THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 1 July 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (Case no 538/2020) [2021] ZASCA 95 (1 July 2021)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (high court).

The high court (per Davis J) had declared almost all of the regulations that the appellant, the Minister of Cooperative Governance and Traditional Affairs (the Minister), promulgated under s 27(2) of the Disaster Management Act 57 of 2002 (the Act), unconstitutional and invalid. The first respondent was Mr Dawid de Beer, a member and president of the second respondent, Liberty Fighters Network (the LFN), a non-governmental organisation, which acts primarily as a tenants' association. Mr de Beer and the LFN engaged in the litigation culminating in the present appeal in their own interests as well as in the interests of members of the LFN and, purportedly, in the public interest. The Hola Bon Renaissance Foundation (HBF) participated as an amicus curiae in the court below. The Council for the Advancement of the South African Constitution (CASAC) was admitted to the appeal as amicus curiae.

The respondents launched proceedings in the high court in May 2020, in response to the regulations which were published to counter the threat to national health and safety presented by the global outbreak of the disease known as COVID-19. The basis of the respondents' challenge to the regulations, was, amongst other grounds, that the regulations were unconstitutional and irrational. They alleged further that the prohibition of gatherings provided for in terms of the regulations was invalid and in violation of s 14(1) of the Regulation of Gatherings Act 205 of 1993 (the Gatherings Act). The respondents also contended that the regulations purported to regulate essential services when the determination of essential services fell within the exclusive competence of the Essential Services Committee (ESC). Furthermore, the respondents contended that the Minister failed to obtain the approval of the National Council of Provinces (the NCOP), which was mandatory

The Minister, in opposing the challenge to the regulations, placed reliance on the provisions of s 27(1) of the Act, which permits the Minister to declare a national state of disaster, if existing legislation and contingency arrangements do not adequately provide for the Executive to deal with a disaster, or where special circumstances warrant such a declaration. The Minister stated that the declaration of a national state of disaster was an appropriate measure to deal with COVID-19, because there was no other available legislative measure or other contingency measure that could be invoked to deal with the threat posed to national health and safety. In relation to the substance of the regulations, the Minister's view was that she was careful to have regard to the limitations placed on her power and she insisted that she kept within the bounds of her power. The Minister noted that s 27(2) required her to consult with the relevant Cabinet Minister, and she did. She asserted that in compliance with that subsection, she consulted with the Minister of Health, the entire Cabinet and the National Coronavirus Command Council (the NCCC). In relation to the contention by the LFN that she was required to consult with the NCOP,

the Minister took the view that this was not so. She also asserted that she took the advice of experts in relation to the virus. She denied that the approval of the NCOP was required

On 2 June 2020, the high court declared almost all of the regulations irrational, unconstitutional, unlawful and invalid, including those that were still to come into force to regulate a new alert level 3 and which were not dealt with in the affidavits. In arriving at its decision the high court rejected the submission on behalf of the present respondents concerning the approval of the NCOP, the Gatherings Act and essential services. On 30 June 2020, the high court granted leave to the Minister to appeal against the declaration of invalidity of those regulations that were not expressly identified in its judgment and refused leave to appeal against the regulations specifically addressed in its judgment, namely regulations 33(1)*(e)*, 34, 35 and 39(2)*(m)* and the exceptions to regulations 46(1) and 48(2), all contained in the Level 3 regulations (the six Level 3 provisions). This Court granted leave to the Minister to appeal in respect of the six Level 3 provisions on 22 September 2020. Accordingly, the appeal before this Court was against the high court's order in its entirety. The respondents were not granted an order by the high court that the declaration of the National State of Disaster was unlawful. An application for leave to cross-appeal that refusal was refused by the high court and thereafter by this court prior to the hearing of the appeal. That issue was therefore not before the SCA. Only the validity of the regulations promulgated thereunder was on appeal.

The SCA, before dealing with the merits of the appeal, found it necessary to deal with what transpired after the judgment of the high court was delivered. The events described related, in the main, to the objection by the present respondents to the hearing of the appeal by this Court on a virtual platform (a digital videoconferencing facility) and to an associated attempt to secure the recusal of the Judges assigned to hear the matter. The respondents were adamant that they would tolerate nothing other than an in-person hearing. They further asserted quite emphatically that in the event that they were forced by a court directive to participate in a virtual hearing, they '[would] respond by bringing an application to challenge the constitutionality and validity of virtual Court hearings in South Africa'. It was alleged that if the court persisted with a virtual hearing it would effectively be prejudging the case against the respondents. In this response the respondents made what could only be described as a scandalous accusation: that in the event that the Court proceeded with a virtual hearing, this Court would have become a mere 'extension of the Appellant's argument and that consequently the SCA was no longer independent'. In terms of the recusal application, the founding affidavit in support of the application for recusal alleged that the appeal was unique, in that COVID-19 measures were at the heart of the appeal, and because the Court had issued the directives in question and insisted on hearing the argument on whether the hearing should proceed virtually, the respondents were compelled to bring the application for the Judges' recusal.

