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COASTAL ZONE LAW PBL603E

AN OVERVIEW OF THE LEGAL REGIME REGULATING SOUTH AFRICA'S OFFSHORE OIL AND GAS INDUSTRIES

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AN OVERVIEW OF THE LEGAL REGIME REGULATING SOUTH AFRICA'S OFFSHORE OIL AND GAS INDUSTRIES

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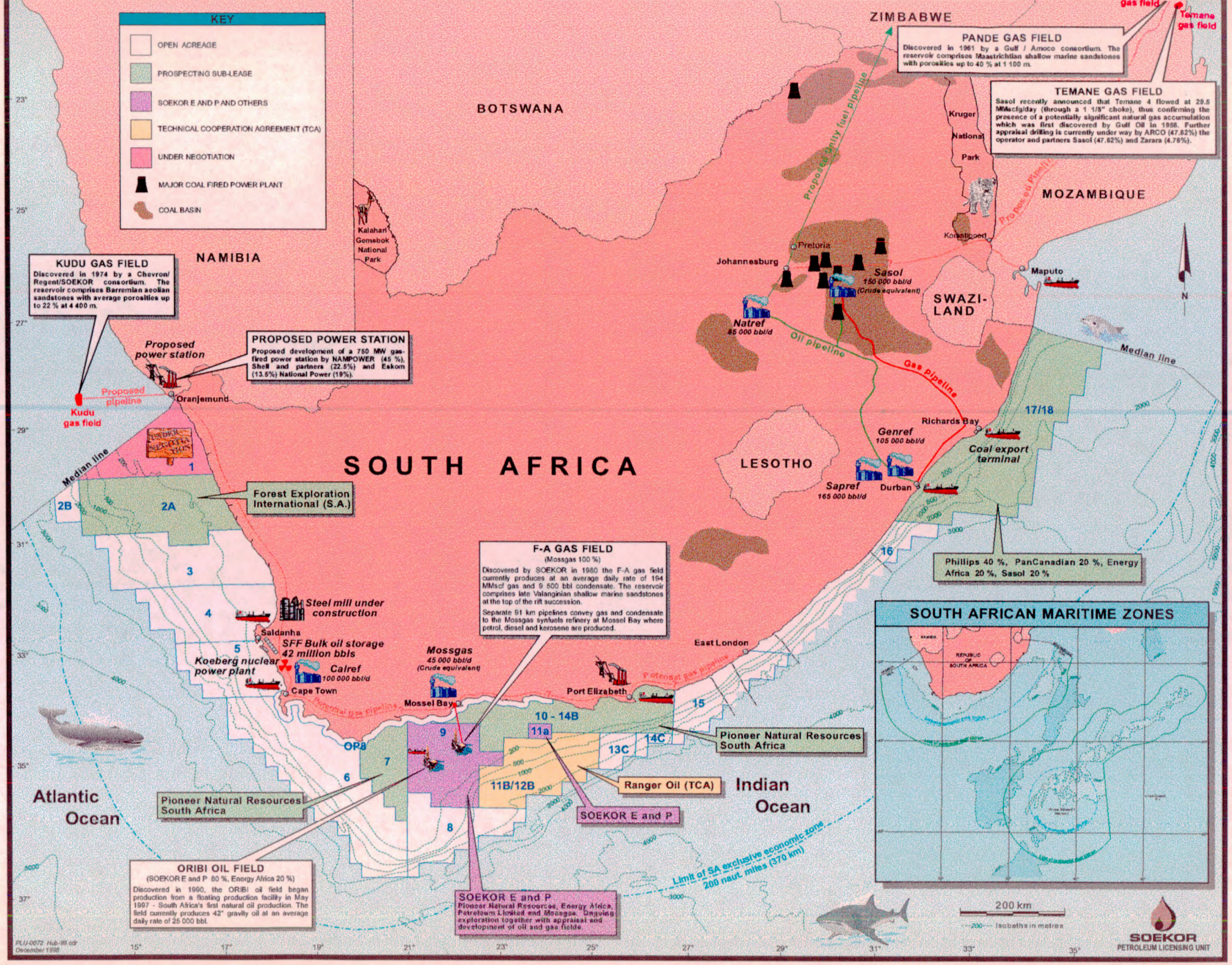

Soekor signed an exclusive offshore oil exploration accord with Pioneer Natural Resources USA giving the company a one year exclusive right to study and negotiate a petroleum exploration sublease with Soekor over an area that covers approximately 2.5 million acres offshore Port Elizabeth. The map on page 5 provides further information on the status of the concession areas offshore South Africa.

