

8 Legal obligations and applicable legislation

There is an overwhelming array of acts and regulations that govern both the environment and SI. These range from the Constitution (which contains the environmental right) to national statutes, provincial legislation and local bylaws. The complexity of the legislation poses a significant challenge to the implementation of SI. This chapter aims to address this challenge by providing an overview of the various national statutes which may be relevant to both the environment and the provision of SI.

These statutes may be categorised as follows:

- Legislation which gives effect to sections 32 and 33 of the Constitution.
- NEMA.
- SEMAs.
- Other laws that are concerned with the protection or management or assessment or protection of natural systems, such as the National Forest Act.
- Planning legislation.

All laws must be read within the context of the Constitution. In particular, the provisions of NEMA must be appreciated in the light of everyone's constitutional right to administrative action that is lawful, reasonable and procedurally fair.¹⁹ A decision to grant or refuse an environmental authorisation, permit or licence qualifies as administrative action in terms of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) ("PAJA"). Accordingly, such decisions may be reviewed and set aside on the grounds of judicial review set out in PAJA.

An overview of each of the statutes, within the above categories, and their relevance to the provision of SI and the environment can be accessed by clicking on the information links on the diagram below. Further guidance on the relevance of these Acts to different infrastructure types is provided in Chapter 10. It is important to note that any legislation applicable to a proposed activity should be identified during the planning phase (See Chapter 4). This will ensure that the applicant does not inadvertently contravene any law and also that adequate provision is made (in respect of time and budget) for any other authorisations that may be required.

Please note that the list of legislation provided here does not constitute a comprehensive list of all laws applicable to SI. Furthermore, copies of the Acts provided here do not include any amendments to these Acts. A thorough interrogation of the legislation is therefore still necessary to identify all applicable laws and ensure that your responsibilities and obligations in terms of these laws have been met.

¹⁹ Section 33 of the Constitution.

8.1 The Constitution and Legislation which gives effect to Sections 32 and 33

The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)



The Constitution is the supreme law of the Republic of South Africa. Statutes must therefore be in line with the Constitution. Where there is a conflict between the Constitution and any other law, the latter is invalid.

The provision of social infrastructure is an obligation imposed (on the State) in the Constitution. In Chapter 2 of the Constitution the State is obliged to take reasonable measures, within available resources, to achieve the progressive realisation of:

- Everyone's right to have access to healthcare services;
- Everyone's right to have access to sufficient food and water;
- Everyone's right to have access to adequate housing; and
- Everyone's right to have access to social security.

In addition to the above, the Constitution guarantees everyone the right to an environment that is not harmful to one's health or well-being.¹ That right includes an obligation imposed on the State to have the environment protected for the benefit of present and future generations.² In *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*³ the Supreme Court of Appeal held that:

*"Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country."*⁴

The above passage reinforces the importance of ensuring that, while the State discharges its constitutional obligation to provide social infrastructure, it must accord appropriate recognition and respect to environmental considerations. Importantly, owing to the fact that while some organs of state may be implementing laws designed to give effect to section 24 of the Constitution other organs of state may be taking steps in order to discharge the constitutional obligation to provide social infrastructure, the provisions of Chapter 3 of the Constitution are critical. Chapter 3 of the Constitution sets out principles of co-operative governance and those principles include obligations to organs of state to:

- Respect the constitutional status, institutions, powers and functions of other organs of state;
- Not assume any power or function except that conferred in terms of the Constitution;
- Exercise their powers and perform their functions in a manner that does not encroach on the integrity of other organs of state; and
- Co-operate with one another in mutual trust and good faith.⁵

Organs of state which seek to discharge their obligations relating to the provision of social infrastructure must act within the ambit of section 41(1) of the Constitution when seeking authorisations, permits or licences from other organs of state which are charged with implementing laws designed to give effect to section 24 of the Constitution. At all relevant times, it must be remembered that the environmental right set out in section 24 of the Constitution is a fundamental right which must be promoted and protected along with other fundamental rights. In *Kaunda and Others v President of the Republic of South Africa and Others*⁶ the Constitutional Court held that:

¹ Section 24.

² In order to give effect to the environmental right, the State is obliged to take reasonable legislative and other measures.

³ 1999 (2) SA 709 (SCA).

⁴ Paragraph 20.

⁵ Section 41(1).

⁶ 2005 (4) SA 235 (CC).

“It is this commitment to the promotion and protection of fundamental rights that binds us and defines us as a nation and which must discipline our government and inform the duty which it owes to its nationals. This commitment ‘must be demonstrated by the State in everything that it does’.”⁷

The laws that are discussed below must be understood in the context of the commitment that the State has to promote and protect fundamental rights including the environmental right.

Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)



The purpose of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA) is to give effect to section 32 of the Constitution. Among others, this section provides for a constitutional right of everyone to have access to information held by the State. The PAIA is fundamental to ensuring transparency and accountability in the way the State operates. Any information in the possession of CAs which informs a decision on whether or not to grant a licence, permission or environmental authorisation may be requested in terms of the PAIA. The PAIA provides:

- How requests for access to information must be lodged;
- How such requests must be considered;
- Circumstances in which a request may be granted or refused; and
- Remedies available after a decision has been made where access to information is refused.

Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)



The Parliament passed the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA) in order to give effect to section 33 of the Constitution. It applies to all administrative decisions which fall within the ambit of its section 1. The requirements set out in section 1 are as follows:

- There must be a decision taken or a failure to take a decision;
- The organ of state making a decision (or failing to make a decision) must be exercising power in terms of the Constitution or legislation;
- The decision or failure to take a decision must affect adversely the rights of any person;
- The decision or failure to take a decision must have a direct, external legal effect; and
- The decision or failure to take a decision must not fall within the exceptions set out in section 1 of PAJA.

A decision or a failure to take a decision on whether or not to grant an environmental authorisation, a permit or a licence falls within section 1 of PAJA. CAs are therefore obliged to take into account the provisions of PAJA when making decisions. PAJA sets out grounds on which a person may institute proceedings for the judicial review⁸ of an administrative decision.⁹ Those grounds include where:

- The decision was unlawful or unconstitutional;
- The decision was procedurally unfair;
- The decision was materially influenced by an error of law; or
- The decision is not authorised by the empowering provision.

A person who wishes to institute judicial review proceedings has an obligation to exhaust internal remedies before instituting judicial review. The most common internal remedy comprises an opportunity to lodge an internal appeal against a decision taken by a decision-maker in the first instance. For example, in terms of NEMA, a person may appeal to the Minister where that person is dissatisfied with a decision taken by an official of the Department of Environmental Affairs where such an official is acting on powers delegated by the Minister.¹⁰ In order to ascertain whether or not there are internal remedies which must be exhausted before approaching the High Court, the person concerned must have regard to the empowering legislation in terms of which the decision in question was made.

⁷ Paragraph 159.

⁸ Judicial review refers to the review and setting aside of an administrative decision by the High Court with jurisdiction on the matter.

⁹ Section 6.

¹⁰ Section 43.

8.2 NEMA

National Environmental Management Act, 1998 (Act No. 107 of 1998)



NEMA is the primary statute designed to give effect to section 24 of the Constitution. It came into effect in January 1999 and, since then, has been amended extensively.

The purpose of NEMA includes the provision of co-operative environmental governance by establishing principles for decision-making on matters which affect the environment. Measures included in NEMA and designed to give effect to its purpose include the following. Firstly, NEMA sets out national environmental management principles which apply to “the actions of all organs of state that may significantly affect the environment”.¹ Those principles:

- Apply alongside all other appropriate and relevant considerations;
- Serve as the general framework within which environmental management and implementation plans must be formulated;
- Serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any law concerned with the protection of the environment; and
- Guide the interpretation, administration and implementation of NEMA and any other law concerned with the protection or management of the environment.²

At the heart of the national environmental management principles is the concept of sustainable development which is defined as “the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations”.³ The national environmental management principles provide that:

- Environmental management must place people and their needs at the forefront of its concern and must serve their physical, psychological, developmental, cultural and social interests equitably.⁴
- Development must be socially, environmentally and economically sustainable.⁵
- Sustainable development requires the consideration of all relevant factors.⁶

Secondly, NEMA gives powers to the national Minister of Environmental Affairs (or the Member of the Executive Council responsible for environmental affairs in a province) to identify activities which may not commence without an EA from the CA. The Minister may also identify geographical areas in which specified activities may not commence without an EA from the CA or in which specified activities may be excluded from authorisation by the CA. Where an activity requires an environmental authorisation before commencement, in terms of section 24F of NEMA, anyone who commences that activity without an environmental authorisation or fails to comply with the conditions applicable to an environmental authorisation is committing an offence and, upon conviction, may be liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment. Crucially, section 38 of NEMA provides that NEMA is binding on the State (except insofar as any criminal liability is concerned).

The Minister promulgated the NEMA EIA Regulations on 4 December 2014. These Regulations comprise:

¹ Section 2(1).

² Section 2(1).

³ Sections 1 and 2 of NEMA.

⁴ Section 2(2).

⁵ Section 2(3).

⁶ Section 2(4).

- Listing Notice 1 of 2014 (GNR 983) – which set out activities which require a BA before an EA may be issued;
- Listing Notice 2 of 2014 (GNR 984) – which set out activities that require a S&EIR process before an EA may be issued;
- Listing Notice 3 of 2014 (GNR 985) – which set out activities which, in certain geographical areas, require a BA before they may be authorised;
- The EIA Regulations – which set out the detail on regulation of impact assessments; and

It must be noted that the EMF Regulations have not been amended since 2006. The Minister only made amendments to Listing Notices 1, 2, and 3 as set out above. Activities set out in Listing Notices 1, 2 and 3 may be required to be undertaken in the context of provision or construction of social infrastructure. Where that is the case, an EA must be obtained in terms of section 24 of NEMA before the commencement of construction. Importantly, in terms of NEMA read with the EIA Regulations, the Minister or the Member of the Executive Council responsible for environmental affairs in a province may delegate powers to make decisions on applications for EAs to the Department⁷ or to an official in the Department. Where such powers have been delegated, a decision made by the relevant official or the Department may be subject to an appeal by a person who is aggrieved by a decision made by the Department or the official. An appeal may be lodged with the Minister or the MEC depending on who delegated the powers in question. After considering an appeal, the Minister or the Member of the Executive Council may confirm, vary or set aside the decision made by the delegated official or Department⁸.

