

A CRITIQUE OF MYOPIC COVID-19 REGULATIONS PERTAINING TO IMMOVABLE PROPERTY RIGHTS

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ABSTRACT

In South Africa, a property owner or a tenant is entitled to specific property right entitlements by virtue of their rights in law. Immovable property is referred to as a place of residence or your home. One of the property entitlements is possession and occupation, which facilitates for the peaceful enjoyment of the immovable property. This means that the owners or possessors of the immovable property for the most part enjoy the benefits of occupation in peace, harmony and it is a haven. The national and local bylaws do impose restriction of property rights that are not unlimited rights. However, this ideal is not a reality for everyone in South Africa, especially women. It is evident that verbal and physical abuse of women has taken place at their homes for a period of time prior to the pandemic, but domestic violence and gender-based violence reached its peak during the pandemic in South Africa. Home was therefore no longer a sanctuary, but a place of property rights violations and restrictions imposed by government. The paper elucidates that the COVID-19 regulations provided a catalyst for infringement to undisturbed use and enjoyment of the home. Women suffered due to the restriction of movement, they could not leave their homes and were at the helm of subjected abuse by their partners. The paper discusses and explores, the constitutional judgment that relates to the constitutionality of the myopic COVID-19 regulations in South Africa. The paper recommends measures to ensure undisturbed possession, use and enjoyment of property during the pandemic and in effect to curb domestic violence and gender-based violence to a minimum or complete elimination in totality at home. The paper aims to protect the immovable property rights of women in South Africa to provide a deterrence against abuse.

Keywords: Covid-19, Rights, Law

INTRODUCTION

On the 26th of March 2020, at midnight, lockdown level 5 measures were imposed in South Africa under section 16(2)(a) of the Disaster Management Act¹, due to the rise of COVID-19 cases nationally. These regulations were amended on numerous occasions for the particular alert levels. In terms of alert level 5 regulations movement was restricted for everyone, with the exception of essential service workers². The restriction of movement was articulated in relation to confinement to one's home, unless you needed essential goods or were performing an essential service or needed medical attention³, to list a few instances⁴. Under Alert Level 4 regulations provided for more people to return to work, not confined to essential workers⁵, as providing a permitted service was allowed⁶. The net effect of the restrictions was an 8pm curfew⁷. For these reasons, working from home became the new normality, in what seemed like an overnight progression⁸. Gyms and restaurants were closed indefinitely⁹, and this forced people to cook for themselves, as takeout was no longer an option. Schools and universities were closed for a short period, to prepare for online classes and lectures¹⁰.

In this redefined normality, relationships took strain. A rise of domestic violence and verbal abuse was tormenting families at home. Women are one of the most vulnerable groups of people due to a multitude of reasons. Some of these factors making women more vulnerable than men (not a closed list) consisting of being historically disadvantaged due to

lack of access to education, lack of employment opportunities, lack of equality and lack of fairness and physique¹¹. The pandemic exacerbated their vulnerability in relation to abuse and immovable property right entitlement infringements. The home symbolises a place of refuge, protection, solitude, safety and escapism with certain limitations imposed.

Problem Statement

The pandemic was the catalyst for restriction of movement of people that caused infringement of property rights namely peaceful possession of property rights. This paper will discuss the different entitlements namely, entitlement to use the property, the entitlement to have control over the property and possess it. The entitlement to claim the thing from any unlawful possessor, in instances of a rei vindicatio application¹².

Impact of the Pandemic

Ownership of immovable property is not an absolute right, meaning that there are limitations and restrictions imposed¹³. The implications and restrictions of ownership disseminate into the basis of the social and economic structures that forms the rationale for the imposition of restrictions¹⁴. It is subject to further limitations as imposed by law. In *Gien v Gien*¹⁵ ownership was defined as:

“The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he please. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restriction imposed thereupon by the law.”¹⁶

Van der Merwe postulates that the law of ownership rights must evolve to the needs of the social and economic circumstances.¹⁷ An example of such is land reform, which is a measure to address the past inequalities and discrepancies of land ownership patterns that differentiated people on the basis of race.¹⁸ Another example of reforming the concept of ownership is creating access to property through long-term leasing of property as millennials are not buying property, which allows for flexibility as postulated by Krecizer-Levy.¹⁹

Due to the pandemic, the regulations on alert level 4 and level 5 that were implemented caused restrictions to property rights in order to curb the spread of the pandemic and protect human life. The restriction was that people were confined to their home space, and to the grocery store, nowhere else. No renovations or movement to other future property could be undertaken. The rights of ownership are restricted by the imposition of laws of South Africa, such as the Expropriation Act 63 of 1975 as amended.²⁰ The restrictions to ownership are comprised of three categories:²¹

- 1) The statutory limitations that comprise of various laws, regulations, schemes for the benefit and interests of society.
- 2) Restrictions to protect the neighbor relationship.
- 3) Individual restrictions imposed for a personal obligation.