1.2 Characteristics of a legal regime

Before looking at South Africa's specific regime, it is necessary to first look at what the characteristics of a desirable regime would be, and then how these are applied in South Africa.

a) Respect for international law

An offshore oil regime should respect international law. This is desirable because it avoids conflict. For South Africa, this means meeting international conventions to which South Africa is a party e.g. dumping conventions, the Geneva conventions and Continental Shelf doctrines. The regime should also meet international customary law which, for example, imposes the due regard principal for sea users. There must also be compliance with the Law of the Sea Convention 1982 in particular. Even if the convention is not ratified, most of it is customary law anyway and therefore must be respected. South Africa has ratified the Law of the Sea Convention.

b) Balance

There must be a balance between the various users of the sea e.g. living resources should be conserved, there should be adequate navigation warnings on installations for vessels.

c) Respect for the environment

The environment should be respected i.e. there should be no pollution of offshore or onshore areas, of living resources and of recreational facilities. As an example, Soekor's activities in the Mossel Bay area have resulted in complaints from fisherman who allege that Soekor is damaging "The Blues" fishing area. They are saying Soekor should remove the sealed up wells while Soekor maintains that they are not legally responsible for doing so, as the wells were drilled by foreign companies.

One would have to consult international law in terms of abandonment to see whether Soekor are responsible for their sub-lessees. Fisherman have tried to get a guarantee that Soekor will clean up after its activities have finished, but Soekor maintains that no clean-up will be necessary because they are operating in such an efficient manner.

Another example is the assertion that the Phillips sub-lease will inconvenience the shrimp trawling industry to the north and east of Durban. Phillips have undertaken to leave the sea bed free of any obstructions and if this is not possible, to inform the industry of the precise location, nature and extent of the obstruction.

d) Physical security of the operators

(i) Physical security from adverse effects of others is important and this is achieved by creating safety zones around installations. In South Africa the Maritime Zones Act 15/94 creates a 500 meter safety zone around installations:

> "'installation means any of the following situated within internal waters, territorial waters or the exclusive economic zone or on or above the continental shelf.....any area situated within a distance of 500 meters measured from any point on the exterior side of an installation referred to in paragraph (a) or (b) other than a pipeline".

The authority to create this safety zone originates in article 60(5) – 60(7) of the Law of the Sea Conventions:

> "5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.
>
> 6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.
>
> 7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation."

Within this zone, rules are introduced for example with respect to navigation by the General Law Amendment Act 38/1993. There are also, *inter alia*, provisions with respect to warnings.

(ii) Physical security from the environment is also important and so properly constructed installations, capable of withstanding the elements and provisions for safety of employees on or in the vicinity of the installations, are very important. The South African Maritime Safety Authority Act 5/98 provides for the establishment of the South African Maritime Safety Authority (SAMSA) and other incidental matters. SAMSA's objectives are to ensure the safety of life and property at sea, to prevent and combat pollution of the marine environment by ships and to promote the Republic's maritime interests.

e) Legal security of the operator

Installations are usually used extraterritorially and therefore cannot necessarily rely on the State's legal system. Installations are also of enormous economic value, so the status in law must be clear. In South Africa this is the case where the Maritime Zones Act 15/94 applies the entire body of South Africa law to installations in the Exclusive Economic Zone (200nm) and on the continental shelf (approximately 350nm):

