



de Beer v The Minister

SEPARATION OF POWERS

*RECIPROCITY IN TIMES OF CRISIS:
DON'T BE SO "MEAN" ABOUT THE "ENDS"*

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In the midst of the COVID-19 crisis, the judgment in the case of *de Beer v The Minister* has caused great controversy and public comment. This judgment is, to say the least, far-reaching: the Court declared as unconstitutional the whole of the lockdown regulations.

This is a remarkable judgment, the detailed legal and technical analysis of which is beyond the scope of the present article. At the outset, it should be said, with respect, that the judgment appears to suffer from a number of significant legal defects, as outlined by Prof de Vos in his recent article in the Daily Maverick.

A large portion of the South African population have expressed approval of the judgment, perhaps to a large extent due to its criticism of government. In this writer's view, the Court unfortunately failed to respect the separation of powers, reciprocal respect for which by the executive and the Court is essential to the principle functioning at all. Without the separation of powers being reciprocally respected by the Court and by the executive/ government, we are left either with the tyranny of the executive or the tyranny of the Court. Neither is Constitutionally acceptable nor any cause for celebration.

There are a number of overtly hostile remarks and language (especially the use of unnecessary adjectives) peppered throughout the judgment, and an objective observer might ask whether the necessary judicial objectivity was displayed in this regard or not. Broadly speaking, the assertions that the lockdown regulations failed the test of rationality are problematic. In general, the Court

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did not apply the test of rationality to the regulations it examined, yet still found these to be irrational.

Indeed, the judgment belies an anti-government feeling, certainly in relation to government's handling of the covid crisis. Whilst many South Africans may share these sentiments, it is not the proper role of a Court to display anything but calm, judicial objectivity.

These matters raise fundamental questions of the balancing of State and executive power versus individual rights, which were not canvassed in this judgment. These are matters of the highest significance: this was no ordinary commercial dispute, nor even the usual litigation against the state. This case concerned state action in conditions of crisis.

For a Court to interfere in such action raises the important issue of separation of powers and demands that a Court exercise the proper judicial care and deference when so doing. Courts must apply and indeed develop the law, but must never make public policy, which is the executive function. These "powers" must be strictly separated – if the Court usurps the powers of the executive, or the executive ignores the Court's powers, the balance of state powers is lost. Such balance is enshrined as a cornerstone of our Constitutional democracy. If we return to the example above, the Court concludes that the measures taken are irrational simply because, in the Court's view, there are criticisms which may be levelled at the measures as to their consistency, or other features. However, this does not render them irrational. For a Court to apply its own ideas of policy would be a serious breach of separation of powers.

In times of economic, social and political tension, an approach by the Court which respects separation of powers is all the more important. For Courts to fulfil their function, they must carefully stay within their proper role. Executive

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abuses are often cited as the justification for the separation of powers, but judicial overreach is just as much a reason for the separation of powers. In truth, these are two sides of the same coin – reciprocal respect of the separation of powers.

The approach taken by the Court to exercise restrictions illustrates the difficulty to which I have referred. The Court summarises its position in paragraph 7.8 stating that *“Restricting the right to freedom of movement in order to limit contact with others in order to curtail the risks of spreading the virus is rational, but to restrict the hours of exercise to arbitrarily determine time periods is completely irrational”*.

With respect, amongst other defects, the above indicates a lack of appreciation of the nature of regulations. Never mind in a crisis, which I will come to in a moment, but the making of regulations in general always involves a certain amount of arbitrariness on the part of the decision-maker.

Consider the question of the speed-limit, a classic regulation which is made for the purpose of ensuring public safety when driving motor vehicles. Having a speed limit is linked to the rational objective of public safety on the roads. If the speed limit is set at 65km per hour, there is no rational reason why it could not have been 63km or indeed 67km per hour. What is important to note from this example is that it would be futile to allow persons to go to Court and to find that the speed limit was irrational because the government was unable to provide a reason why it was 65km rather than 63km or 67km per hour.

In the above circumstances, it cannot be argued that the government is irrational in setting a speed limit. In a national pandemic, with so much at stake and wide-ranging factors changing all the time, to engage with the regulations as the Court did and find them to be irrational (without applying the test for rationality) is surprising and engenders confusion in the mind of the public.

