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Mixed views on lockdown judgment

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lyse.comins@inl.co.za

CONSTITUTIONAL lawyers and legal experts have polarised views on the Gauteng High Court judgment that declares some level 4 and 3 lockdown regulations invalid, with some describing it as “scathing” and a “symbolic victory” for constitutional democracy, and others decrying it as “lacking cogency”.

Legal experts said the judgment was a testament to the separation of powers and oversight role of the judiciary in holding the executive accountable for its decisions.

The judgment came after an application was filed by a group called Liberty Fighters Network asking the court to declare the national State of Disaster and regulations under the Disaster Management Act 57 of 2002 “unconstitutional, unlawful and invalid”.

Judge Norman Davis found some regulations were “irrational” and “invalid” and ordered costs to be paid by Minister of Co-operative Governance and Traditional Affairs, Nkosazana Dlamini Zuma.

However, in his judgment Judge Davis found that the declaration of a national State of Disaster was “rational” to fight the Covid-19 pandemic, and he upheld four regulations, including Regulation 36 which prohibits evictions, Regulation 38 which prohibits initiation practices, Regulation 39 which lists places closed to the public including night clubs, casinos, sports, entertainment, cultural and leisure venues, and Regulation 41 which relates to the closure of the country’s borders.

He ruled that the regulations relating to the ban on the sale of tobacco products was excluded from the order and postponed, pending the outcome of a separate court challenge.

Judge Davis suspended his declaration of invalidity of all the other regulations for 14 days to give Dlamini Zuma time to consult with other ministers in order to amend, review and

Some call it a symbolic victory while others say it lacks cogency



SOLDIERS patrol the streets during the lockdown. Judge Norman Davis found some lockdown regulations were ‘irrational’ and ‘invalid’. | Reuters

republish the regulations, keeping in mind the limitations on citizens’ rights.

In his judgment, Judge Davis found that the regulations did not pass the “rationality test” in that the means of limiting citizens’ constitutional rights was not justifiable to meet the end of curbing the spread of the virus.

He said once the government had aimed for the goal of flattening the curve, “little or no regard was given to the extent of the impact of individual regulations on the rights of people and whether the extent of the limitation of their rights was justifiable or not”.

“The starting point was not ‘How can we as government limit constitutional rights in the least possible fashion while still protecting the inhabitants of South Africa?’, but rather ‘We will seek to achieve our goal by whatever means, irrespective of the costs, and we will determine, albeit incrementally, which constitutional rights you as the people of South Africa may exercise.’ The affidavit put up by

the minister confirms that the factual position was the latter.”

Judge Davis listed some examples of the regulations that he had found to be irrational, including those that related to funerals, informal traders, construction workers, hairdressers and exercise.

He said it was “distressing and irrational” that loved ones were not allowed to visit and care for a terminally ill (with a disease other than Covid-19) family member, yet once he/she had died “up to 50 people armed with certified copies of death certificates may even cross provincial borders to attend the funeral of one who has departed and who is no longer in need of support”.

“There are numerous, thousands, no millions of South Africans who operate in the informal sector. They are traders, fisheries, construction workers, street vendors, waste pickers, hairdressers and the like who have lost their livelihood. The blanket ban imposed on them as opposed to the imposition

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The lockdown regulations under level 4 and 3 are now declared totally unconstitutional and invalid

of limitations and precautions appears to be irrational,” he said.

Judge Davis ruled that the limitation on the hours of exercise was “completely irrational”.

He ruled that in so far as the “lockdown regulations” did not satisfy the “rationality test” their encroachment on and limitation of rights guaranteed in the Bill of Rights was “not justifiable in an open and democratic society based on human dignity, equality and freedom”.

Lawyers for Constitutional Democracy chairperson Yusuf Ismail said the judgment was a “symbolic victory” and the group hoped it was “the beginning of the end of state abuse”.

“The validity behind the declaration of the national disaster has been questioned by us and a few others from day one. This is now gaining momentum nationally, and the lockdown regulations under level 4 and 3 are now declared totally unconstitutional and invalid,” Ismail said.

“The regulations are found not to have fulfilled the ‘rationality test’, with there being a clear disconnect, and the minister has come under scathing review in the judgment.”

He said he anticipated civil claims being filed against the state by people who had been arrested and convicted under the regulations.

“Those who have had convictions will be able to take this on review and

have those convictions set aside. The regulations never met constitutional muster from day one because they were totally irrational,” he said.

Council for the Advancement of the South African Constitution executive secretary Lawson Naidoo said the judgment lacked cogency and did not deal thoroughly enough with the issues.

“The judge starts out setting out the rationality test of whether a regulation is rational or not, but then does not apply that test consistently in all the examples he uses. He goes through a few examples of hairdressers and walking on the promenade and not the beach and then jumps to a far-reaching conclusion that all the regulations are irrational.

“For me, that is unjustifiable. He should have looked at each regulation specifically,” he said.

“I would be very surprised if the government doesn’t appeal against this judgment.”

Cox Yeats partner Richard Hoal said the case was the first of a series of challenges to the constitutionality of aspects of the regulations and the role of the National Coronavirus Command Council.

“The judgment raises important constitutional considerations regarding the lockdown regulations and importantly emphasises the importance of the government acting rationally, and highlights the requirement to limit citizens’ rights as little as possible,” Hoal said.

“It is confirmation that we live in a constitutional democracy and that any legislation by the government must be rational and must justifiably limit the rights of citizens.”

Durban attorney Saber Jazbhay said the judgment provided a “ripple of hope”.

“But most importantly it shows that we, as a constitutional democracy, have a robustly impartial judiciary with the capacity to tell the government that it has overstepped the boundaries of the Constitution,” Jazbhay said.