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REAL ESTATE

The impact of COVID-19 on the use of common areas

7 May 2020 *8 min read*

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1. On 15 March 2020 a national state of disaster was declared in terms of section 27 of the Disaster Management Act No 57 Of 2002 ("**Act**") by the South African government ("**Government**"). On 18 March 2020, regulations were published by the Department of Co operative Governance and Traditional Affairs, in terms of section 27(2) of the Act, to provide the procedures to be followed during the period of the national lockdown ("**Regulations**").
2. On 23 March 2020 President Cyril Ramaphosa, in order to combat the Covid 19 pandemic, announced a nationwide lockdown in South Africa for 21 days ("**Lockdown**"). The Regulations commenced at midnight on Thursday, 26 March 2020, and were originally in effect for 21 days until midnight on Thursday, 16 April 2020. After the commencement of the Regulations there have been four amendments made to the Regulations, the latest being on 16 April 2020, which extended the Lockdown until midnight 30 April 2020 ("**Lockdown Period**").
3. On 29 April 2020, new regulations were published by the Department of Co operative Governance and Traditional Affairs, in terms of section 27(2) of the Act, which provide for the different alert levels ("**New Regulations**") to ease South Africa phase by phase into the re-opening of its economy. The New Regulations came into effect on 1 May 2020. In terms of regulation 3(1) of the New Regulations, chapter 1 and 2 of the New Regulations will apply for the duration of the national state of disaster.
4. In addition, in terms of regulation 2 of the New Regulations, the Regulations have been repealed. However, despite the repeal, for the purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings the Regulations will still apply.
5. The Regulations provided, amongst other matters, for the restriction of the movement of people and certain goods. Regulation 11B(1)(a) provided that "*for the period of lockdown every person is confined to his or her **place of residence**, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving, or chronic medical attention*".
6. Regulation 11B(1)(a), the counterpart of which in the New Regulations is New Regulation 16, provides that every person is confined to his or her place of residence and may only leave their place of residence to perform an essential or permitted service, as specified in the New Regulations. During 'Alert Level 4', the New Regulations now permit people to walk, run or cycle between the hours of 06h00 and 09h00, within a 5 kilometre radius of their place of residence, provided that this activity is not done in organised groups.
7. Both Regulation 11B(1)(a) and the New Regulation 16, limit our rights to freedom of movement and residence provided for in section 21 of the Constitution of the Republic of South Africa, 1996 ("**Constitution**"). In terms of section 21 everyone has the right to freedom of movement and every citizen has the right to enter, to remain in and to reside anywhere in the Republic ("**Section 21 rights**").
8. However, in terms of section 36 of the Constitution the rights in the Bill of Rights (under which section 21 falls), may be limited in terms of a law of general application provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account various relevant factors. In the

recent court decision of Mohamed and Others v President of the Republic of South Africa and Others (21402/20) [2020] ZAGPPHC 120 (30 April 2020), in relation to the use of places of religious worship and the movement to and from places of religious worship under the authority of a permit issued by the head of the religious institution, the court found that the restrictions imposed by the Regulations are neither unreasonable nor unjustifiable.

9. We have received a number of queries as to the applicability of the Regulations, in particular Regulation 11B(1)(a) and New Regulation 16, to common use areas in sectional title schemes and residential communities governed and managed respectively by the Sectional Titles Schemes Management Act No 8 of 2011, property and homeowners associations' constitutions or memoranda of association.

Sectional Title Schemes ("Sectional Schemes") as well as Property and Home Owners Associations (collectively "HoA's")

10. In terms of the Sectional Titles Act No 95 of 1986 ("**Sectional Titles Act**") a unit is defined as "*a section together with its undivided share in the common property apportioned to that unit in accordance with the quota of that section*". Section 16 of the Sectional Titles Act provides that the common property shall be owned in undivided shares by the owners of sections and further states that a section and its undivided share in the common property shall together be deemed to be one unit.

11. This raises the question as to whether or not the term 'place of residence', as used in the Regulations and the New Regulations, is inclusive of the common property in a Sectional Scheme or if it only applies to the physical dwelling section. The Regulations, and the New Regulations, do not provide a definition of 'residence' and therefore the ordinary dictionary meaning must be considered. Dictionary.com defines 'residence' as being "*the place, especially the house, in which a person lives*". Other dictionaries define 'residence' in a similar manner. Thus, it appears that the word 'residence' only applies to the actual house or apartment in which a person lives and does not include the common use areas surrounding the house or apartment.

12. The Community Schemes Ombud Service ("**Ombud Service**"), under section 3 of the Community Schemes Ombud Service Act No 9 of 2011 ("**CSOS Act**"), issued a directive on 21 April 2020 ("**Ombud Directive**") which 'community schemes' are obliged to implement. In terms of the Ombud Directive a 'community scheme' includes Sectional Schemes and home or property owners' associations.

13. The Ombud Service is empowered under section 36 of the CSOS Act to issue practice directives in relation to any matter pertaining to the operation of the Ombud Service and community schemes. The directives published by the Ombud Service are binding on community schemes. In terms of section 34(1)(b) of the CSOS Act any person, which includes 'scheme executives', (described in the Ombud Directive as being trustees of Sectional Schemes and members or directors of home or property owners' associations), who fails to comply with a directive issued under the CSOS Act is guilty of an offence and is liable on conviction to a fine or imprisonment not exceeding five years or to both.

14. In terms of the Ombud Directive "*owners and occupiers (including tenants) living in community schemes may only use the common property (such as the common driveway shared by all residents in the scheme or essential common property facilities such as the laundry room or the refuse removal area) insofar as access is for necessary and/or essential use*" and "*are not permitted to walk around or perform any sort of activity on the common property, unless such activity is classified as essential by the scheme executives irrespective of each and every unit owner's share in the common property in relation to the participation quota.*".

15. The Ombud Service has issued the Ombud Directive to enforce the Regulations. This directive provides that "*these implementation measures… do not require prior CSOS approval insofar as they enhance compliance with the Regulations, are fair and of general application to all residents (which include owners and occupiers) and are not prejudicial to any person residing within the community scheme.*" The Ombud Directive further provides that "*transgression of the Regulations may result in a fine or imprisonment as it is a criminal offence to breach these Regulations as stipulated in Section 11 of the Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002.*"

16. As the law stands, community schemes are required to operate within the confines of the Ombud Directive, the Regulations and the New Regulations. Irrespective of whether or not community schemes have made provision in their constitutional documents and rules for inclusion of the Regulations, the New Regulations or the Ombud Directive, the latter will, for the duration of the Lockdown and national state of disaster, override anything to the contrary contained in the management and conduct rules of a Sectional Scheme or the constitution, MOI or rules of a HoA.

Policing, Enforcement and Penalties

17. In terms of Regulation 11G any person who contravenes Regulation 11B(1)(a) "*commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment*". These Regulations are mirrored in New Regulations 16(1) and (2) and 31(2), which apply during 'Alert Level 4'.
18. The Minister of Police, Bheki Cele ("**Minister**") issued a statement, on 25 March 2020, saying that the "*police will be responsible to ensure the restriction of movement of persons and goods*" and that "*anyone found to be in contravention of the Regulations, shall be found guilty and on conviction, will be liable to a fine, or imprisonment for a period not exceeding six months, or both*". The Minister has requested that any infringement of the Regulations be reported to the South African Police Service.
19. In conclusion, irrespective of what is stated in the management and conduct rules of a Sectional Scheme or in the constitution, MOI or rules of a HoA, Sectional Schemes and HoA's are obliged for the duration of the Lockdown to follow the Regulations, the New Regulations and the Ombud Directive.

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