> "(1) Any law in force in the Republic, including the common law, shall also apply on and in respect of an installation.
>
> (2) For the purposes of subsection (1) an installation shall be deemed to be within the district, as defined in section 1 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), designated by the Minister of Justice.
>
> (3) In the absence of a designation contemplated in subsection (2) an installation shall be deemed to be within the district nearest to that installation.

f) A legal regime should be created

Because most installations occur extraterritorially there needs to be a regime to apply to personnel (e.g. civil, criminal, social, fiscal). In South Africa, the Maritime Zones Act applies as in (f). Note that installations may have a tax regime which differs from that on land.

g) Incentives for developers

Technical know-how is with the big United States companies and they are looking for opportunities. South Africa therefore needs a measure of technical feasibility to attract serious investors. Political stability is also important, as are favourable contract terms. Competition exists to attract investors and so a favourable tax regime is also needed. A good example of this is the Phillips lease regime - tax only comes into effect on discovery of oil / gas, and the rate of tax is fixed at 35% (usually 72%) to align with the generally prevalent international percentage. No foreign exchange controls apply and only a small royalty is payable to Soekor.

h) Incentives for fast development

If licence fees are too low, the developer might not feel an urgency to develop. Therefore it is important to put a time limit on development. In South Africa, Phillips pay $US 150 000 / year during the exploration lease, with their total capital investment being estimated at about $US 20 2000 000. The lease expires on 6 May 2001, but can be renewed twice for a further period of 3 years. There is also a work programme in which Phillips are undertaking to do 1500 km of seismic surveying during the 4 years and drill at least one exploration well. If the lease is renewed, there will be undertakings to drill other wells as well.

i) Orderly and gradual development

The state will try to ensure that there is a gradual flow of oil / gas over a long period of time. This is done by putting up blocks for tender piece by piece. In South Africa, Soekor has rounds of invitations to tender.

j) Economic interest of State

In themselves, oil and gas are great economic assets which can be increased by bringing them ashore before exporting. Many states require oil and gas to be landed. In South Africa, this is the case with Mossgas and so it has the necessary infrastructure in Mossel Bay. Phillips has no restriction on international marketing but does have to process an oil and gas discovered at Sasol or in Durban.

k) Strategic interests of State

Oil / gas are strategic resources, which is why many states require onshore landing. States also create state oil companies e.g. British National Oil Company (BNOC) and Norway's State Oil Company (STATOIL) which take up holdings in other companies. The rationale behind this is so that the state can act in an emergency to get hold of oil. In South Africa there is no problem with Soekor because it is parastatal. The Phillips contract stipulates that Soekor has the option to take 10% equity in the consortium for no consideration (i.e. for no financial remuneration).

2. OFFSHORE OIL AND GAS DEPOSITS

Most oil and gas occurs on the continental shelf. With the technology available today, it is only technically feasible to prospect and exploit on the South African continental shelf within the 200 nautical mile limit of the Exclusive Economic Zone (given jurisdiction by the Law of the Sea Convention and claimed in the Maritime Zones Act). However, it may in the future be possible to exploit on areas of the continental shelf beyond 200nm. In such cases, South Africa would still have jurisdiction, given by special rules of art 76 (paragraphs 4-6) of the Law of the Seas Convention:

> "4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.
>
> 5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 meter isobath, which is a line connecting the depth of 2,500 meters.
>
> 6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of

the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs."

3. DEFINITIONS

Since the purpose of this essay is concerned with a legal regime governing resources, activities and structures, it is necessary to define these in the legal sense. As an example, the word installation in technical terms may conjure up images of only traditional platforms. The legal definition, however, has further implications, as shall be seen later.

3.1 Oil and gas

According to the Minerals Act 50/91 (1)(xiv), mineral means

> "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings and having been formed by or subject to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil"

This definition would thus include natural oil and gas.