Thirdly, NEMA provides for the duty of care and remediation of environmental damage. This duty is set out in section 28 of NEMA and is imposed on every person “who causes, has caused or may cause significant pollution or degradation of the environment”⁹. It involves the taking of reasonable measures:

- To prevent pollution or degradation from occurring, continuing or recurring; or
- (Insofar as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped) to minimise and rectify such pollution or degradation of the environment.

A person who fails to take the reasonable measures required in terms of section 28(1) may be compelled to take those measures by the Director-General of the Department of Environmental Affairs or a provincial head of a Department responsible for environmental affairs in a particular province.¹⁰ Steps may also be taken in order to discharge the duty of care and to recover the costs of doing so from the person who failed to discharge that duty¹¹.

Where a duty of care arises in the context of construction of SI projects, the persons responsible must ensure that that duty is discharged.

⁷ The national or provincial Department of Environmental Affairs.

⁸ Section 43 of NEMA.

⁹ Section 28(1).

¹⁰ Section 28(4).

¹¹ Section 28(7), (8), (9), (10) and (11).

8.3 SEMAs



National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008)

The National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008) (ICMA) is a SEMA which regulates integrated coastal management within the context of NEMA. Its purpose includes:

- To establish integrated coastal and estuarine management;
- To promote the conservation of the coastal environment;
- To ensure that development and the use of natural resources within the coastal zone are socially and economically justifiable and ecologically sustainable;
- To determine the coastal zone;
- To preserve, protect, extend and enhance the status of coastal public property; and
- To give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment.¹

In the ICMA the following measures are included in order to achieve its purpose.

- (a) The State is declared as a trustee of coastal public property.² The concept of "coastal public property" is used to describe a very wide geographical area which includes coastal waters, parts of the sea-shore and admiralty reserve owned by the State. Closely related to that concept is the concept of the "coastal protection zone" which refers to a zone "established for enabling the use of land that is adjacent to coastal public property or that plays a significant role in a coastal ecosystem to be managed, regulated or restricted", among others, in order to:
 - Protect the ecological integrity, natural character and the economic, social and aesthetic value of coastal public property; and
 - Protect people, property and economic activities from risks arising from dynamic coastal processes.³
- (b) No occupation, construction or erection of any building, road, barrier or structure on or in the coastal public property may occur without a coastal lease awarded by the national Minister of Environmental Affairs.^{4 5}
- (c) The ICMA provides for the regulation of coastal activities. The latter relates to listed activities or specified activities (in terms of NEMA) envisaged to take place in the coastal zone. Section 63 of the ICMA provides relevant factors which must be taken into account when the CA considers granting an EA to those activities.⁶ Importantly, the ICMA also prohibit the CA to issue an EA if the development or activity for which authorisation

¹ Long title and section 2 of the ICMA.

² Section 12.

³ Section 17 of the ICMA.

⁴ As an exception to this prohibition, the ICMA does allow temporary occupation of the coastal public property in certain circumstances. The exception is provided for in section 67 of the ICMA.

⁵ Section 65 which sets out this prohibition has not yet taken effect.

⁶ Those factors are:

- (a) The representations made by the applicant and by interested and affected parties;
- (b) The extent to which the applicant has in the past complied with similar authorisations;
- (c) Where the coastal public property, the coastal protection zone or coastal access land will be affected, if so, the extent to which the proposed development or activity is consistent with the purpose for establishing and protecting those areas;
- (d) The estuarine management plans, coastal management programmes and coastal management objectives applicable in the area;
- (e) The socio-economic impact of the activity is authorised or not authorised;
- (f) The likely impact of the proposed activity on the coastal environment, including the cumulative effect of its impact together with those of existing activities;
- (g) The likely impact of coastal environmental processes on the proposed activity; and
- (h) The objects of the ICMA.

is sought falls within any of the categories set out in section 63(2) of the ICMA.⁷ The CA in such circumstances may refer the application for consideration by the Minister who may grant an EA if doing so is in the interests of the whole community.⁸

The measures included in the ICMA may affect the provision of SI in the following manner. Firstly, those measures may be relevant where the provision of SI would take place on coastal public property or the coastal protection zone. Where applicable, the organ of state which envisages the construction of SI would require a lease before proceeding with the construction. Secondly, owing to the application of section 63 of the ICMA, an application for an EA in terms of NEMA may be refused if it falls within any of the categories set out in section 63(2) of the ICMA.