The applicability of statutory limitations is discussed in relation to the COVID-19 regulations on alert level 4 and 5. The aspects pertaining to the restrictions to protect neighbor relationship and individual restrictions are outside of the scope of the paper, but for the purpose to illustrate that there are three categories of limitations of property rights.

Although not a closed list of entitlements. Some of these rights and privileges that one enjoys as an owner are follows: ²²

- a) The entitlement to use the thing (ius utendi);

- b) The entitlement to draw the natural (*fructus naturales*) and civil (*fructus civiles*) fruits from the thing (*ius fruendi*);
- c) The entitlement to consume and destroy the thing (*ius abutendi*);
- d) The entitlement to possess the thing (*ius possidendi*);
- e) The entitlement to dispose of the thing (*ius disponendi*);
- f) The entitlement to claim the thing from any unlawful possessor (*ius vindicandi*); and
- g) The entitlement to resist any unlawful invasion (*ius negandi*)²³

The entitlement to use one's own property was restricted due to the COVID-19 regulations, namely regulation under level 4 lockdown that prevented gatherings of people including family at home.²⁴ The use of residential property was restricted to the people that resided within the property.²⁵ The entitlement to possess the property was restricted, if one had COVID-19 virus, one had to isolate in a room and could not move around the whole home. If there was no physical space to quarantine, then you had to leave the property and quarantine in a State designated place of quarantine.²⁶ The entitlement to dispose of the property became relevant when joint occupiers/owners relationship broke down during the pandemic and elected to leave the shared residence. The entitlement to possess the property from any unlawful occupier, during the level 4 lockdown, was not allowed as there was a moratorium was placed from eviction of unlawful occupiers until the last day of level 4 lockdown.²⁷ In addition, criminals that propagated crimes of burglaries and house robberies (increased during the pandemic) against owners is a violation against unlawful invasion and peaceful use and enjoyment of the property. The infringement of these aforementioned rights to property and privileges cannot be justified because of the harm caused to owners and leaseholders and is automatically unfair to both owners and occupiers, with the exception of the eviction proceedings suspended until the expiration of alert level 4.

Under lockdown level 4, the regulations prevented eviction orders²⁸ from being executed for the protection of people from being homeless during the pandemic.²⁹ For instance, In the case of *South African Human Rights Commission and Others v The City of Cape Town and Others*,³⁰ the court prevented the arbitrary evictions and demolitions of the residence of unlawful occupiers. The court stated that:

“Whilst demolitions without court orders continue unabated, thousands of vulnerable people will continue to be subjected to arbitrary demolitions by ALIU and face the irreparable harm of being homeless, it violates their dignity, threatens their health and multiple other constitutional rights that can only be enjoyed when one has shelter”³¹

The court emphasized that by guarding against evictions, the vulnerable groups of homeless were protected especially women and children were not to be left desolate and abandoned due to their social class constraints.³²

Constitutional Analysis

Van der Walt and Viljoen elucidate that section 25 and section 26 of the Constitution must be read conjunctively, in that section 25 deals with property rights and section 26 deals with the social economic and welfare impact of those property rights due to the past discrimination and racist laws.³³ Erasmus also postulates that property rights are important to evolve in accordance with functionality and socialisation in terms of the adaptation to societal needs.³⁴ It is pertinent as emphasised by Erasmus that property rights cannot be considered as an absolute right, but rather as a culmination of ‘the needs of the community and should therefore always be judged and interpreted in a social context.’³⁵ In the current social context of the pandemic there is an emphasis on the adaptation to societal need, and the current need was to protect people from fatalities of the virus. This meant that one was confined solely to

their place of residence/home despite the circumstances of abuse, which culminated into life over liberties.