3.2 Prospecting and mining

The Minerals Act 50/91 (1)(xiii)(b) defines mine (used as a verb) as

> "the making of any excavation or borehole referred to in paragraph (a)(I) to the exploitation of any mineral deposit in any manner, for the purpose of winning a mineral, including any prospecting in connection with the winning of such mineral;(xx)"

It can thus be inferred that both exploring and exploiting (prospecting and mining) of natural oil and gas are covered in the definition of "mine" in the Minerals Act 50/91.

3.3 Installation

As mentioned earlier, the technical and legal definitions of installation are different. While the word installation may imply a fixed structure, such as in figure 2, the Maritime Zones Act 15/94 (1) defines installation as:

" any of the following situated within internal waters, territorial waters or the exclusive economic zone or on or above the continental shelf:

(a) Any installation, including a pipeline, which is used for the transfer of any substance to or from- (i) a ship; (ii) a research, exploration or production platform; or (iii) the coast of the Republic.

(b) Any exploration or production platform used in prospecting for or the mining of any substance.

(c) Any exploration or production vessel used in prospecting for or the mining of any substance. [Para. (c) substituted by s. 3 of Act 82 of 1995.]

(d) A telecommunications line as defined in section 1 of the Post Office Act, 1958 (Act 44 of 1958).

(e) Any vessel or appliance used for the exploration or exploitation of the seabed.

(f) Any area situated within a distance of 500 metres measured from any point on the exterior side of an installation referred to in paragraph (a) or (b) other than a pipeline.

(g) Any area situated under or above an installation referred to in paragraph (a) or (b);

Thus it can be seen that legislation applying to "installations" will have further applications than might be obvious at first glance.

A typical offshore installation

4. LEGISLATION

The main point to note here is the legislation with regards to oil and gas is not coordinated. *Ad hoc* pieces of law can be applied to various operations in the various zones offshore South Africa and these are identified below. Pollution laws are contained in a separate section.

4.1 Authority to mine

As mentioned previously, Soekor obtained the right to prospect and mine under the old Mining Rights Act 20/67. Currently, sections 6 and 9 of the new Minerals Act 50/91 deal with the issuing of prospecting permits and mining authorisations respectively. Any new leases granted would be done so under the new act.

4.2 Seashore, internal waters, territorial waters

Because different legislation applies to different offshore zones, it is necessary to define the boundaries of these zones.

a) The Seashore Act 21/35 defines the seashore as the area between the high and low water marks. The State President is deemed to be the owner of the seashore and is it's custodian on behalf of the citizens of South Africa.
b) The Maritime Zones Act 15/94 defines internal waters as all waters landward of baselines established by the Act (two types of baselines occur in different areas viz. the low water mark and straight (man-made) baselines).
c) The same Act also defines territorial waters, these being 12nm from whichever baselines apply in a specific area.

All South African statutes apply in these areas because of the Maritime Zones Act 15/94 section 4(2), which says:

> "Any law in force in the Republic, including the common law, shall also apply in its territorial waters and the airspace above its territorial waters."

All South African common law applies for the same reason i.e. there is no difference between the land and these sea areas. In summary, all South African statutes and common law apply up to the 12nm territorial waters limit.

4.3 Beyond territorial waters (contiguous zone 24nm, EEZ 200nm, Continental Shelf 350nm, high seas, waters of other states)

4.3.1 Applicable statutory law

A good starting point would be to assume that South African legislation does not apply extra-territorially i.e. beyond the territorial waters. This was decided in Chemical Workers Industrial Union v Sopelog 1988. The issue was whether the Labour Relations Act 28/56 applied outside territorial waters. The courts assumed that the statutes didn't apply i.e. there was a presumption of non-application. It is necessary, therefore, to find a legislative intent to extend the act. This can be found in two places, either (i) in the act itself (expressed or implied) or (ii) in another act.

i) Auto extension of statutes:

Here a number of examples of statutes which extend themselves to be enforceable extra-territorially are provided. This is not an exhaustive list, but is provided for illustrative purposes.

a): The obvious example is the Maritime Zones Act 15/94, which creates a Contiguous Zone of 24nm, as well as an Exclusive Economic Zone and Continental Shelf and then applies all South African law to these areas.