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Arguably, in states of genuine crisis and emergency, even more discretion should be given to government to deal with these matters and the test for rationality is a basic one: are the measures rationally linked to the stated purposes of dealing with the pandemic broadly? In dealing with this question, a wide berth must be given to the executive in exercising their discretion and formulating regulations, which in itself is an imperfect science. There will always be inconsistencies and difficulties with any regulation, but it simply does not follow that such regulations are irrational and liable to be struck down. Limiting hours of exercise is easily shown to be rational, one need hardly state the simple basis (limiting hours when people are out and about, assisting with policing etc).

The farther one proceeds into the judgment, the more emotive (with all due respect) the analysis and language becomes. At paragraph 7.9 we find “*Similarly, to put it bluntly, [as if matters have not been put bluntly before], it can hardly be argued that it is rational to allow scores of people to run on the promenade but were one to step a foot on the beach, it will lead to rampant infection.*” This is a straw-man of the government regulation. It is similar to arguing that it is absurd to have a speed limit of 65km per hour and to charge someone who is found at 66km per hour, because one additional kilometre per hour cannot result in accident or death and it is absurd to suggest that it can. Clearly, there must be rules made in regulations, and there must be both time and place limits in terms of physical interaction, if circumstances warrant. In a global and highly contagious pandemic, where the broad objective is to hold back infection, measures of this nature are obviously rational and to quibble with their detail in such a manner is not judicially appropriate, to say the least.

However, at paragraph 7.10 matters descend further. The Court says “*And what about the poor gogo who had to look after four youngsters in a single room shack during the whole lockdown period? She may still not take them to the park even if they all wear masks and avoid other people altogether*”. The Court does not even

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seek to draw a conclusion here, but leaves it implicit that this is clearly irrational. At paragraph 7.12 appears another example of the Court simply relying on its own apparent judgment to conclude that the government approach was irrational.

“The practicalities (or rather impracticalities) of distributing aid relief in the form of food parcels highlights yet another absurdity: a whole community might have had limited contact with one another and then only in passing on the way to school or places of employment on any given day prior to the regulations, but are now forced to congregate in huge numbers, sometimes for days, in order to obtain food which they would otherwise have prepared or acquired for themselves.”

Once again, this is asserted to be an example of absurdity, without a basis being set out for this contention as a matter of law. Inherent in the above and underlying it is a policy criticism, once again a violation of the separation of powers. At paragraph 7.3 the Court goes on:

“I am certain, from what I have seen in the papers filed in this matter, and from a mere reading of the regulations, even after including the Alert Level 3 regulations, that there are many more instances of sheer irrationality included therein. If one has regard to some of the public platforms to which I have been referred to, the examples are too numerous to mention. One need only to think to the irrationality in being allowed to buy a jersey but not undergarments or open-toed shoes and the criminalisation of many of the regulatory measures.”

With all due respect, the above is not the appropriate approach of a judicial officer when evaluating the conduct of a government in trying to deal with an ongoing national crisis and a global pandemic. The test for rationality is a simple one: whether the measures taken, as a whole, are rationally linked to their

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purpose, which is the purpose of dealing with the crisis. Provided that a rational link can be drawn between a measure and its broad purpose, and with due deference to the government affording recognition to their discretion to decide these matters and indeed to have inconsistencies and mistakes in their approach, such a measure passes the test of rationality (but not necessarily a section 36 test, which is different but which the Court failed to enter into).

The proper application of the doctrine of separation of powers depends upon the Court having appropriate respect for the government, just as much as it depends upon the government having respect for the Court. It really is a “two-way street” in that regard, and for the Court to be so high-handed in dismissing the government’s regulations as irrational, and to enter into policy-based findings characterised as rationality findings, is not in accordance with keeping this balance. If regulations were to be struck down, this should have been done with great care and rigour, and only problematic regulations, not all of them. These are matters of the highest national significance, and the required judicial rigour was missing from this judgment.

Especially in times of heightened national economic and political tension, it is to be hoped that this will be corrected on appeal and some statement made by the appellate Court relating to the separation of powers, and the need to display reciprocal respect for this fundamental principle especially in times of crisis.

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