.

Therefore the limitation of the initiates' right to participate in cultural initiation by prohibiting initiation practices, and the means chosen, are objectively rational. This is

³⁶ *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 138.

³⁷ Bennett (n 21) 95. See, further, De Vos, Freedman, Boggenpoel, Draga, Gevers, Govender, Lenaghan, Weeks, Namakula, Ntlama, Mailula, Moyo, Sibanda & Stone (n 19) 432.

³⁸ *ibid.*

³⁹ *S v Manmela* 2000 (3) SA 1 (CC) para 66; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 139.

because in 2020 there was still limited knowledge about Covid-19 (including in the specialised field of epidemiology), there was little scientific information about how Covid-19 is transmitted and prevented, and the finding of a vaccine for Covid-19 was still work in progress.⁴⁰ The means chosen by the government to restrict prospective initiates from participating in cultural initiation is also proportional in that the chosen means are necessary to deal with the harsh consequences of Covid-19 and to decrease the potential for large numbers of deaths at initiation schools. In this regard, the government struck an appropriate balance between minimising the adverse effects of Covid-19 and saving the lives of initiates.

4 CONCLUSION

The South African government adopted far-reaching measures to prevent the spread of the Covid-19 pandemic. These measures involved a restriction on the right to participate in cultural initiation, as discussed above. However, in a national state of disaster such as has been the case with the Covid-19 pandemic, these measures are justifiable limitations of the right to enjoy cultural initiation in terms of section 36 of the Constitution. This is because these measures have the legitimate purpose of protecting public health in terms of section 27 (2) and (3) of the DMA. Moreover, these measures are justifiable because they fall within the terms of law and meet the requirements of reasonableness and

⁴⁰ *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) paras 140-141.

proportionality in terms of section 36 of the Constitution. Furthermore, these measures are justifiable because they were aimed at protecting the lives of initiates in line with constitutional rights such as the right to life and security of the person.