National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004)



The purpose of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEM:BA) is:

- To provide for the management and conservation of the biodiversity within the framework of NEMA;
- To provide for the protection of ecosystems and specifies those that warrant national protection; and
- To establish the South African National Biodiversity Institute.⁹

The NEM:BA provides for the following:

- (a) The South African National Biodiversity Institute is established and its functions include provision of advice on matters relating to biodiversity to organs of state.¹⁰
- (b) As part of integrated and co-ordinated biodiversity planning, the NEM:BA provides for the preparation and adoption of various policies.¹¹
- (c) The Minister may publish lists of threatened species and threatened ecosystems, respectively, in need of protection.¹² Once a species has been listed as a threatened or protected species, restricted activities may not be undertaken in relation to those species without a permit. Restricted activities include:
 - Having in possession or exercising physical control over any specimen of a listed threatened or protected species;
 - Gathering, collecting or plucking any specimen of a listed threatened or protected species;
 - Picking parts of, or cutting, chopping off, uprooting, damaging or destroying, any specimen of a listed threatened or protected species;¹³ and
 - Conveying, moving or otherwise translocating any specimen of a listed, threatened or protected species.¹⁴

Any type of SI on an area with threatened species and ecosystems may be affected by the provisions of the NEM:BA.

⁷ Such categories are where the development or activity for which authorisation is sought:

- (a) Is situated within the coastal public property and is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations;
- (b) Is situated within the coastal protection zone and is inconsistent with the purpose for which a coastal protection zone is established in terms of the ICMA;
- (c) Is situated within coastal access land and is inconsistent with the purpose for which coastal access land is designated;
- (d) Is likely to cause irreversible or long-term adverse effects to any aspect of the coastal environment that cannot satisfactorily be mitigated;
- (e) Is likely to be significantly damaged or prejudiced by dynamic coastal processes;
- (f) Would substantially prejudice the achievement of any coastal management objective; or
- (g) Would be contrary to the interests of the whole community.

⁸ Section 63 read with section 64.

⁹ Long title of the Biodiversity Act.

¹⁰ Sections 10 and 11(1)(c).

¹¹ Those policies include the national biodiversity framework, the bioregions and bioregional plans and the biodiversity management plans.

¹² Chapter 4 of the Biodiversity Act.

¹³ Section 57(1).

¹⁴ Section 1.

Acting in terms of section 52 of the NEM:BA, the Minister published a *National List of Ecosystems that are Threatened and in Need of Protection* in *Government Gazette* No. 34809 on 9 December 2011. The primary purpose of the listing of ecosystems that are threatened and in need of protection is:

- (With regard to threatened ecosystems) To reduce the rate of extinction of ecosystems and species;
- (With regard to protected ecosystems) To preserve witness sites of exceptionally high conservation value; and
- (To both threatened and protected ecosystems) To enable or facilitate proactive management of these ecosystems.

In addition to the above, the secondary purpose is, to play a symbolic and awareness-raising role. Crucially, the list of threatened ecosystems is specifically relevant to Activity 12 of Listing Notice 3 as that activity comprises:

“The clearance of an area of 300 square metres or more of vegetation where 75% or more of the vegetative cover constitutes indigenous vegetation ... Within any critically endangered or endangered ecosystem listed in terms of section 52 of NEMBA or prior to the publication of such a list, within an area that has been identified as critically endangered in National Spatial Biodiversity Assessment 2004 ...”.

Regarding Activity 12 of Listing Notice 3, it is important to note that, an environmental authorisation is required if the vegetative cover which is going to be cleared comprises (at least) 75% indigenous vegetation and the area to be cleared is at least 300 square metres. Importantly, the Minister published *Lists of Critically Endangered, Endangered, Vulnerable and Protected Species* in Government Notice R151 of 23 February 2007 (as amended).¹⁵

Any type of SI on an area with threatened species and ecosystems may be affected by the provisions of the NEM:BA.

The National Water Act, 1998 (Act No. 36 of 1998)



The National Water Act, 1998 (Act No. 36 of 1998) (NWA) seeks to ensure that the Republic’s water resources are protected, used, developed, conserved, managed and controlled in a manner which takes into account relevant factors such as the meeting of the basic human needs of present and future generations.¹⁶ Other factors include:

- Promoting equitable access to water;
- Redressing the results of past racial and gender discrimination;
- Promoting the efficient, sustainable and beneficial use of water in the public interest; and
- Facilitating social and economic development.¹⁷

The following measures are included in the NWA:

- (a) It clarifies what is regarded as a water use in terms of the NWA. In terms of section 21, water use includes:
- Taking water from a water resource;¹⁸
 - Storing water;
 - Impeding or diverting the flow of water in a watercourse; and
 - Altering the bed, banks, cause or characteristics of a watercourse.

¹⁵ *Government Gazette* 29657 of 23 February 2007 as amended by Government Notice R1187 promulgated in *Government Gazette* 30568 of 14 December 2007.

¹⁶ Section 2.

¹⁷ Section 2.

¹⁸ Water resource is defined as including a watercourse, surface water, estuary, or aquifer. On the other hand, watercourse is defined as:

(a) A river or spring;

(b) A natural channel in which water flows regularly or intermittently;

(c) A wetland, lake or dam into which, or from which water flows; and

(d) Any collection of water which the Minister may, by notice in the *Government Gazette*, declare to be a watercourse, and a reference to a watercourse includes, where relevant, its bed and banks.