In the *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs*³⁶ this was application relating to constitutionality of the COVID-19 regulations as imposed by the Disaster Management Act.³⁷ The court quoted Kennedy in illustrating the considerations that must be balanced in weighing the constitutionality of the regulations.³⁸

The essential humanity of man can be protected and preserved only where the government must answer-not just to the wealthy; not just to those of a particular religion, not just to those of a particular race, but to all of the people. And even a government by the consent of the governed, as in our Constitution, must be limited in its power to act against its people: so that there may be no interference with the right to worship, but also no interference with the security of the home; no arbitrary imposition of pains or penalties on an ordinary citizen by officials high or low; no restriction on the freedom of men to seek education or to seek opportunity of any kind, so that each man may become all that he is capable of becoming.³⁹

The element of emphasis is that humanity being preserved at the helm of an unprecedented pandemic. The effect of these regulations interfered with the security of home and imposed arbitrary imposition upon South Africans. The relief claimed by the Applicant was not limited to the regulations, but also sought relief to declare the state of disaster unconstitutional,⁴⁰ unlawful and invalid. Further relief sought was to allow businesses to open with the provision of hand sanitizing, wearing masks and taking the necessary precautions.⁴¹ The Applicant also sought a declaration relating to all gatherings be declared lawful or subject to conditions.⁴² The court pointed out that in relation to making regulations pertaining to the COVID-19 regulations alert levels 1-5 that:

The power to make regulations and directions “may be exercised only to the extent that this is necessary for the purpose of

- a) Assisting and protecting the public;
- b) Providing relief to the public;
- c) Protecting property;
- d) Preventing or combating disruption; or
- e) Dealing with the destructive and other effects of the disaster⁴³

These considerations are important when weighing the purpose of the regulations itself must be interlinked for the intended power conferred by the regulation.⁴⁴ This is known as the “rationality test” that needs to be answered in the affirmative, the question that is posed “Is there a rational connection between the intervention and the purpose for which it was taken?”⁴⁵ When the exercise of public power infringes or limits a constitutional right, the test invoked is whether such limitation is justifiable in terms of section 36 of the Constitution.⁴⁶ The emphasis is that the rationality test, means an investigation into whether the regulations (means) was rationally connected to the objective that was sought to be achieved.⁴⁷ If it does not meet this standard, then it fails the standard as envisaged by the Constitution, and leaves a disconnect⁴⁸ as there is no nexus between the objective and regulations.⁴⁹

Judge Davis applied the rational test to explaining the nexus of the stated objectives the legislation and preventing the spread of the virus. He stated that when a family member is suffering from a terminal illness and is at the end of their life and one can understand that you cannot visit them at a hospital due to fear of the spread of COVID 19. However, if they were at their own home or the home of a family member or a loved one. It does not make rational sense that loved ones are prohibited from leaving their homes to visit if they are not the primary caregiver of the patient.⁵⁰ Whereas, people are allowed to gather and travel for a funeral of the departed that no longer need the support, which amounts to a “disparity of the situations are not only distressing but irrational”⁵¹ Once again, the emphasis of the restriction

to use and enjoyment of one's home was imposed by the State in the restriction of family members having access to each other at home. This restriction is irrational and undignified to saying one's last goodbyes to loved ones for closure in the comfort and protection of their home, taking the respective safety measures of mask wearing, sanitizing and adhering to protocols of safe social distancing.

Judge Davis emphasized that courts are always alert to the principle of separation of powers and emphasized the principle as enunciated by the Chief Justice:

The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government. Court ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or which is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the others arms of government."⁵²

It is apparent in the powers as vested by the Judiciary, that the Court did not overstep its powers in the reasoning of the invalidity of majority of the COVID-19 regulations due to the imposition of irrationality. The order that Judge Davis made was that the regulations that were promulgated were declared to be unconstitutional and invalid. The declaration of invalidity was suspended until the Minister could amend the regulations, review the regulations and consult with the relevant cabinet ministers. The regulations 36, 38, 39(2)(d) and (e) and 41 were held to be valid under Alert Level 3) During the period of suspension the Alert Level 3 regulations were still applicable.⁵³

Subsequent to this judgment, there was a cross-appeal together with the immediate implementation of the orders made.⁵⁴ The appeal is already before the Supreme Court of Appeal relating to the orders made, which has the effect of suspension of the orders. The Supreme Court of Appeal granted the Minister the leave to appeal, as a special appeal against the blanket constitutional invalidity of the COVID-19 regulations.

