

30 APRIL 2020

REAL ESTATE ALERT

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Property rights during lockdown

On 23 April 2020, the President announced that on 1 May the National State of Disaster will be lowered from national Coronavirus alert Level 5 to alert Level 4. The downgrade will see a slight reduction in the extreme measures enacted to prevent the spread of the virus through a gradual and limited resumption of activities which were previously prohibited. All sectors of South African society will continue to be affected by the measures imposed by the government. The property sector too will face challenges in the private and commercial spheres.

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CLIFFE DEKKER HOFMEYR

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Personal Movement

The right to movement as enshrined in the Constitution is currently curtailed by the Disaster Management Regulations, published under Government Notice 318 in Government Gazette No. 43107 on 18 March (Regulations) which currently state that:

"Every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service,

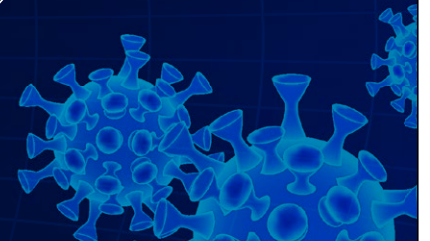
obtaining an essential good or service, collecting a social grant, or seeking emergency, life-saving, or chronic medical attention."

The phrase "place of residence" is not defined in the regulations and is generally understood to mean where a person considers his or her "home" to be. While the boundaries of a free-standing home are easy to ascertain, with sectional title ownership, the undivided share in the common property appears to be excluded from the bundle of sectional title ownership rights. It is for this reason that those residing in sectional title schemes cannot currently exercise in areas designated as common property. This was discussed at great lengths in the CDH alert "[Use of common property during lockdown](#)".

With Level 4 coming into effect, citizens have been encouraged to work from their residence if possible. In addition, restricted exercise will be allowed. In his speech, the President stated that people will be allowed to exercise "under strict public health conditions". Physical exercise

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Property rights during lockdown ...continued

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outside one's free-standing house, or on the common property in a complex or outside the complex will be allowed, provided that it is individually and not in groups. The exact manner in which this right to exercise is to be exercised, remains to be clarified by the government; however, it will provide some reprieve given that access to gyms remains prohibited. Despite this reprieve, a curfew between 20h00 – 05h00 daily will come into effect as of 1 May 2020.

The confinement to one's residence dovetails with the prohibition on travel between provinces unless for the transportation of essential goods. At the start of the lockdown, an urgent application was brought in the Mpumalanga High Court requesting that the applicant be allowed to travel to the Eastern Cape to attend the funeral of the applicant's deceased grandfather. The High Court dismissed the application on the ground that such movement to another province was at the time prohibited by the regulations.

Following this decision, the Minister of Cooperative Governance and Traditional Affairs published amendments to the regulations on 2 April. The amendment allowed for travel between provinces in exceptional circumstances like funerals. A person will have to obtain authorisation for their travels and produce said authorisation at roadblocks. The President declared that this restriction on travel will remain in Level 4.

Initially, the government also prohibited the movement of children during the lockdown between the homes of their divorced parents who have joint custody. After consternation from the public, an amendment to the regulations was made on 6 April. It provided two exceptions – allowing for the transportation of a child in terms of a court order or a parenting plan. The parents transporting their child(ren) between residences have to have a certified copy of the court order or the parenting plan during their travels. In Level 4, this restriction will continue as is.

No recreational visits to family and friends will be permitted in Level 4 and private vehicles will be limited to 3 people per vehicle.

Evictions

On 16 April, an amendment was made to the regulations, dealing with evictions. The amendment reads:

"No person may be evicted from their place of residence, regardless of whether it is formal or informal residence or a farm dwelling, for the duration of the lockdown."

The regulation expressly states that it is valid until the end of the lockdown (i.e. 1 May). Concerning commercial property and leased retail space, the lease terms and the relationship between the landlord and tenant will govern any disputes before leading to evictions. The President did not discuss evictions in his latest speech and it remains to be seen how landlords and tenants navigate these murky waters.

Property rights during lockdown

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The property sector, which is steeped in the tradition of paper, will have to find alternative ways to function, given that the COVID-19 peak will only take place in September.

Registration of transfers and bonds

In the commercial sphere, the closure of the Deeds Office during the Level 5 lockdown has had a huge impact on the property sector. While the Deeds Office may now operate during Level 4, the President has announced that entities that resume operations shall do so in phases with a workforce "in batches of no more than one-third." Practitioners who work in the Deeds Office are well aware that the nature of this institution is dependent on its large staff compliment. At the moment, conveyancers await feedback from the Chief Registrar's office as to how the Deeds Office will function in a manner that is fully compliant with the said Regulations.

Sale and Lease of Properties

Those in the market looking to acquire or dispose of property, or even rent new premises, may find themselves left in an uncertain space, for so long as the lockdown remains in force. Property viewings, valuations (by banks and estate

agents) and relocating (assuming that the sale of a property has been registered) all appear to be unlikely for the foreseeable future. While online selling and letting platforms for the sale of properties have always existed, the true test lies in viewing the property. It is uncertain as to when this sector will be able to operate "normally". The role of legal contracts in these scenarios will be more crucial as parties will be relying on warranties and undertakings provided in the absence of a physical inspection.

The property sector, which is steeped in the tradition of paper, will have to find alternative ways to function, given that the COVID-19 peak will only take place in September. The online Deeds Office system, the electronic signature of documents for banks and the virtual viewing of homes and office spaces may all come to be, sooner rather than later, if the sector as a whole is to survive.

Nayna Cara and Eburn Taigbenu

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