- (b) No person may engage in a water use without a licence unless such use fall within certain exceptions set out in the NWA.¹⁹

The construction of SI may involve certain water uses and, as a result, the organ of state which undertakes those water uses must obtain a water licence unless its use falls within one of the exceptions set out in the NWA.

National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)



The purpose of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (NEM:WA) includes to protect health, well-being and the environment by providing reasonable measures.²⁰

The following measures are included in the Act:

- (a) A holder of waste has a general duty to take all reasonable measures to avoid the generation of waste.²¹
- (b) The Minister responsible for Environmental Affairs in the national government has power to publish a list of waste management activities that have, or are likely to have, a detrimental effect on the environment.²² No person may commence, undertake or conduct such activities unless that person has a waste management licence (if such a licence is required) or complies with certain stipulated requirements or standards.²³

The Minister has promulgated the *List of Waste Management Activities that have, or are likely to have a Detrimental Effect on the Environment*²⁴ which include the construction of facilities and the treatment of effluent, wastewater or sewage with an annual throughput capacity of more than 2000 cubic metres but less than 15000 cubic metres.²⁵

Construction of SI relating to wastewater and sewage treatment plants would require compliance with the Act.

National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003)



The purpose of the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003) (NEM:PAA) includes to provide for the protection and conservation of ecologically viable areas representative of South Africa's biological diversity.²⁶ Section 17 provides that the purpose of declaring areas as protected areas include:

- (a) To preserve the ecological integrity of those areas;
- (b) To conserve biodiversity in those areas;
- (c) To protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa;
and
- (d) To protect an area which is vulnerable or ecologically sensitive.

The following measures are included in the Act:

- (a) The State is declared as a trustee of protected areas.²⁷
- (b) It prescribes the system of protected areas in South Africa as consisting four main categories.²⁸ These categories are:
- Special nature reserves, national parks, nature reserves and protected areas;
 - World heritage sites;
 - Marine protected areas;

¹⁹ Section 22.

²⁰ Section 2.

²¹ Section 16(1)(a).

²² Section 19(1).

²³ Section 19(3) read with section 20.

²⁴ Government Notice 718 in *Government Gazette* 32368 of 3 July 2009.

²⁵ Activities 11 and 18.

²⁶ Long title.

²⁷ Section 3.

²⁸ Section 9.

- Specially protected forest areas, forest nature reserves and forest wilderness areas declared in terms of the National Forests Act; and
 - Mountain catchment areas declared in terms of the Mountain Catchment Areas Act.²⁹
- (c) The Minister is obliged to maintain the Register of Protected Areas.³⁰
- (d) No development or construction may take place in a protected area without prior written approval of the responsible management authority.³¹

Any SI envisaged in a protected area would require approval from the responsible management authority.

National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)



The purpose of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (NEM:AQA) includes to reform the law relating to air quality and to provide for national norms and standards regulating air quality monitoring, management and control in the Republic of South Africa.³² The object of that Act includes to give effect to section 24 of the Constitution.³³

The NEM:AQA establishes a licence insisting and imposes an obligation on metropolitan and district municipalities to implement that system. The following features are central to that system. Firstly, the Minister of Environmental Affairs (or a Member of the Executive Council responsible for the portfolio of environmental affairs in a province) may publish a list of activities which he or she reasonably believes have or may have a significant detrimental effect on the environment.³⁴ Secondly, once an activity has been listed, no person may undertake such an activity without a provisional Atmospheric Emissions Licence (AEL) or an AEL.³⁵

The Minister published a list of activities which require a licence for undertaking in Government Notice 248 in *Government Gazette* 33064 of 21 March 2010 and titled, *List of Activities which result in atmospheric emissions which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage*. Accordingly, any infrastructure development which requires the undertaking of activities listed in terms of the NEM:AQA would require a licence in terms of that Act.

²⁹ 63 of 1970.

³⁰ Section 10.

³¹ Section 50.

³² Long title.

³³ Section 2.

³⁴ Section 21(1).

³⁵ Section 22.

8.4 Other Laws

Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002)



The purpose of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) (MPRDA) is to provide for equitable access to and sustainable development of the mineral and petroleum resources.¹ The Act prohibits mining of minerals without a permit issued in terms of section 27(6). The term “mineral” is defined as including sand, stone, rock, gravel, clay, soil and other minerals occurring in residue stockpiles or in residue deposits.² On the other hand, mining is defined as meaning:

“... any operation or activity for the purposes of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto.”³

The construction of gravel roads requires the mining of minerals to surface the roads. Accordingly, such mining must be preceded by the organ of state involved obtaining a permit in terms of section 27(6) of the Act.