Judge Davis cited a more recent case in relation to the rationality test by the Supreme Court of Appeal.⁵⁵ The court stated:

The principle of legality dictates that there must be a rational connection between the decision and the purpose for which the decision was taken. For a decision to be rational, there must be rationally objective basis justifying the impugned conduct. In the ordinary meaning of the term, a decision is "rationally" connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious.⁵⁶

In applying the principle of legality to the COVID-19 regulations, which were arbitrary and irrational, it is apparent that there is no nexus between the purpose of the legislature and prevention of the virus. There were no evaluative investigations to determine the proportionality of the infringements against the constitutionality rights, which amounts to both lack of "process" rationality and "substantive" rationality.⁵⁷ Accordingly, based on the previous ratio of the Supreme Court of Appeal, it follows that the Appeal of unconstitutionality pertaining to the COVID-19 regulations will be confirmed and upheld in due course.

CONCLUSION AND RECOMMENDATIONS

The COVID-19 regulations especially on Alert Levels 3,4,5 restricted and limited the property rights of people in various ways from undisturbed use and enjoyment, to family gatherings in the home, to bidding farewell to loved ones suffering terminal illness. The rise in crime and domestic violence at home exacerbated a toxic situation from one of peaceful possession of their property. The pandemic has placed everyone in a capricious situation; however, the home must remain a place of safety, protection, peace and freedom. The courts

have been robust and dexterous in the protection of rights of people and not placing irrational constraints on freedom of movement, as the regulations did. The Supreme Court of Appeal shall hear a posterity appeal and deliver judgment concerning the invalidity of the COVID-19 regulations, (that is yet to be given) shall ameliorate the draconian COVID-19 regulations which placed undue restrictions and infringements on property rights and access to entitlements.

ENDNOTES

1. 57 of 2002.
2. Government Gazette No.43148 of 25 March 2020 section 11A set out the terms of essential goods and essential services.
3. Government Gazette No.43148 of 25 March 2020 section 11B(1)(a)(i).
4. Government Gazette No.43148 of 25 March 2020 section 11B.
5. Government Gazette No.43258 of 29 April 2020 section 16(2)(a).
6. Ibid.
7. Government Gazette No.43258 of 29 April 2020 section 16(3).
8. Government Gazette No.43258 of 29 April 2020 section 16(1).
9. Government Gazette No.43258 of 29 April 2020 section 24(1).
10. Government Gazette No. 43107 of 18 March 2020 section 6.
11. Kristian Thorborg, Thomas Bandholm & Per Hölmich 'Men are stronger than women-Also in the hip' (2013) *Journal of Science and Medicine in Sport* 16(5) 1-3. See also Cheryl Walker, 'Elusive Equality: Women, Property Rights and Land Reform in South Africa' (2009) 25 *South Africa Journal on Human Rights* 467.
12. Zsa Zsa Boggenpoel, Reghard Brits, Gustav Muller, & Juanita Pienaar. *Silberberg and Schoeman's: The Law of Property* (2019) 6th edition LexisNexis at 6.1
13. Zsa Zsa Boggenpoel, Reghard Brits, Gustav Muller, & Juanita Pienaar. *Silberberg and Schoeman's: The Law of Property* (2019) 6th edition LexisNexis Publishers at 6.1. See G Muller (ed) *General Principles of South African Property Law* (2019) by R Brits, ZT Boggenpoel, P Dhliwayo, W Erlank, EJ Marais and BV Slade. LexisNexis.
14. Ibid.
15. 1979 (2) SA 1113 (T).
16. Ibid at Acting Judge Spoelstra at 1120.
17. Van der Merwe, SE Lawsa Vol 27 2nd edition at para 137.
18. Van der Merwe, SE Lawsa Vol 27 2nd edition at para 137.
19. Kreiczler-Levy, S (2019) *Destabilized Property: Property Law in the Sharing Economy*. Cambridge University Press.
20. 63 of 1975.
21. Zsa Zsa Boggenpoel, Reghard Brits, Gustav Muller, & Juanita Pienaar. *Silberberg and Schoeman's: The Law of Property* (2019) 6th edition LexisNexis Publishers at 6.2.
22. Zsa Zsa Boggenpoel, Reghard Brits, Gustav Muller, & Juanita Pienaar. *Silberberg and Schoeman's: The Law of Property* (2019) 6th edition LexisNexis at 6.1
23. Ibid.
24. Government Gazette No.43258 of 29 April 2020 section 23(1).
25. Government Gazette No.43258 of 29 April 2020 section 16(1).
26. Government Gazette No.43258 of 29 April 2020 section 10(1)(b).
27. Government Gazette No.43258 of 29 April 2020 section 19.
28. Disaster Management Act 57, 2002 Regulations Issued in Terms of Section 27(2) of the Disaster Management Act, 2002. Government Gazette No 43258 of 29 April 2020 Alert Level 4 Regulation 19 "A competent court may grant an order for the eviction of any person from land or a home in terms of the provisions of the Extension of Security of Tenure Act 62 of 1997 and the Prevention of illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998: Provided that any order of eviction shall be stayed and suspended until the last day Alert Level 4, unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 4 period.
29. The Preamble of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act No.19 of 1998 (PIE) provides that "And Whereas no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances; And Whereas it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances; And Whereas special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the