b) The Admiralty Jurisdiction Regulation Act 105/83 applies to collisions between ships, wherever they occur

c) The Customs and Excise Act 91/64 applies to installations on the continental shelf. The installation is deemed to be part of the republic.

d) The Labour Relations Act 28/56 was amended in 1991 to extend to all activities on the continental shelf

e) The old Sea Fisheries Act 12/88 gave fisheries control officers power to act anywhere at sea. The act was of course replaced by the Marine Living Resources Act 18/98 which, in section 3(2), specifically makes the provisions of the act extraterritorial

> "This Act, including any applicable regulation, shall have extraterritorial application."

f) The Prevention and Combating of Pollution of the Sea by Oil Act 6/81 created a prohibited zone of 50nm from the coast, within which it is considered an offence to discharge oil. This act now exists under two new names, the Marine Pollution (Control and Civil Liability) Act 6/81 and the definition of prohibited area has been amended to include the internal waters, territorial waters and the exclusive economic zone.

g) The Dumping at Sea Control Act 73/80 applies to South African ships anywhere (the Merchant Shipping Act 57/51 will identify whether an installation is considered a ship for this purpose).

h) The Intervention Act 2/86 applies to casualties at sea and entitles the authorities to intervene on the high seas to prevent pollution.

i) The National Environmental Management Act 107/98 (section 2) lists national environment management principles which apply throughout the Republic to the actions of all organs of the state that may significantly affect the environment. These would obviously apply to all activities within internal waters and possibly territorial waters. NEMA does not, however, define the Republic and so it is assumed the Republic extends to the limit of the territorial waters. Thus it is debatable whether the NEMA principles would extend to the limit of the Exclusive Economic Zone.

j) The Environment Conservation Act 73/89 enables the Minister to identify and place certain restrictions on those activities which in his opinion may have a detrimental affect on the environment, including resource removal. These restrictions would obviously apply to the extent on the Exclusive Economic Zone.

ii) Statutes extended by other statutes:

Two examples are considered here:

a) The Merchant Shipping Act 57/51 Section 327(1) deals with criminal offences on South African ships wherever they are and therefore all criminal law statutes follow this.

b) The Maritime Zones Act 15/94 extends substantial bodies of legislation to extra-territorial waters e.g. customs and excise acts, immigration laws (Admissions Act 59/72, Departure Act 34/35), health laws, fiscal laws to the contiguous zones. Also all statutes and common law extends to installations in the Exclusive Economic Zone and continental shelf and to a 500m pocket around the installations.

4.3.2 Applicable common law

Common law will apply in three cases:

(i) When it is extended by a statute e.g. Merchant Shipping Act 57/51 Section 327(1)
(ii) When a statute already applies, some common law could also apply if attached to the statute
(iii) When the courts interpret the statutes as being applicable.

4.3.3 Application of the constitution

Certain statutes apply as well as the rules of common law. These can be tested constitutionally and therefore the constitution will follow these laws offshore.

4.3.4 Contractual law

Exploring / exploiting was taking place beyond the territorial waters and therefore most statutes did not apply before the Maritime Zones Act was in place. The mechanism to make the statutes applicable was contracts.

Soekor had prospecting and mining leases (PL and ML). These two leases were simply contracts with two types of clauses:
i) Clauses obliging Soekor to comply with certain legislation
(ii) Clauses obliging Soekor to observe certain standards

Type i) is of primary interest here. The relevant clauses in the contract are PL 33(2) and ML 32 and they oblige Soekor to respect all South African law in force on or before 29/07/77 and any additions / substitutions after 29/07/77 provided that they had no adverse effects on Soekor's activities and that Soekor consented to the application of these laws. The net result is that Soekor cannot be prejudiced without its consent.

The provisions in the lease raise a number of questions:

a) Is the contract binding on the State?

Yes. The Mining Rights Act 14(3) says that the terms and conditions of the lease are binding on the State

b) Is the contract binding on Parliament?

