

High Court Declares Level 3 and 4 Regulations Unconstitutional

What does this mean for you?

Introduction

On 2 June 2020, The Honourable Judge N Davies of the Pretoria High Court handed down a judgement in *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*.

In essence, the judgement declared the Alert Level III and IV regulations invalid and unconstitutional.

This paper will briefly highlight:

- [Several cautionary notes on the judgment](#)
- [What Relief the Applicants sought.](#)
- [The Grounds for the challenge and opposition.](#)
- [Summarised Observations and Findings of the Court.](#)
- [Summary of Order of the Court.](#)

Cautionary Notes on the Judgment

First and foremost, however, it is important to note that:

- the declaration of invalidity is suspended for at least 14 business days (23 June 2020), during which the Alert Level 3 regulations shall apply;
- not all regulations were declared invalid. Certain prohibitions, such as those regarding evictions, initiation practices, and closure of nightclubs were found to be rational.
- section 172(2) of the Constitution prescribes that an order of constitutional invalidity has no force until it is confirmed by the Constitutional Court; and
- The Minister (or any person or organ of state with sufficient interest in the matter - , in terms of section 172(2) (d) of the Constitution) is permitted to appeal the judgment. An appeal may suspend the order until the appeal has been finalised.
- Some commentators have suggested that civil claims damages may be possible against the government where damages have been suffered as a result of the regulations. It is our position that this is not necessarily the case and that possibility does not mean that any of these cases would be successful as unlawfulness is only 1 requirement of several in a damages claim.

What Relief did the Applicants Seek?

- That the national state of disaster be declared unconstitutional;
- That the regulations be declared unconstitutional and invalid;
- That all gatherings should be declared lawful or allowed subject to certain conditions; and
- That all businesses, services and shops be allowed to operate subject to reasonable precautionary measures of utilising masks and gloves and hand sanitiser.

Grounds for the challenge and opposition

It must be borne in mind that these were urgent proceedings and the parties (particularly the Minister) would have had far less time than usual to prepare their cases and affidavits.

The main grounds upon which the Applicants challenged the regulations include:

- The regulations were irrationally connected to the purpose of flattening the curve and, thus, did not satisfy the rationality test in terms of section 36 of the constitution. (Section 36 of the constitution requires that the rights enshrined in the Bill of Rights may only be limited 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);
- The regulations were irregular in that they were not approved by the National Council of provinces;
- The limitation on gatherings in the regulations was contrary to a purported right to have public gatherings in terms of the Gatherings Act; and
- The regulations were invalid as they did not correspond with section 27(2) of the Disaster Management Act.

Defence and justifications by the Minister:

- According to the judgment, it appears that the Answering Affidavit of the Minister merely recited legislation and offered few facts in support of the rationality of the regulations.
- The Minister often made blanket statements such as *"... I submit, with respect, that under the circumstances the means justify the ends"* and *"The powers exercised under lockdown regulations are for good. Therefore the standard is not breached"*.

Summarised Observations and Findings of the Court

In the judgement, the judge had to **decide whether the regulations were rationally connected to the purpose which they allegedly served**. The judge emphasised that the question is not whether they are better means of achieving the same purpose, but whether the means selected are rationally related to the objective sought to be achieved. If not, they fall short of the standards demanded by the Constitution.

In this regard, the judge found the **regulations were irrational in light of, *inter alia***, the following:

- The regulations prevent persons who are not caregivers of the patient from having access to the patient while they are ill and to ease their suffering. However, if they die, up to 50 people are suddenly allowed at the funeral;
- A single mother may not render hairdressing services and earn a living her beauty salon (taking the necessary precautions). However, a taxi is allowed to operate where patrons are sitting closer together than they would in her salon;
- People are allowed to buy a jersey but not to buy undergarments or sandals;
- Freedom of movement is limited between people who would normally have little contact with each other. However, these people would be forced to gather in huge numbers in order to obtain food from government food drives.

The Judge also remarked that:

- the reversion to **total bans harks back to a pre-Constitutional era of restrictive State of Emergency regulations**.
- the government seemed to have taken a **paternalistic approach** rather than a constitutionally justifiable approach.
- little or no regard was given to the extent that regulations would have on the constitutional rights of people. It appeared that the **government sought to achieve their goal by whatever means, irrespective of the cost**.
- **no amount of money in compensation can sufficiently recompense a victim for the loss of rights such as dignity, freedom of movement, and association with family**.

Despite the above, there are **certain regulations which are indeed rational**. These include prohibitions of evictions, restrictions on education, restriction of initiation practices, closure of nightclubs and fitness centres, et cetera.

Summary of Order of the Court

- The regulations are declared unconstitutional and invalid.
- The declaration of invalidity is suspended for 14 business days until such time as the Minister, republish the regulations (save for regulations on prohibitions of evictions, restrictions on education, restriction of initiation practices, closure of nightclubs and fitness centres, etc) having due consideration to the limitation each regulation has on the rights guaranteed in the Bill of Rights.
- In the interim, the Alert Level 3 regulations shall apply.
- In light of the cases before the same court in respect of the ban on tobacco products, this judgement did not make a decision on the matter. An application on the issue will be heard by a full-court of 3 judges later this month.
- The Minister is ordered to pay the costs of the applicants.

If you require any assistance or advice regarding the regulations and their impact on your business, please do not hesitate to contact us on the platforms below.