3 JUNE 2020

DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

BREAKING NEWS

When judgments have the potential to be forces of nature – unpacking the recent High Court judgment declaring the Disaster Management Regulations unlawful

On 2 June 2020, a significant judgment was handed down in the Gauteng Division of the High Court, Pretoria in *De Beer and others v The Minister of Cooperative Governance and Traditional Affairs* (Gauteng Division, Pretoria, Case no.: 21542/2020, 2 June 2020). The judgment declared the Lockdown Regulations (Regulations) promulgated by the Minister of Cooperative Governance and Traditional Affairs (the Minister) in respect of Alert Levels 4 and 3 to be unconstitutional and invalid. The judge rejected an argument that the declaration of a national state of disaster itself was unconstitutional and invalid and only dealt with the unconstitutionality of the regulations.

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When judgments have the potential to be forces of nature – unpacking the recent High Court judgment declaring the Disaster Management Regulations unlawful

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The court's reasoning hinged on the fact that many of the limitations imposed by the Regulations were not rationally linked to the purpose sought to achieve. The court criticised the Government for adopting a paternalistic approach to dealing with the COVID-19 pandemic as opposed to the compulsory constitutional approach. The court explained that it appears as though Government did not start with the question as to how it can seek to limit constitutional rights in the least possible fashion whilst protecting inhabitants of South Africa but operated from the position that it will determine, albeit incrementally, which constitutional rights may be exercised. The court did however admit that some of the Regulations were rational - presumably the regulations excluded from further review and amendment, being the prohibition on evictions, the prohibition of initiation practices, the closure of night clubs and casinos and the closure of borders.

The court considered the disruption that the invalidity would cause, and as a consequence suspended the declaration of invalidity for a period of 14 business days, meaning that the current regulations relating to Alert Level 3 will continue to apply regulations during this 14 day period and it is business/life as usual for people and industries. During the 14 day period, the Minister is directed to consult with the relevant cabinet minister/s, review, amend and republish appropriate regulations.

Cabinet has issued a statement which alludes to the fact that it will be abiding by the decision of the court, however one cannot be certain as the Minister may appeal against the order and judgment. The declaration of invalidity also need not be confirmed by the Constitutional Court, as the impugned regulations are subordinate legislation, and does not amount to the conduct of the president. Therefore, the declaration of unlawfulness stand without further steps having to be taken.

What is curious is that despite declaring all of the regulations to be unlawful, the court took it upon itself to excise the issue of tobacco sales from the reach of the judgment. The court held that the issue of

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the sale of tobacco, is a complex one that involves many different players including the fiscus, is less than acutely connected with the limitation of constitutional rights and can be appropriately dealt with in the FITA challenge set down for hearing sometime in June. The Minister is therefore under no obligation to amend the existing tobacco ban whilst the regulations are being brought forward into lawfulness.

There are numerous other discussion points and critiques that emanate from the judgment and the order, caused primarily because the declaration of invalidity operates against the Disaster Management Regulations in their entirety (save for those *"rational"* regulations mentioned above and the regulation on tobacco products, e-cigarettes and related products) and not just against those Regulations that are actually irrational. One of these points is whether the invalidity operates retrospectively, or whether the invalidity cascades down to the numerous directions published to give further effect to the Regulations – such as the transport directions and the directions relating to schools, all of which supplement the Regulations and are directly dependant on the validity of the Regulations themselves in many respects. Indeed, the judgment has the potential to cause a multitude of problematic consequences. One could argue that the source of all the problems were the Regulations themselves and that the judgment correctly sends the Government back to the drawing board – while that may be so, the judgment should have expressed that sentiment clearer. As it currently stands it is possible that the government will appeal against the judgment and order which would result in a suspension of the order itself during the appeal process. That being said, the judgment is particularly potent on the lack of rationality in respect of many of the Regulations, and this finding will be difficult for the Minister and the government to escape on appeal.

Whilst the nitty-gritty of appeal and re-draft are being considered by the appropriate parties, we wish to focus on a lesser debated matter about the recourse that members of the public or industry have against the government should the judgment stand unchallenged. In other words, does the invalidity of the Regulations open the Government up to damages claims? The court did not dwell on the subject in great detail, but held that:

> *"[E]ven if the government's attempts at providing economic relief functioned at its conceivable optional best, monetary recompense cannot remedy the loss of rights such as dignity, freedom of movement, assembly, association and the like."*

At first glance, the wording suggests that compensation cannot be sought for the loss of dignity, freedom of moment and so on, but that is not what it says at all. Read in context, it states that the state cannot remedy infringements upon people's

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liberties by merely throwing money at the problem (although our courts have held that it is inappropriate to use scarce state resources to pay constitutional damages to plaintiffs who are already fully compensated for the injuries done to them).

Whether or not someone has been "*fully compensated*", is also relevant where businesses may want to institute delictual claims for economic losses suffered due to trade prohibitions contained in the unconstitutional and invalid Regulations. In this regard, the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (2015 (1) SA 1 (CC)) held that the wrongfulness element in delictual liability typically acted as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability. In the Faircape Property Developers – judgment (2003(6) SA 13 (SCA)), the Supreme Court of Appeal held that in an determining the accountability of an official or member of government towards a plaintiff, it was necessary to have regard to his or her specific statutory duties, and to the nature of the function involved. **Importantly, the court held that it would seldom be that the merely incorrect exercise of a discretion would be considered to be wrongful.** The enquiry as to wrongfulness also included a consideration of whether the legislation in question, expressly or by implication, precluded an action for damages against an official or member of government. Each case had to be determined on its merits.

The above approach was confirmed in the *Steenkamp NO* – judgment (2006 (3) SA 151 (SCA)), wherein the SCA held that, subject to the duty of courts to develop the common law in accordance with constitutional principles, the general approach of our law towards the extension of the boundaries of delictual liability remained conservative, especially when dealing with liability for pure economic losses. Further, that although organs of state and administrators had no delictual immunity, 'something more' – than a mere negligent statutory breach – i.e. intentional, *mala fide* conduct - and consequent economic loss is required to hold them delictually liable for the improper performance of an administrative function.

In our view, the necessary elements to prove wrongfulness do not appear to be present, therefore it is unlikely that claims for economic losses against the government will succeed. Ultimately though, the judgment under consideration is akin to oceanic plate movement in that we know when it happens, can anticipate its effects, but must wait to see whether an actual tsunami results from the occurrence.

Anja Hofmeyr and Imraan Abdullah

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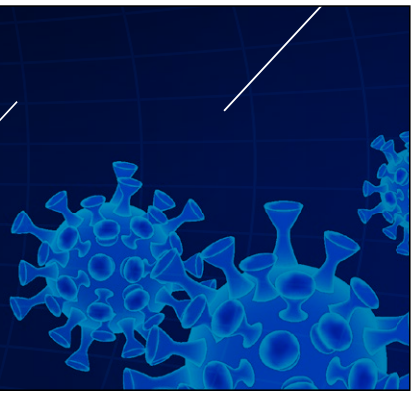

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The LEGAL 500 EMEA

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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