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Our ref: BEN GROOT/SOU5/0001

Date: 26 MARCH 2020

SOUTH AFRICAN PROPERTY OWNERS' ASSOCIATION

ATT: NEIL GOPAL

VIA E-MAIL

Dear Sir

Re: **IMPLICATIONS OF LOCKDOWN REGULATIONS DATED 25 MARCH 2020 FOR LANDLORDS**

1. We refer to the above as well as the regulations issued by the Minister of Cooperative Government and Traditional Affairs, on 25 March 2020 ("the lockdown regulations"), which regulations contain various amendments of and additions to the regulations issued on 18 March 2020 ("the initial regulations"). Due to the nature and content of the regulations, this letter is unfortunately fairly long and detailed. We trust, however, that it provides clear summaries and answers to the most important questions raised.
2. We wish to stress that the content hereof merely contains our interpretation of the regulations, based on the existing law, and in a manner that will be arguable in court. Where there is ambiguity, we have opted to err on the side of caution. It might, however, be that government enforces some of the lockdown regulations in a different manner. We will have to wait and see, and, if there are any changes, we will notify you accordingly.
3. At the outset, it is important to note that the lockdown regulations are merely an amendment to the existing regulations, which means that, unless amended, the initial regulations still apply. Furthermore, once the lockdown has ended, the initial regulations will again apply, until terminated by government. In terms of the provisions of the Disaster Management Act, 57 of 2002, the initial regulations may apply for up to 3 months, but may be extended in certain circumstances.
4. As stated in our previous letter, these regulations carry the penalty of criminal sanction if disobeyed, and therefore landlords, tenants, and the like are to comply with these requirements.

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5. Also, as stated previously, the present lockdown will probably amount to *casus fortuitus*, which is an incidence of *vis major*, and which is defined as an exceptional or extraordinary occurrence which was not reasonably foreseeable¹. It has been held² that plague is an incidence of *casus fortuitus*. In our view, the present COVID-19 outbreak is analogous, and the resultant government bans constitute *vis major*.
6. In light of the ban on general trading which has now been issued, tenants who do not fall within the exempted categories, will be prohibited from trading for the 21-day period. Accordingly, they probably will not receive full beneficial occupation of their premises, and, depending on the wording of their lease agreements, might be entitled to a rent remission. It is important to note, in our view, that a total rent remission will probably not be applicable, as the tenants will still be using the premises during this time, as their business assets will still be situated in the premises. It is, if course, a substantial reduction in use. In any event, each remission (if any) will need to be dealt with on a case-by-case basis, to determine whether a remission ought to be granted, and if so, what the amount of such remission ought to be.
7. The president has also announced various measures to alleviate the economic effects of the lockdown. Tenants and other businesses should be encouraged to make use of the measures, and to do so in a responsible measure. Also, most lease agreements require tenants to obtain, and keep in place, their own insurance for their businesses, which normally includes business interruption insurance. In our view, tenants ought to be encouraged to claim against their insurance first.
8. We have also seen correspondence from national retailers, stating that they will not be paying any rent (and even other lease charges) during the lockdown period. In our view, this position is completely incorrect, and indeed unlawful – the law is clear, and has been set out above and in our letter of 16 March 2020. In any event, at best, utilities, rates etc remain due and payable.
9. A further measure of confusion seems to have been sown by the regulations published by the Minister of Trade and Industry, to relax certain provisions of the Competition Act, 89 of 1998 (“the Competition Act”). These regulations are only to relax the provisions relating to restrictive horizontal and vertical practices, for the period of the current disaster, and under further strict conditions. This means that, for the current period, Landlord A may decide to grant its tenants, in the categories set out in the regulations, certain rent relief, but not to grant that same relief to tenants outside those categories. This behaviour, which would normally be prohibited under the Competition Act, will now be allowed, provided that the other conditions in the regulations are met. Landlord B, on the other hand, may come to a totally different arrangement with its tenants (some of whom might be the same as Landlord A’s tenants), and Landlord C may decide not to come to any agreement at all. The object is merely to give landlords space to negotiate the appropriate relief. Nothing in these regulations, however, entitle any tenant to any form of rent remission or other relief whatsoever.

