

NAMA Notice Board

Issue 45 | 28 July 2020

MASK OFF, CUFFS ON - A RESPONSE TO THE CRIMINALISATION OF THE FAILURE TO WEAR A MASK AND THE IMPACT THEREOF ON COMMUNITY SCHEME LIVING

Dear Member,

1. On 12 July 2020, with Minister Nkosazana Dlamini Zuma's publication of regulation number 763, several amendments were made to the existing regulations. Relevant to this note are the amendments to regulations 5 and 14, as follows;
 - 1.1 *The wearing of a cloth face mask, a homemade item or another appropriate item, that covers the nose and mouth, is mandatory for every person when in a public place.* – Regulation 5(1)
 - 1.2 *No person will be allowed to enter or be in a building, place or premises, including government buildings, places or premises, used by the public to obtain goods or services, or be in any public open space if he or she is not wearing a cloth face mask, homemade item, or another appropriate item that covers the nose and mouth.* – Regulation 5(2)
 - 1.3 *A manager or owner of a building, place or premises, including a government building place or premises, used by the public to obtain goods or services who fails to take reasonable steps to ensure compliance with regulation 5(2)(b) [prohibiting any person from entering a premises without a face mask] commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.* – Regulation 14(6)
2. From these regulations, the following considerations arise:
 - 2.1 whether an owner, occupant or a permitted visitor within a community scheme is obliged to wear a facemask when entering the common property;
 - 2.2 whether trustees / directors have a duty to report any non-compliance by owners, occupants or visitors to the relevant authorities; and
 - 2.3 whether trustees / directors can be prosecuted and be held liable on conviction to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment, for the non-compliance of the regulations by members, occupants or visitors.

SHOULD OCCUPANTS OF THE COMMUNITY SCHEME WEAR A MASK IN THE COMMON PROPERTY?

3. The starting point in determining whether occupants within a community scheme are obliged to wear a facemask within the common property is regulation 5(1), which states that the wearing of a mask (or similar personal protective equipment) that covers the nose and mouth, is mandatory for every person when in a public or open place.
4. In this regard, it bears mentioning that:
 - 4.1 the regulations are notoriously vague and no definition of "public place or public open space" is given within the context of the regulation;
 - 4.2 when attempting to determine the meaning of a "public open space", alternatively a "public place", the legislature provides for a plethora of definitions in different legal instruments such as previous statutes and regulations;
 - 4.3 for current purposes and bearing in mind the threat of criminal prosecution, it is advisable that a wide interpretation of the definition be adopted;
 - 4.4 one definition of "public place", and perhaps the most stringent, includes property "...reserved or set apart for the use by the public or the owners or occupiers of such erven ..." (own emphasis); as being part of a public place .
5. Although the common property in a community scheme is not, strictly speaking, a public place under the definition of law, it does certainly lend itself to social engagement between members and occupants of the scheme. Accordingly, by adopting a wide definition of a "public open space and/or public place", it may well be reasoned that the common property in a community scheme ought to be included in the ambit of the regulation and, as such, occupants of a community scheme will be obliged to wear a mask insofar as they are within or on the common property.
6. The consequence of this is that non-compliance by owners, occupants and visitors may mean that trustees / directors fall foul of the positive obligation incumbent upon them in terms of the regulation.
7. The next question is thus whether trustees / directors are obliged to report non-compliance to authorities and what the ramifications of a failure to do so would mean for trustees / directors.

TRUSTEES' / DIRECTORS' DUTY TO REPORT NON-COMPLIANCE WITH THE REGULATIONS

8. The point of departure when determining whether a trustee is obliged to report such non-compliance is forthcoming from the public's duty to report criminal offences in certain circumstances.
9. Without dealing with the moral or ethical duty to report criminal offences, there is no general legal duty to report a criminal offence *per se*, apart from exceptional circumstances, such as corrupt or unusual transactions; acts of terrorism and certain criminal offences committed against minor children.
10. In furtherance, when reading the *Disaster Management Act 57 of 2002*, there is no duty on the general public (or an individual for that matter) to report any non-compliance with the disaster management regulations to the relevant authorities.

11. Accordingly, trustees / directors are not obliged to report members' non-compliance with the regulations. However, as a precaution, it is advisable that trustees enact preventative measures, such as adopting and circulating a COVID-19 Readiness Plan and relevant notices to occupants, members and other entrants to the community scheme, to thwart the possibility of civil liability.

CAN TRUSTEES / DIRECTORS BE PROSECUTED FOR MEMBERS' NON-COMPLIANCE WITH THE REGULATIONS?

12. A community scheme is not building, place or premises used by the public "to obtain goods or services". As such, trustees / directors cannot be considered as being managers or owners of such a building, place or premises, to ensure compliance as required by regulation 14(6).
13. Accordingly, trustees / directors cannot be prosecuted for members' non-compliance with the regulations.
14. In closing, we wish to reiterate the sentiments as expressed in our previous articles pertaining to visitors and community scheme meetings, which remain as follows:
- 14.1 Community scheme meetings, which include trustees' / directors, and owners' meetings, will be permissible subject to the following;
- i. a limitation of 50 persons, excluding those who participate through electronic platforms;
 - ii. restricted to business purposes; and
 - iii. strict adherence to all health protocols and social distancing measures as published.
- 14.2 Visitors are still not allowed to enter the community scheme for recreational purposes. Only in circumstances where a visitor is required to provide care to an immediate family member who resides within the community scheme, such a visitor will be permitted to enter the community scheme. Should it be necessary for such a visitor to travel between provinces to provide care to an immediate family member, such a person will be required to obtain the necessary affidavit.

Article provided by Rudi Heerschop



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