National Forests Act, 1998 (Act No 84 of 1998)



The purpose of the National Forests Act, 1998 (Act No. 84 of 1998) (National Forests Act) includes to promote the sustainable management and development of forests for the benefit of all South Africans.⁴

The following measures are included in the Act:

- (a) The Minister responsible for forestry in the national government has a number of responsibilities. Those responsibilities include commissioning research which promotes the objectives of forest policy.⁵
- (b) Indigenous trees found in a natural forest are protected by prohibiting certain activities without a licence or an exemption issued in terms of the Act.⁶ The prohibited activities include cutting, disturbing, damaging or destroying any indigenous tree in a natural forest.
- (c) The Minister may declare a forest (or part of it) as a protected area.⁷ Once declared as such, no person may cut, disturb, damage or destroy any forest produce or remove such produce from a protected area except in terms of section 10 of the Act.
- (d) The Minister also has a power to protect:
 - A particular tree;
 - A particular group of trees;
 - A particular woodland; or
 - Trees belonging to a particular species.⁸
- (e) A licence or an exemption in terms of the Act is required before any person may cut, disturb, damage or destroy any protected tree.⁹

The National Forests Act is applicable to any SI where the provision of that infrastructure would involve interference with protected areas or protected trees.

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- ¹ Long title of the Act.
 - ² Section 1.
 - ³ Section 1.
 - ⁴ Section 1.
 - ⁵ Section 5.
 - ⁶ Section 7.
 - ⁷ Section 8(1).
 - ⁸ Section 12.
 - ⁹ Section 15.

Sea-shore Act, 1935 (Act No. 21 of 1935)



The purpose of the Sea-shore Act, 1935 (Act No. 21 of 1935) (Sea-shore Act) is to declare the State President to be the owner of the sea-shore and the sea within the territorial waters of the Republic of South Africa.¹⁰

The Sea-shore Act provides the following:

- (a) It defines the sea-shore and the sea.¹¹
- (b) The Minister of Transport has powers to let any portion of the sea and the sea-shore for the purposes set out in section 3 of the Act.¹²
- (c) The Minister may also authorise the use of any portion of the sea-shore and the sea “for Government purposes”.¹³

Any infrastructure envisaged in the sea or the sea-shore would require authorisation from the Minister.

National Heritage Resources Act, 1999 (Act No. 25 of 1999)



The purpose of the National Heritage Resources Act, 1999 (Act No. 25 of 1999) (NHRA) is to introduce an integrated and interactive system for the management of the national heritage resources. A heritage resource is defined in section 1 as “any place or object of cultural significance”. As such a heritage resource may also refer to a natural object such as a tree.

The NHRA provides for the following:

- (a) It declares a national estate by providing that:
“... those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities.”¹⁴
- (b) The South African Heritage Resources Agency (SAHRA) is established whose duty is to co-ordinate the identification and management of the national estate. The role and responsibilities between SAHRA and other heritage authorities is clarified. For instance, SAHRA may declare a place to be a national heritage site while a provincial heritage resources authority may declare a provincial heritage site.¹⁵
- (c) Once a heritage site has been declared, no person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of that site without a permit issued by the heritage resources authority responsible for the protection of such a site.¹⁶
- (d) Burial grounds and graves are protected by SAHRA where it is not the responsibility of any other authority to protect them.¹⁷ A permit is required where a person wants to damage or alter certain graves or burial grounds.¹⁸ Importantly, section 36(6) provides that:
“Subject to the provision of any other law, any person who in the course of development or any other activity discovers the location of a grave, the existence of which was previously unknown, must immediately cease such activity and report the discovery to the responsible heritage resources authority.”

▪ ¹⁰ Long title.

▪ ¹¹ The sea-shore is defined as “the water and the land between the low-water mark and the high-water mark” and the sea is defined as “the water and the bed of the sea below the low-water mark and within the territorial waters of the Republic, including the water and the bed of any tidal river and of any tidal lagoon”.

▪ ¹² Those purposes include:

- The construction of infrastructure;
- “The carrying out of any work of public utility”; and
- The carrying out of any work which in the opinion of the Minister serves a necessary or useful purpose.

▪ ¹³ Section 5.

▪ ¹⁴ Section 3(1).

▪ ¹⁵ Section 27.

▪ ¹⁶ Section 27(18).

▪ ¹⁷ Section 36(1).

▪ ¹⁸ Section 36(3).

- (e) Structures older than 60 years are protected by prohibiting their altering or demolition without a permit issued by the relevant provincial heritage resources authority.¹⁹
- (f) In certain circumstances, the following categories of development must be preceded by notification to and authorisation from the responsible heritage resources authority:
 - The construction of a road, wall, powerline, pipeline, canal or other similar form of linear development or barrier exceeding 300 metres in length;
 - The construction of a bridge or similar structure exceeding 50 metres in length;
 - Any development or other activity which will change the character of a site–
 - (i) Exceeding 5000 square metres in extent; or
 - (ii) Involving 3 or more existing erven or subdivisions thereof; or
 - (iii) Involving 3 or more erven or divisions thereof which have been consolidated within the past 5 years;
 - (iv) The costs of which will exceed an amount stipulated by SAHRA or a provincial heritage authority;
 - (v) The re-zoning of a site exceeding 10000 square metres in extent; or
 - (vi) Any other category of development stipulated by SAHRA or a provincial heritage resources authority.²⁰

The exclusions referred to in (f) above include a development required to be assessed in terms of the Environment Conservation Act 73 of 1989, the predecessor to NEMA. Accordingly, developments assessed in terms of NEMA fall within the ambit of the exclusions. While section 38 does not apply to the exclusions, section 38(8) provides that the CA must ensure that the assessment process complies with the requirements of the relevant heritage resources authority and that any comments and recommendations of that authority are taken into account prior to the decision being made on whether or not the development may proceed.

