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# REAL ESTATE ALERT

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### Use of common property during lockdown

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## Use of common property during lockdown

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Residents of sectional title schemes have been left with a degree of uncertainty as to whether they are to remain confined to their sections or whether the use of common property and/or exclusive use areas are permissible during the lockdown period. In order to answer, what may seem like a simple question, it is necessary to understand the context that we find ourselves in.

On 15 March 2020, a National State of Disaster was declared by Government in terms of Section 27 of the Disaster Management Act 57 of 2002, (the DMA). As a consequence, to this declaration, a nationwide lockdown was initiated which is governed by Regulations issued in terms of Section 27(2) of the DMA (the Regulations). The part of the Regulations in discussion here concerns the movement of persons.

**Understanding sectional ownership, a unique statutory creature:**

Sectional ownership is made up of three parts. The first part is individual ownership of a section, for example an apartment. The second part is joint ownership of the

common property of the sectional title scheme, for example the land, complex pool, clubhouse, gymnasium or other amenities within the sectional title scheme. The third part is the owner's membership of the body corporate. These three parts are interconnected and inseparable.

In terms of the Sectional Titles Act 95 of 1986 (the Act), when a unit is registered in the name of a person, that person becomes owner of the particular section, joint owner with the other sectional owners of the common property in the scheme and a member of the body corporate comprising of all the persons in whose names the sections are registered.

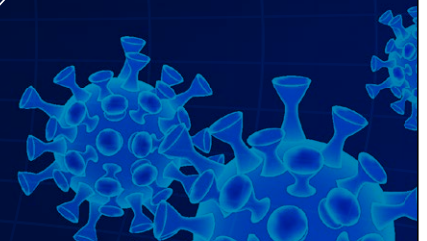
In the ordinary course, an owner of a unit in a sectional title scheme has a right to use and enjoy all three prongs of their indivisible ownership.

**The DMA, the Regulations and the effect on sectional titles:**

A National State of Disaster is declared in terms of the DMA, "if existing legislation and contingency arrangements do not adequately provide for the national

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## Use of common property during lockdown...continued

In giving effect to the above objectives of the DMA, the lockdown regulations state that persons must be confined to their place of residence.

*executive to deal effectively with a disaster or if other special circumstances warrant the declaration of a national state of disaster."*

The DMA is used as a legal instrument to govern the disaster. The approach to the disaster is characterised by "an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness and rapid and effective response to disasters."

### What does the focus of prevention and mitigation mean in terms of the DMA?

"Prevention" is defined as measures aimed at stopping a disaster from occurring or preventing an occurrence from being a disaster;

"Mitigation" is defined as the lessening of the potential adverse impacts of physical hazards, including those that are human induced, through actions that reduce hazard, exposure and vulnerability.

In giving effect to the above objectives of the DMA, the lockdown regulations state that persons must be confined to their place of residence. The Regulations provide 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, or seeking emergency, life-saving, or chronic medical attention."*

The Regulations or the DMA do not define what residence means. The court, in the case of *Hoosein v Dangor* [2010] 2 All SA 55 (WCC), stated that "there is normally no difficulty in determining where a natural person resides. It is a factual question, little helped by what a definition of the concept "residence" ought to be."

Against this background, the owner of a sectional title's residence would then consist of ownership in the section, the exclusive use area if applicable, and an undivided share in the common property.

Notwithstanding this interpretation of the law, the use of the common areas in a sectional title scheme may increase the susceptibility of a community to the COVID-19 pandemic because of the simple fact that it results in social engagement between persons or contact with the same environment.

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## Use of common property during lockdown...*continued*

The task of determining the nature and extent of potential hazards and evaluating the existing conditions that could potentially harm exposed residents is no easy feat.

Should bodies corporate be given the responsibility of making a risk assessment of the use by residents of common property? The task of determining the nature and extent of potential hazards and evaluating the existing conditions that could potentially harm exposed residents is no easy feat. It is unclear where liability lies in the event that infections occur as a result of contaminated common areas.

The body corporate would have to ensure that no gathering occurs on the common property of the scheme as every gathering is prohibited, except for a funeral. A "gathering", in terms of the Regulations means "any assembly, concourse or procession in or on any other building or premises, including wholly or partly in the open air, and including but not limited to any premises or place used for any sporting, entertainment, funeral, recreational, religious or cultural purposes."

The Regulations declare that "any person who contravenes the Regulations shall be guilty of an offence, and on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment."

The use of common property in sectional title schemes will have to be dealt with by bodies corporate on a case by case basis as each sectional title scheme is unique. All bodies corporate should promote initiatives that encourage risk avoidance behaviour that is in line with the

Government's initiatives and the DMA as set out above as this is the legal instrument governing this National State of Disaster.

