

15 May 2020

OPINION ON TRAVEL RESTRICTIONS DURING LOCKDOWN

In accordance with the Regulations promulgated under the Disasters Management Act 57 of 2002, certain Regulations and directions have been issued which restrict the freedom of persons to move within South Africa.

The first of these Regulations to be issued was published on 25 March 2020. In that Regulation, the following is stated:

“Prohibition of public transport

11C. (1) All commuter transport services including passenger rail services, bus services, taxi services, e-hailing services, maritime and air passenger transport is prohibited, except bus services, taxi services, e-hailing services and private motor vehicles for purposes of rendering essential services, obtaining essential goods, seeking medical attention, funeral services and to receive payment of grants: Provided that such vehicle carries no more than 50% of the licensed capacity and all directions in respect of hygienic conditions and the limitation of exposure to COVID-19, are adhered to.

(2) Where a person rendering essential services is unable to travel to and from his or her place of employment, the employer must make the necessary transport arrangements: Provided that no more than 50% of the licensed capacity of the vehicle or vessel is exceeded and all directions in respect of hygienic conditions and the limitation of exposure to persons with COVID-19, are adhered to.”

This Regulation is clear in its intent, though the Regulation should probably be re-worded to read “licensed occupancy” rather than “capacity.” In any event, the intention here is to limit all vehicles to carrying only 50% of the maximum number of people that they can legally carry.

A situation arose where a plumber was travelling to a client in a two-seater vehicle. The plumber was pulled over by police who informed him that the capacity of his vehicle was 2 and that he was therefore at 100% of the vehicle’s capacity. This means that the plumber was in contravention of the Regulations and the plumber was fined a sum of money.

At the time, the position was clear that only 50% of the vehicle’s capacity could be used. On 26 March 2020, this Regulation was amended slightly as follows:

“(1) All commuter transport services including passenger rail services, bus services, taxi services, e-hailing services, maritime and air passenger transport are prohibited, except bus services, taxi services, e-hailing services and private motor vehicles for the purposes of rendering essential services, obtaining essential goods, seeking medical attention, funeral services and to receive payment of grants: Provided that –

(a) ...

(b) private vehicles shall not carry more than 60% of the licensed capacity, and that all directions in respect of hygienic conditions and the limitation of exposure of persons to COVID-19 are adhered to.”

As can be noted, the Regulation is more or less identical, save that the allowed capacity of private vehicles was increased to 60% meaning that a 5-seater vehicle could carry 3 persons as opposed to 2 and a half. Again, a two-seater vehicle could only lawfully seat one person at that stage.

This 60% capacity was again confirmed in Regulations promulgated on 2 April 2020 and I will not restate them here. The only difference in these Regulations was in respect of public transport services and not private vehicles.

The next set of Regulations to be published were those that deal with level 4 of lockdown, the current situation. These Regulations make absolutely no mention of the carrying capacity of motor vehicles. The Regulations state as follows in Section 2:

“2. (1) The regulations published by Government Notice No. 318 of 18 March 2020, as amended by Government Notice Nos. R398 of 25 March 2020, R419 of 26 March 2020, R446 of 2 April 2020, R465 of 16 April 2020 and R471 of 20 April 2020, are hereby repealed.”

What this means is that the previous Regulations stopped being of any force and effect. There is a proviso which states that they will continue to be of force and effect insofar as the enforcement of those Regulations are concerned i.e. contraventions committed whilst they were in effect will be prosecuted as if they are still in effect. There is a second proviso which states that any directives issued by cabinet, even if issued under the repealed Regulations, will remain in force. There do not seem to be any such directives in respect of private motor vehicles.

The fact that the previous Regulations have been repealed and that there are no directives in terms of carrying capacity of private vehicles is problematic. This is so because this means that there is, technically speaking, nothing which limits the carrying capacity of private motor vehicles. There are certain directions in respect of public transport, but, according to the government website, no directions have been posted regarding private vehicles. The capacity restriction in respect of public transport services currently stands between 50% and 70%, depending on the type of vehicle.

On 14 May 2020, the government released further directions in respect of travel, however, these are limited to once-off movements in specific circumstances, including domestic violence and moving homes during level 4. These directions still make no reference to travel by private vehicle or occupancy of such vehicles.

This would mean that, technically, any number of persons can now travel in a private vehicle. The concern is, however, that the intention of the government was not to completely remove this rule from operation. Given that police officers and other enforcement officers may not be as technically-minded or that they are likely still being told by their superiors that occupancy of vehicles is limited to 50% or 60%, I would not advise that the original limit of 50% is exceeded by any person i.e. if the vehicle is a two-seater, in order to avoid fines or potential imprisonment, I would advise that no more than one person be in the vehicle at any time. For the time being, I advise that private-use vehicles limit their occupancy to the same type of vehicle in the Regulations, or, to be safe, simply keep at 50% or lower.

The reason I would adopt such a cautious approach is that the government has been heavy-handed in their enforcement, as have the police officers. It would only be long after the fine, the wasted time and potential imprisonment that any action could be taken and the action would simply be to potentially sue the government for unlawful arrest and detention or for the return of the unlawfully imposed fine. This would hardly rectify the lost time, money and time spent sitting in jail.

Should you require any further opinions on matters relating to COVID-19 and the Regulations therewith associated, please do not hesitate to contact me.



Kind regards

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