Any SI development which falls within the ambit of the developments described above and/or which involves an impact on heritage resources must comply with the requirements of the NHRA.

Water Services Act, 1997 (Act No. 108 of 1997)



The purpose of the Water Services Act, 1997 (Act No 108 of 1997) (Water Services Act) includes:

- To provide for the rights of access to basic water supply and basic sanitation; and
- To provide for water services development plans.²¹

The Water Services Act gives everyone a right to access to basic water supply and basic sanitation and imposes an obligation to water services authorities to give effect to those rights.²²

In terms of section 6 of the Water Services Act, no person may use water services from a source other than a water services provider nominated by the water services authority having jurisdiction in the area in question unless that water services authority has issued approval for that use. In addition, the Act also regulates what it refers to as “industrial use” of water. Industrial use includes the use of water for mining, construction or any related purpose.²³ In terms of section 7 of that Act, no person may obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question unless the water services authority has issued approval. Importantly, no person may operate as a water services provider without the approval of the water services authority having jurisdiction in the area in question.²⁴

▪ ¹⁹ Section 34(1).

▪ ²⁰ Section 38.

▪ ²¹ Long title and section 2.

▪ ²² Section 3.

▪ ²³ Section 1.

▪ ²⁴ Section 22(1).

8.5 Planning legislation

Planning legislation comprises those laws which regulate the use of land. Among others, those laws provide for the following:

- (a) The development and adoption of zoning schemes;
- (b) The subdivision of parcels of land;
- (c) The consolidation of parcels of land (into one subdivision);
- (d) The facilitation of appropriate development; and
- (e) The regulation of land-use changes for instance from one type of zoning to another.

Given that the use of land is also regulated by environmental laws, there is an overlap of planning legislation and environmental legislation. The White Paper on Spatial Planning and Land Use Management¹ (the “White Paper”) noted this overlap as follows:

“Most types of land development require a number of different permissions from different authorities. The two in which there is the most overlap are the rezoning permission and the consent in terms of the Environmental Impact Assessment requirements of the Environment Conservation Act. This overlap leads to a situation in which an applicant has to apply to two separate authorities for permission to use or develop land. In practice many of the requirements of the two processes are very similar and this can lead to an expensive duplication of efforts. Also, it can result in each authority giving a different decision, leading to institutional conflict and a bewildered public.”²

Planning legislation comprises national legislation, provincial legislation and by-laws. Recently enacted, Spatial Planning and Land Use Management Act (SPLUMA) (Act NO. 16 of 2013) is the supreme planning legislation in South Africa. It aims to provide for inclusive developmental, equitable and efficient spatial planning at the different spheres of government. It repeals the DFA of 1995 and Physical Planning Act below. The following are examples of other national planning legislation.

Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970)



The Subdivision of Agricultural Land Act, 1970 (Act No 70 of 1970) provides that a consent must be obtained from the Minister of Agriculture before agricultural land may be subdivided.³ The Act applies irrespective of the nature of the proposed development provided that such development requires the subdivision of agricultural land.

Physical Planning Act, 1967 (Act No. 88 of 1967)



The purpose of the Physical Planning Act, 1967 (Act No 88 of 1967)(Physical Planning Act) is:

- To promote co-ordinated environment planning;
- To promote the utilisation of the Republic’s resources;
- To provide for control of the zoning and subdivision of land for industrial purposes;
- To provide for the reservation of land for use of specific purposes;
- To provide for the establishment of controlled areas; and
- To provide for restrictions upon the subdivision and use of land in controlled areas.⁴

The Act has been emasculated by various amendments. For instance, sections 6A and 6B which provide for the issuing of Guide Plans have been repealed. However, while that means that no new Guide Plans may be approved in terms of the Act historical Guide Plans are still relevant. For instance, in *Antoy Investments v Rand Water Board*⁵ the Court held that: “The development of the Vaal River Barrage Area was regulated by a Guide Plan issued under the Physical Planning Act 88 of 1967. In the Plan a so-called 1975 control floodline of the Vaal River was proclaimed. Development below this line was prohibited save for the consent of the Rand Water Board ... In terms of paragraph 2.2 [of the Guide Plan], no habitable

¹ July 2001.

² Section 1.2.

³ Section 6.

⁴ Long title.