- needs of those groups should be considered;” Similarly there is also a mirrored protection of PIE in the Extension of Security of Tenure Act No. 62 of 1997 (ESTA) the preamble also recognises eviction creates socioeconomic distress for individuals as it states that: ”Whereas unfair evictions lead to great hardship, conflict and social instability; Whereas this situation is in part the result of past discriminatory laws and practices;”
30. *South African Human Rights Commission and Others v The City of Cape Town and Others* (Western Cape Division, Cape Town Case no: 8631/2020)
 31. *South African Human Rights Commission and Others v The City of Cape Town and Others* (Western Cape Division, Cape Town Case no: 8631/2020) at para 57.
 32. Ibid.
 33. AJ van der Walt and S Viljoen (2015) “The Constitutional Mandate for Social Welfare-Systemic Differences and Links Between Property, Land Rights and Housing Rights *Potchefstroom Electronic Law Journal* Volume 18 (4) 1034-1089 at 1059.
 34. J Erasmus (1999) Striving towards social responsiveness in private property law: The dutch functionalist approach. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 62(4) 530-546. See also A.J. van der Walt ‘Property, Social justice and citizenship: Property law in post-apartheid South Africa’ (2008) *Stellenbosch Law Review* 19(3) 325.
 35. J. Erasmus (1999) Striving towards social responsiveness in private property law: The dutch functionalist approach. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 62(4) 530-546 at 538. See also A.J. van der Walt ‘Property, Social justice and citizenship: Property law in post-apartheid South Africa’ (2008) *Stellenbosch Law Review* 19(3) 325.
 36. [2020] HIPR 155 (GP).
 37. 57 of 2002.
 38. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 3.
 39. “Day of Affirmation Address” by “US Attorney-General Robert F Kennedy on 6 June 1966 at the University of Cape Town and which include the “*we live in interesting times*” quotation included in the judgment in *Mahomed and Others v The President and Others* (referred to in paragraph 3.5 of this judgment) which came some time after his speech at the Joint Defense Appeal on 21 June 1961 in Chicago.”
 40. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 3.1.1.
 41. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 3.1.4.
 42. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 3.1.3.
 43. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 6.1.
 44. *DA v President of the RSA* 2013 (1) SA 248 (CC) at paragraph 27 and *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the RSA and Others* 2000 (2) SA 674 (CC) at paragraph 85.
 45. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 6.1.
 46. Ibid.
 47. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 6.4.
 48. Chief Justice stated this is a disconnect when there is no connection between means and purpose in the case of *Electronic Media Network v e.tv (Pty) Ltd* 2017 (9) BCLR (CC) 8 June 2017.
 49. *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paragraph 51.
 50. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 7.1.
 51. Ibid.
 52. *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) at paragraphs 92 and 93.
 53. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] HIPR 155 (GP) at paragraph 11.
 54. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] Case no: 21542/2020 Judgment 23 October 2020. (Gauteng Division, Pretoria).
 55. *Airports Company SA v Imperial Group (Pty) Ltd* 2020 (4) SA 17 (SCA).
 56. *Airports Company SA v Imperial Group (Pty) Ltd* 2020 (4) SA 17 (SCA) at paragraph 30.

57. *De Beer and Another v Minister of Cooperative Governance and Traditional Affairs* [2020] Case no: 21542/2020 Judgment 23 October 2020. (Gauteng Division, Pretoria) at paragraph 3.3.

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