

Covid-19 Beach Closures

12 January 2021 11 min read

by Shayne Krige, Director and Co-Head of Investment Funds & Private Equity Practice

We have been inundated with queries from private individuals, professional and recreational sportsmen and women as well as sporting bodies regarding the impact of the Adjusted Level 3 Regulations (the “**Regulations**”) on activities in and around the beach. A private letter from our firm to the South African Police Services was recently leaked on social media. In this article, we set out our views on the beach closures under the Regulations.

These views do not constitute legal advice and you should seek your own legal advice before taking any action that might place you at risk. A breach of the Regulations can result in arrest, a fine, detention and/or a criminal record. It should be noted that other laws, in addition to the Regulations might apply in certain places. As an alternative to placing yourself at risk, you could raise these issues with the Minister of Cooperative Governance and Traditional Affairs (“**COGTA Minister**”) or your local ward councillor.

1. Background to the regulations

The Disaster Management Act allows the COGTA Minister to declare a state of disaster for an initial period of 90 days. That initial 90-day period can be extended monthly in perpetuity.

The initial state of disaster declared 15 March 2020 has been extended eight times. If South Africa were at war, and a state of emergency had been declared, that state of emergency would have expired after only 21 days and the extension of the emergency until now would have required three separate approvals by the National Assembly – the first by a 51% vote and each subsequent approval by a 60% vote. Neither the declaration of the state of disaster nor any of the Regulations have been approved by Parliament.

The Regulations were last amended on 11 January 2021. In broad terms, the Regulations deal separately with hotspots and the rest of the country in separate Chapters. All of the beaches in the country, other than beaches in the Northern Cape Province, are located in hotspots. In the Northern Cape, beaches are open between 06h00 and 19h00 other than for permitted fishing, which is allowed outside those times. Given that most beaches are located in hotspots, in this article, we focus on hotspots.

The Regulations aim to curb the spread of the virus through non-pharmaceutical interventions and a number of restrictions, including restrictions on the movement of persons and restrictions on gatherings. In general, indoor gatherings are restricted to 50 persons and outdoor gatherings to 100 persons where access can be controlled. This applies, for example, to cinemas, theatres, restaurants, casinos and gyms. Although certain public places where access cannot be controlled are closed (parks for example), other public places are open (including roads and sidewalks).

2. What sports are allowed?

Organised sport, that is, sporting activities by recognised sporting bodies, are regulated (Regulation 84(16)). This is presumably because organised sport inevitably results in a gathering. Whilst organised sport was banned under the hard lockdown, it is now allowed subject to limitations that apply to sports matches, television crews, spectators etc. Certain sports, including sailing and surfing have previously agreed the requisite protocols with Government for allowing their registered members to practise.

It has been said that the only form of sport currently allowed under the Regulations is professional sport (organised sport by regulated sporting bodies). We find no support for this position in the Regulations and note that Government representatives have not referred to a ban on recreational sports and no such ban is being enforced. During the hard lockdown, the Regulations did indeed prohibit all forms of exercise other than walking, running and cycling. That restriction on recreational sport no longer exists.

3. Closure of the sea

The sea is not closed under the Regulations. There was a suggestion that the reference to the closure of the beach should be read as a closure of the sea. Not only was that suggestion in conflict with the definition of “beach” in our environmental laws, but the matter has now been clarified by the new definition of beaches contained in the Regulations.

4. Closure of hotspot beaches

Beaches, dams, lakes and rivers are closed to the public in terms of Regulation 84(9). It seems that the reference to “dams, lakes and rivers” was added after the initial closure of beaches resulted in gatherings moving to the shores of dams, lakes and rivers. The reference to “the public” suggests that beaches, dams, lakes and rivers are not closed to owners of private facilities, to members of private clubs or other facilities where access is controlled. In this regard, certain beaches in state-owned Nature Reserves where access is controlled are open. This is consistent with the approach of the regulations to allow access where gatherings can effectively be limited to 50 indoors and 100 outdoors.

A definition of “beach” was inserted into the Regulations on 11 January 2021.

As such, the beach consists of rock, sand or pebbles. Promenades, jetties, causeways, slipways, grassed areas, parking lots and harbours do not form part of the beach. In addition, any private property is excluded from the definition.

However, it is stated that the sandy, pebbly or rocky shore within 100 metres of the high-water mark, including the sea adjacent to the beach is included. Our understanding therefore is that the water within 100m of the high water mark is now included in the definition of “beach”.

In our view, the fact that the sea beyond the beach is open, necessarily implies a right to traverse the beach to access the sea. That view is strengthened by the new definition of beach. If the definition of beach includes the first 100m of land and sea all along our coast, the sea, which is not closed, would be inaccessible. There is precedent in South African law for this approach. The use of riverbanks to enter and leave a river is considered a “necessary incident of navigation” and the public is entitled to use the riverbank (even if privately owned) in order to access the river. Similarly, we think that the public is entitled to access the sea and crossing the beach to that end is a necessary incident of the activity.

Beaches are not closed to fishing with a permit.

5. Offences

Although the beach is closed (Regulation 84(9)), failure to comply with this provision is not an offence in terms of Regulation 87. It may seem incoherent to say that beaches are closed, but being on the beach is not an offence. It is generally known that, prior to the 29 December amendments to the Regulations, the wearing of masks in public places was mandatory, but it was not an offence not to wear one. In the same way, being on the beach is not an offence, even though the beach is closed.

However, Regulation 84(17) provides that where there is a “gathering” in contravention of the Regulations, an enforcement officer must order the persons (plural) at the gathering to disperse and if the persons refuse, then the enforcement officer can take appropriate action including arresting or fining the individual. An individual can only be guilty if they are participating in a gathering and refuse to disperse.