⁵ [2008] ZASCA 10.

buildings or structures, toilets, french drains, conservancy or septic tanks, sewerage pumping installations or sewerage works are permitted below the flood control line, except with the written consent of the Board. In terms of section 29(3) of the Development Facilitation Act, 67 of 1995, the Guide Plan with the exception of Annexure C was withdrawn as a statutory document with effect from 25 December 1996.”⁶

The provisions of the Act which remain are those relating to the establishment and disestablishment of controlled areas. Once an area is declared as a controlled area⁷ it must be used for:

- A purpose for which it was being used immediately prior to being declared; or
- The purpose for which it was declared as a controlled area.⁸

Where a person intends to use land which falls within a controlled area for purposes other than the purposes set out above that person must apply for a permit in terms of section 8 of the Act. The provisions of this Act are applicable to any type of social infrastructure provided that it is envisaged to be constructed within a controlled area.

National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977)



The purpose of the National Building Regulations and Building Standards Act, 1977 (Act No 103 of 1977) is to provide for uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities and to provide for prescribing of building standards.⁹ The historic importance of the reference to areas of jurisdiction of local authorities relates to the fact that, in the apartheid era, certain areas such as the so-called homelands fell outside the jurisdiction of local authorities.

The Act provides for the following:

- a. It defines the term “building” widely as including any structure erected or used for or in connection with the rendering of any service.¹⁰ It also includes any bridge or any other structure connected to it.¹¹
- b. In terms of section 4, no person may erect any building without the prior written approval of the local authority responsible for the area where the building is to be situated. The local authority grants approval if it is satisfied that the application in question complies with the requirements of the Act and any other applicable law.¹²
- c. The Minister¹³ may promulgate national building regulations.¹⁴

Any person who wishes to construct a structure which falls within the meaning of the term “building” as defined in the Act must obtain written approval before commencing with the construction. This may relate to all types of infrastructure.

Development Facilitation Act, 1995 (Act No. 67 of 1995)



The White Paper noted the following regarding the Development Facilitation Act, 1995 (Act No. 67 of 1995)(DFA):

“The only post-1994 planning law enacted by Parliament is the Development Facilitation Act, the DFA. The DFA was promulgated as an interim measure to breach the gap between the old apartheid era planning laws and a new planning system reflecting the needs and priorities of the democratic South Africa. The Act, however, did not wipe the slate clean with the result that the national and provincial laws relating to planning promulgated before 1994 are still in existence.

The DFA thus operates parallel to the existing laws, until such time as they are replaced, as proposed by this White Paper.”¹⁵

⁶ Paragraphs 1 and 8.

⁷ By the Minister responsible.

⁸ Section 6.

⁹ Long title.

¹⁰ Section 1.

¹¹ Section 1.

¹² Section 7.

¹³ Of Economic Affairs and Technology.

¹⁴ Section 17.

The primary objects of the Act are:

- To facilitate and expedite the implementation of the reconstruction and development programmes and projects by introducing extraordinary measures;
- To lay down general principles regulating all land developments, irrespective of whether the development is undertaken in terms of the Act or some other law; and
- To establish development tribunals (in all provinces) with powers to determine land development applications.¹⁶

Section 33 of the Act regulates the determination of land development applications by tribunals established in terms of the Act. The powers of such tribunals are wide. They include the power to exclude the operation of laws in regard to land forming the subject-matter of a land development application. The Constitutional Court has found that certain provisions of the Act, including section 33, are unconstitutional.¹⁷ The constitutional decision in which those sections were set aside was the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*.¹⁸ The result is that planning decisions which in the past were made by development tribunals established in terms of the Act are now made by Municipalities in terms of provincial legislation.

Provincial planning legislation

Depending on the province where social infrastructure is envisaged to be provided, the following legislation must be consulted:

- (a) KwaZulu-Natal: Planning and Development Act.¹⁹
- (b) Gauteng: Town-Planning and Townships Ordinance;²⁰ Division of Land Ordinance;²¹ and Transvaal Board for the Development of Peri-Urban Areas Ordinance.²²
- (c) Western Cape: Land Use Planning Ordinance.²³
- (d) Eastern Cape: Land Use Planning Ordinance;²⁴ and Ciskei Land Use Regulation Act.²⁵
- (e) Free State: Townships Ordinance.²⁶
- (f) Limpopo: Town Planning and Townships Ordinance;²⁷ Transvaal Board for the Development of Peri-Urban Areas Ordinance;²⁸ and Venda Proclamation.²⁹
- (g) Mpumalanga: Town Planning and Townships Ordinance;³⁰ and KwaNdebele Town Planning Act.³¹
- (h) North-West: Town Planning and Townships Ordinance;³² and Bophuthatswana Land Control Act.³³
- (i) Northern Cape: Northern Cape Planning Development Act.³⁴

¹⁵ Section 1.2.

¹⁶ Long title and section 2.

¹⁷ The court set aside Chapters IV and V.

¹⁸ 2010 (6) SA 182 CC.

¹⁹ 6 of 2008.

²⁰ 15 of 1986.

²¹ 20 of 1986.

²² 20 of 1943.

²³ 15 of 1985.

²⁴ 15 of 1985.

²⁵ 15 of 1987.

²⁶ 9 of 1969.

²⁷ 15 of 1986.

²⁸ 20 of 1943.

²⁹ 45 of 1990.

³⁰ 15 of 1986.

³¹ 10 of 1992.

³² 15 of 1986.

³³ 39 of 1979.

³⁴ 7 of 1998.