¹ See *Spolander v Ward* 1940 CPD 24

² *Stockham & De Jong v Kaplansky & Co* (1901) 18 SC 156 and also *Joe v Mahomet* (1901) 11 CTR 816

10. Many of the national tenants have clauses in their lease agreements if more than a certain percentage of tenants (usually 70%) in a centre is not trading for a specific period of time. Insofar as the current lockdown period may exceed the periods allowed in the leases (most of them are in any event for 30 days or more), it is in any event a clear situation of *casus fortuitus* and *vis major*, as explained above and previously, and, in our view, these tenants will not be able to successfully rely on these clauses.
11. The point of departure of the lockdown regulations is contained in regulation 11B(1)(a)(i) which provides that, for the lockdown period, which is defined as being from 23h59 on Thursday 26 March 2020 until 23h59 on 16 April 2020, unless extended, every person is confined to his/her place of residence, unless movement is allowed for purposes of the regulations. In light of the clear position, the regulations will have to be interpreted restrictively – if there is doubt, it would be safer to err on the side of caution.
12. Various of the definitions in the lockdown regulations need to be kept in mind for the rest of this discussion:
 - 12.1. “Lockdown” means the restriction of movement of persons during the lockdown period as defined above;
 - 12.2. “Movement” means entering or leaving a place of residence.
 - 12.3. “Essential goods” means the following:
 - 12.3.1. Food, which include food products, but excludes alcoholic beverages, and further includes animal food, and chemicals, packaging and the like used in the production of food;
 - 12.3.2. Cleaning and hygiene products, which include toilet paper, sanitary pads, condoms, hand sanitiser, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment;
 - 12.3.3. Medical products, which include medical and hospital supplies, equipment and personal protective equipment and chemicals, packaging and the like used in the production of these products;
 - 12.3.4. Fuel, which includes coal and gas; and
 - 12.3.5. Basic goods, which include airtime and electricity. It is important to note that basic goods have not been defined, and no definition could be seen in any other legislation or case law. A general definition would include those items used to satisfy human requirements that are needed in order to survive.
 - 12.4. “Essential services” include a list of 28 services, the most important of which for this discussions include following:
 - 12.4.1. the production and sale of essential goods as defined above;
 - 12.4.2. grocery stores and spaza shops;
 - 12.4.3. essential municipal services;
 - 12.4.4. cleaning, sanitation, sewerage, waste and refuse removal services;
 - 12.4.5. services related to essential functioning of the courts;
 - 12.4.6. postal services and courier services related to transport of medical products;
 - 12.4.7. private security services;
 - 12.4.8. production, supply, logistics, delivery, critical maintenance and repair, in relation to the rendering of essential services;

- 12.4.9. transport and accommodation for persons rendering essential services; and
 - 12.4.10. essential services as defined in the Labour Relations Act, 66 of 1995, and designated thereunder. These include any service which, if interrupted, such interruption would endanger the life, personal safety, or health of the whole or a part of the population.
13. Under the lockdown regulations, a person will only be allowed to leave his/her place of residence, strictly in order to:
 - 13.1. Perform an essential service;
 - 13.2. Obtain an essential good or service;
 - 13.3. Collect a social grant;
 - 13.4. Seek emergency, life-saving, or chronic medical attention.
 14. No gathering is allowed, save for a funeral, in which event no more than 50 people are allowed to attend. Furthermore, movement between provinces and movement between metropolitan and district areas are also prohibited.
 15. Retail shops and shopping centres are to be closed, with the exception of shops selling essential goods. In shops that are trading, controls must be put in place to enforce social distancing, i.e. customers are to keep at least one square metre from one another. The hygiene aspects in terms of the initial regulations continue to apply.
 16. Importantly, retail stores selling essential goods are prohibited from selling any other goods. Therefore, a cellphone shop may continue to sell airtime or deal with service-related issues, but may not attend to contract upgrades during this time. Similarly, a shop selling pet food and other products for pets, may sell only pet food, but may not sell, e.g. pet toys, pet clothing, and the like.
 17. Any place not involved in the provision of an essential good or service must remain closed during the lockdown period.
 18. The head (defined as the CEO) of an institution (which includes public and private institutions engaged in the supply or distribution of essential goods or services) must designate essential staff to perform those services. This function may be delegated. This means that, for example, the CEO of a landlord may delegate the power to designate essential employees to the centre managers. Persons performing essential services must be duly designated in writing in the prescribed form, which form, together with proof of identification, must be carried with them at all times. The draft permit is annexed hereto in word-format, to be used as necessary.
 19. The following places and premises must be closed to the public, and the only persons allowed there will be persons rendering security and maintenance services:
 - 19.1. All religious, cultural, sporting, entertainment, recreational, exhibitional, organisational, or similar places;
 - 19.2. Any place where goods other than essential goods are traded;