6. What is a gathering?

The Regulations themselves contain a definition of “gathering”.

The definition refers to an “assembly, concourse or procession”. These are words that were used in Apartheid-era security laws and as such have been the subject of a number of court cases. The Apartheid State consistently sought to argue that the smallest number of people constituted an assembly, concourse or procession and some courts found that a gathering could be constituted by as few as two people. The courts have required some form of coordination between the people at a gathering – merely being in the same public space at the same time does not constitute an assembly, concourse or procession.

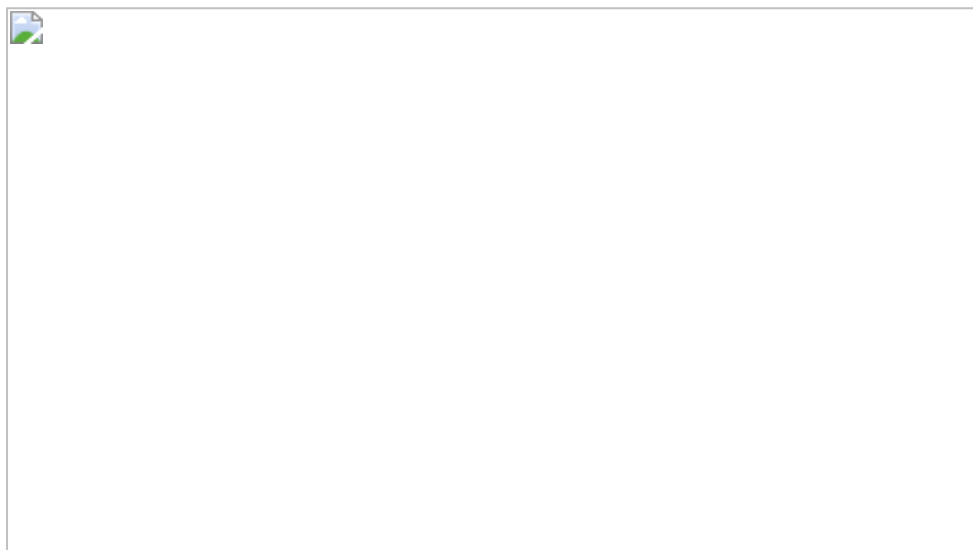
In 1994, the Regulation of Gatherings Act was passed and this defines a gathering similarly by reference to an assembly, concourse or procession, but includes a requirement for at least 15 persons to be present.

The greater the number of water users concentrated in a particular area (the definition of a single beach is nebulous), the greater the risk that a gathering might be deemed to have been constituted. This is no different to the risk posed by running or cycling or other recreational sports, where gatherings can also spontaneously form on the roads. What is clear, however, is that an individual alone could not constitute a gathering.

7. How have other countries dealt with this?

Many countries the world over have closed their beaches to address the risk of people congregating on the beach. Most countries have recognised the benefit of having open air exercise opportunities and have adopted procedures for opening beaches and lakes to sport.

Australia closed their beaches to all users initially, but then reopened them up for sports only. Certain States introduced a “No Towel” rule, which opened the beach for exercise, but did not allow stopping on the beach or gathering. At Bondi Beach, which is famous amongst surfers, a “Surf and Go” policy was introduced whereby users accessed the sea through a designated thoroughfare and had to leave the beach as soon as they were finished. We understand that this same approach has been adopted in certain Nature Reserves in South Africa.



Credit: Associated Press. VOANews

8. Conclusion

The consequences of the beach closure are far-reaching and go beyond citizens simply not being able to enjoy themselves. Beach closures have brought towns like Langebaan and parts of the Garden Route to their knees with likely consequences for the lives and livelihoods of the citizens who live there. There is an incentive to find a way to ensure that beaches are opened safely wherever possible. Ultimately, what is required is a justification from government for the Regulations relating to the beach closure so that they can be interpreted properly by officers on the ground. This is particularly in light of the fact that many other recreational sports are allowed, notably on public sidewalks and roads. Given the right guidance, enforcement officers could apply discretion to enforcing the rules.

From a legal perspective, all recreational sports are currently allowed. It would seem logistically challenging, though not impossible, for users to enter the sea without crossing a beach. There is, in any event, an argument that users have a right to cross a closed beach in order to access the sea (which now clearly does not form part of the beach). To the extent that a user can restrict his or her activities to a distance of more than 100m from the high water mark, they would not be contravening the beach closure during the activity. The user would only be guilty of an offence if he or she formed a gathering with at least one other person on the beach (or in the water that forms part of the beach) and refused to disperse when ordered to by an enforcement officer.

The intention behind the Regulations is clearly to limit events at which the virus might spread. That risk is evident in relation to land-based events. In the ordinary course, water sports are conducted by small numbers of individuals who are not organised and who, given the nature of the sports are distanced and are forced to sanitise regularly. It is not self-evident from the regulations that these activities are deemed unsafe and that the intention was to prohibit them. They are at least as safe as other forms of recreational sports conducted on the streets and sidewalks. It would seem relatively simple to monitor these activities if designated access areas were created as was done in Australia. The large numbers of officers currently patrolling the beaches could be better deployed manning such access points.

Given the likelihood that the virus will be with us for some time and the socio-economic consequences of beach closures, it is hoped that confirmation will soon be provided that water sports can be conducted in the sea and on dams and lakes and that the only restriction is on gatherings, whether on the land or in the water.

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Shayne Krige

Head of Investment Funds

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