When the Court convened on the morning of 26 May 2021to hear the appeal and, potentially, the objection to a hearing on a virtual platform and the envisaged application for recusal, Mr de Beer, in his personal capacity and representing the LFN, joined the virtual hearing using the Microsoft Teams platform. Mr Mothopeng, from the HBF, also appeared. The Court enquired from Mr de Beer whether he was willing to make submissions concerning the propriety of a virtual hearing and whether he intended to move the application for the Judges' recusal. Mr de Beer elected not to participate in the virtual hearing. The recusal application was not formally moved. Each member of the Court recorded that they could conceive of no reason *mero motu* to recuse themselves. The SCA noted that the respondents had not indicated, despite having been invited to do, how they would be prejudiced by a virtual appeal hearing, nor did they make any submissions concerning the attenuation of their rights if any. No one who sought access to the virtual platform was denied it. No evidence was placed before the court to suggest that anyone who might have wished to attend the hearing could not do so on the virtual platform. The respondents and the HBF were excused, since they declined to address the SCA on any issue, even under reservation of their rights. The Minister and CASAC made submissions and the appeal was conducted virtually.

In relation to the merits of the appeal the Minister contended: first, the high court strayed beyond the pleadings; alternatively, the respondents had not properly pleaded the constitutional attack and it was too vague for the Minister to answer; second, the respondents had not raised a proper rationality attack and, in any event, the high court's application of the rationality test was fundamentally flawed; and, third, the high court's orders were impermissibly vague. Furthermore, it was contended that the Minister was denied a proper hearing, but the respondents were granted relief in respect of level 3 regulations that had not been sought, nor dealt with on the papers. In that sense, not only did the judgment suffer a failure of proper judicial reasoning, but it also failed to recognise and respect – as it was constitutionally obliged to do – the limits of the judicial function.

The SCA held that the Minister was compelled to deal with a case framed in almost unintelligible terms. Her explanations as to why she was moved to declare a national state of disaster and that she took scientific advice before formulating the regulations was not meaningfully contradicted. The SCA noted that the respondents did not plead, or in any event properly plead, the constitutional attack that was upheld by the high court. It held that constitutional questions ought to be approached by litigants and courts alike with the appropriate degree of care.

It reiterated that constitutional attacks on the validity of legislation must be pleaded explicitly and with specificity to enable the State to know what case it has to meet and to adduce the evidence necessary to do so.

The SCA held that a rationality attack needs to be properly pleaded so that the functionary knows what he or she is being called upon to explain. The high court was required to assess each regulation against its purpose and to determine whether there was a rational link between that regulation and the stated purpose of curbing the spread of COVID-19. The high court did not properly apply the rationality test. In respect of the propriety of the terms of order of the high court it was held that an order of court should be clear in its terms since it binds all those to whom it applied. However, part of the order of the high court did not tell the Minister what was required of her. The Minister was thus left to speculate as to the respects in which the regulations were unconstitutional and how that should be remedied. The SCA held that the regulations did not require the approval of the NCOP.

It was held that the Gatherings Act did not apply to the regulatory competence of the Minister under s 27(2) of the Act and that the high court thus correctly dismissed that challenge. In respect of the contention on behalf of the respondents concerning essential services it was held that their submissions could not prevail. The ESC was given powers and functions in terms of s 70B of the Labour Relations Act (LRA), because of the distinctive treatment given to essential services under the LRA, but that this did not circumscribe the treatment of essential services in the regulations.

The SCA was critical of the conclusions reached by the high court concerning the constitutional validity of the regulations. It held that the constitutional challenge was too diffuse and inadequately specified to make out a case for an infringement of the Bill of Rights. The rationality challenge, which was likewise not properly pleaded, failed to properly consider the relationship between of means and ends that is essential to such a challenge. The high court struck down regulations that had not been properly challenged, on a case not properly pleaded, and on the basis of reasoning that the invalidity of certain regulations must contaminate all the regulations. In sum, neither the challenge brought, nor the high court's reasons for sustaining that challenge could be allowed to stand. The SCA emphasised that courts should pay careful attention to the propriety of constitutional challenges so as not to encourage emotive, unfocused and improperly framed litigation. The SCA considered the case brough by the respondents in the high court to be an object lesson in how not to bring a review application to set aside legislation.

The SCA accepted that courts were not above criticism. Legal commentators, the media, academics, and members of the public criticise judgments and court rulings on an almost daily basis. In that sense, courts could rightly claim that they are constantly held up to public account. Judges and indeed, no person, whatever their station, are above scrutiny. The SCA in this case, was constrained however, to draw a judicial line in the sand. The SCA set out in some detail the criticisms levelled against it by the respondents. The SCA's primary concern however, was the baseless criticism levelled, in the last communication of Mr de Beer and the LFN, against the President of the Court, the deplorable denigration of the Court, and the generalised contempt displayed towards all judges at the SCA, unconnected though they were to this case. The Court was concerned too about the scurrilous insults, set out in the communications referred to in the judgment, directed at those who serve in the Registrar's office. The last written communication from Mr de Beer and the LFN was crude, gratuitously insulting, clearly contemptuous and intended to denigrate the SCA. The Constitutional Court has most recently warned that unjustifiable defamatory and scurrilous utterances against judicial officers will not be tolerated. In the present circumstances there seemed to the Court to be no alternative but to refer this judgment to the National Director of Public Prosecutions (the NDPP) for her attention. In doing so the Court was mindful that Mr de Beer was a layperson. However, even for a layperson the statements were beyond the pale and there was no excuse for his conduct or that of the LFN. The Registrar was thus directed to take the necessary steps to ensure that the judgment was brought to the attention of the NDPP. In the result, the appeal was upheld, the high court's orders were set aside and replaced with the order: that the application be dismissed.

~~~~ends~~~~
~~~~