- 19.3. Any place normally open to the public, such as flea markets, public parks, beaches, swimming pools, night clubs, casinos, hotels, game reserves, holiday resorts, places where liquor is consumed on premises (such as taverns), off-consumption premises (liquor stores), off-consumption areas in supermarkets where liquor is sold, cinemas, shopping centres (except for grocery stores and pharmacies), taxi ranks, airport, bus stations and train stations.
20. Public transport is also severely restricted. Only buses, taxis, e-hailing cars (such as Uber) and private vehicles for purposes of rendering essential goods or services are allowed. If so used, these vehicles may not carry more than 50% of the licenced capacity. If a person rendering essential services cannot travel to and from work, the employer needs to arrange transport for that person. The minister of transport is to issue a directive as to how people who need to access basic goods and services are to travel, if they do not have their own transport.
21. It is important to note that all of these regulations, including the classifications and designations, may be amended by the relevant cabinet ministers as need be.
22. Trading hours have not been regulated yet. Therefore, trading hours may be fixed according to each centre's own requirements. We would suggest that, initially, normal trading hours be adhered to by tenants who remain open, and that these then be amended as need be.
23. Importantly, shopping centres are to be closed, except for the limited numbers of tenants who will be allowed to trade. We would suggest, as far as possible, that non-trading portions of shopping centres be closed off in some way. This will, of course, be difficult to do, and security guards patrolling these areas should be extra vigilant.
24. Quite clearly, from the above, it is government's intention to severely restrict the movement of people during the lockdown period, and the regulations should therefore be interpreted in such a way. It is of course one of the basic rules of the interpretation of statutes that they are interpreted restrictively, in other words, only issues specifically prohibited therein are prohibited.
25. Over the past few days, we have received a number of questions on the details of the lockdown regulations. We will deal with some of the questions here, and provide answers in light of these regulations, now that we have clarity.
- 25.1. May alcohol still be sold, and may liquor stores still trade? No, alcoholic beverages are not included in the definition of food products, and may therefore not be sold during the lockdown period.
- 25.2. May supermarkets continue selling alcohol? No, this is specifically prohibited.
- 25.3. May I still walk through my estate or residential area with my family or pets during the lockdown? No, this will not be allowed, as no-one may leave their place of residence, except for supplying or obtaining essential goods or services.
- 25.4. May I drive from my house to my holiday home on the coast during the lockdown? No, this will not be allowed.
- 25.5. Will a centre manager and operations manager be deemed to be rendering essential services? In our view, it will depend on the specifics of each case. Generally, however,

- on our understanding of their duties, they will not be deemed to render essential services, unless their normal duties include those as set out in par 12.4.8 above.
- 25.6. Is there a limitation on the types of food that may be sold? No, all food, except for alcoholic beverages may still be sold. This would therefore include biltong, dried fruit, health foods and the like.
- 25.7. May private security, cleaning and related services continue to work? Yes, they may. Therefore, security guards may continue at shopping centres, and cleaning and refuse removal may continue, though obviously at reduced levels.
- 25.8. Is there a duty on a landlord to ensure that a tenant who does not render an essential good or service does not trade? The lockdown regulations do not place such a duty on the landlords. In our view, it will be prudent to advise the tenant to cease trading, and, if the tenant still continues to trade, to then refer the matter to the appropriate authorities.
- 25.9. If a retailer usually sells essential and non-essential goods, may it continue selling non-essential goods? No it may not. We would suggest that portions of a premises selling non-essentials be cordoned off, to ensure that customers cannot access those areas.
- 25.10. May restaurants and take-aways still operate in some form, either by having customers attend their premises or by delivering food? In this regard, the Department of Tourism has issued a notice to the restaurant industry, stating that all restaurants, bars, cafes, and coffee shops will be closed during the lockdown period. The notice furthermore makes it clear that food delivery services may also not continue. In light of this clear directive, these types of businesses will have to be closed for the lockdown period.
- 25.11. Will optometrists, audiologists and the like also be entitled to remain open? In our view they may remain open, as they render medical services.
- 25.12. May butcheries remain open? Yes, as they sell food and basic goods.
26. Lastly, on a more personal and practical level, we confirm that, even though our offices will also be under lockdown, our systems have been set up some years ago to allow for remote working. Our staff will therefore continue working on all matters, as they are able to do so remotely. It is to be kept in mind that the civil courts will be closed, and that all court appearances for the lockdown period will have to be rescheduled, which will be attended to as soon as we are able to obtain new dates from the courts. We also anticipate that, once the lockdown is lifted, the court rolls will be in a mess, and that it will take 4-6 weeks for these rolls to normalise.
27. We trust that you find the above in order. Please do not hesitate to contact us, should you wish to discuss any aspect hereof.

Yours faithfully

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