A general guideline to bodies corporate:

1. If amenities are recreational such as the pool, gym or clubhouse it would be advisable to prohibit access during lockdown to prevent the spread of COVID-19.
2. If amenities of which use is unavoidable such as a communal laundromat, walkways, elevators or reception areas, strict social distancing and sanitization protocols must be observed to achieve the DMA's objectives of prevention and mitigation.

### Constitutionally speaking, rights are being limited

Sectional title owners and all other South Africans have the constitutional right to freedom of movement and residence, guaranteed by Section 21 of the Constitution of the Republic of South Africa, 1996 (the Constitution). This right states that "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."

Furthermore, Section 25 of the Constitution states that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

## Use of common property during lockdown...*continued*

Sectional title owners and all other South Africans have the constitutional right to freedom of movement and residence, guaranteed by Section 21 of the Constitution of the Republic of South Africa, 1996.

The Constitution states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

From this we understand that the ordinary rights of citizens may and can be limited in unprecedented disasters or crises in accordance with the law. In casu, the Regulations to the DMA is the law that limits the rights of South Africans during a lockdown. On closer examination, in the case where bodies corporate prohibit the use of common

areas during the lockdown, sectional title owners will be deprived of their property and their constitutional right would be temporarily limited.

Though this issue has not yet been determined by our courts, it is probable that the limitation will be deemed justifiable as it is in line with the general approach of disaster management in terms of the DMA.

In conclusion, the legal standpoint of the Regulations is that persons must be confined to their place of residence, which for a sectional title owner includes the undivided share in the common property. However, bodies corporate should promote initiatives that encourage risk avoidance behaviour as this is in line with the Governments initiatives and the DMA as per the guidelines set out herein.

*Muhammad Gattoo, Nabeela Edris, John Webber and Lucia Erasmus*

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The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

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## OUR TEAM

For more information about our Real Estate practice and services, please contact:



**John Webber**  
National Practice Head  
Director  
T +27 (0)11 562 1444  
E john.webber@cdhlegal.com



**Bronwyn Brown**  
Director  
T +27 (0)11 562 1235  
E bronwyn.brown@cdhlegal.com



**Nayna Cara**  
Director  
T +27 (0)11 562 1701  
E nayna.cara@cdhlegal.com



**Mike Collins**  
Director  
T +27 (0)21 481 6401  
E mike.collins@cdhlegal.com



**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
E werner.dewaal@cdhlegal.com



**Lucia Erasmus**  
Director  
T +27 (0)11 562 1082  
E lucia.erasmus@cdhlegal.com



**Simone Franks**  
Director  
T +27 (0)21 670 7462  
E simone.franks@cdhlegal.com



**Daniel Fyfer**  
Director  
T +27 (0)21 405 6084  
E daniel.fyfer@cdhlegal.com



**Fatima Gattoo**  
Director  
T +27 (0)11 562 1236  
E fatima.gattoo@cdhlegal.com



**Muhammad Gattoo**  
Director  
T +27 (0)11 562 1174  
E muhammad.gattoo@cdhlegal.com



**Andrew Heiberg**  
Director  
T +27 (0)21 481 6317  
E andrew.heiberg@cdhlegal.com



**Simone Immelman**  
Director  
T +27 (0)21 405 6078  
E simone.immelman@cdhlegal.com



**William Midgley**  
Director  
T +27 (0)11 562 1390  
E william.midgley@cdhlegal.com



**Muriel Serfontein**  
Director  
T +27 (0)11 562 1237  
E muriel.serfontein@cdhlegal.com



**Kelsey Biddulph**  
Senior Associate  
T +27 (0)11 562 1417  
E kelsey.biddulph@cdhlegal.com



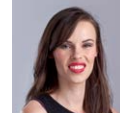
**Natasha Fletcher**  
Senior Associate  
T +27 (0)11 562 1263  
E natasha.fletcher@cdhlegal.com



**Robyn Geswindt**  
Senior Associate  
T +27 (0)21 481 6382  
E robyn.geswindt@cdhlegal.com



**Samantha Kelly**  
Senior Associate  
T +27 (0)11 562 1160  
E samantha.kelly@cdhlegal.com



**Janke Strydom**  
Senior Associate  
T +27 (0)11 562 1613  
E janke.strydom@cdhlegal.com

**Nabeela Edris**  
Associate  
T +27 (0)11 562 1740  
E nabeela.edris@cdhlegal.com

**Shanita Goven**  
Associate  
T +27 (0)11 562 1586  
E shanita.goven@cdhlegal.com

**Lutfiyya Kara**  
Associate  
T +27 (0)11 562 1859  
E lutfiyya.kara@cdhlegal.com

**Sune Kruger**  
Associate  
T +27 (0)11 562 1540  
E sune.kruger@cdhlegal.com

**Aaron Mupeti**  
Associate  
T +27 (0)11 562 1016  
E aaron.mupeti@cdhlegal.com

**Melissa Peneda**  
Associate  
T +27 (0)11 562 1385  
E melissa.peneda@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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