No. A parliament cannot bind a future parliament and so the Mining Rights Act 14(3) could be repealed / amended by a future parliament

c) Is the contract binding on the Government?

Yes. The United Kingdom and Norway provide good comparisons. The United Kingdom has a similar approach to South Africa because it also imposes terms / conditions on concession holders via contracts. It is of the opinion that public power exists for public benefit and therefore cannot be limited by any particular contract i.e. the contract could be adversely affected. Norway draws distinction between the regulatory part of the contract (e.g. taxation) which can be changed by exercising public authority and the commercial part of the contract (e.g. licence fees, concession areas) which cannot be changed. South Africa law says that public power cannot be limited by a contract, but can be limited by legislation.

The Mining Rights Act 14(3) says the state is bound by the contract and therefore the minister would not be able to alter the terms of the contract.

d) What is the relevance to the constitution?

If parliament amends the act adversely, sections 25(1)(2) of the South African constitution say that nobody shall be deprived of property unless it is in the public interest and then only on payment of just and equitable compensation. Section 25(4) says that property is not confined to land and therefore leases could constitute property. What would just and equitable compensation be in the case of Soekor? Nothing, because the state would be detrimentally affecting itself. The case would be different for sub-lessees and if a sub-lessee was foreign, there could be international implications as well.

e) What provisions are binding on the State?

The state grants a prospecting lease. Attached to the prospecting lease is a draft / specimen mining lease. The Mining Rights Act said that when certain conditions are fulfilled, the mining lease proper will be issued and it will have the same terms and conditions as the draft / specimen version. Therefore, the provisions of both leases are binding on the state. What provisions applied before the mining lease was granted? The provisions of the specimen mining lease were initially binding as well.

f) What are the remedies for breach of contract?

Prosecution: Prosecution in terms of criminal law is possible because the Mining Rights Act section 186 says breaking the terms of the lease is a criminal offence
Civil action: The state may sue, but there is a provision that if the breach of contract arises out of circumstance beyond Soekor's control, then Soekor is not liable (Mining Lease clause 27(1) and Prospecting Lease clause 31(1)).
Termination: If Soekor breaks the lease, action to terminate the lease could be taken.
Ejectment: Soekor could be ejected from the concession if the lease is broken.

g) Who has locus standi (ability to bring action)?

The state has the ability to prosecute, both the State and Soekor have the ability to bring civil action against the other party, both have the right to terminate the contract and the State can eject Soekor.

h) What about third party remedies?

Does an injured person have locus standi if the injury was caused by a breach of contract? No. Only parties to the contract can enforce it and therefore no direct action can be taken.

Action can only be taken by a third party if any of three cases are evident:

a) Stipulatio Alteri: This applies if the contract between A and B intends to confer benefits onto a third party C. Do the government and Soekor intend stipulatio alteri? An LLM thesis concluded that stipulatio alteri was not intended in the lease.

b) The individual has a contract of employment with Soekor. If the contract is broken, he third party may be able to bring action.

c) Delict (wrongful act unconnected with the contract): If a person is injured on an installation due to the delict of Soekor, then action can be brought. If injury occurs > 500 m from the installation (e.g. as a result of an explosion on the installation), could the injured person bring a claim? The indications are yes because the event occurred on the installation.

4.4 Pollution prevention and control

The main pollution threat from offshore installations is obviously from oil and so some of the more important international and national legislation pertaining to oil pollution is examined.

4.4.1 International Conventions

a) **The Law of the Sea Convention** is a logical place to start this discussion. Part 12 is dedicated to the protection and preservation of the marine environment and contains provisions regarding marine pollution from specific sources as well as on their enforcement. These include provisions on marine pollution from vessels. The LOSC defines marine pollution as:

> "The introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities".

b) **The International Convention for the Prevention of Pollution of the Sea by Oil, 1954** (OILPOL) was the forerunner of contemporary marine pollution conventions in that it was aimed at controlling only one substance, namely oil. It was not limited to operational discharges but emphasised operational discharge by prohibiting the discharge of oil and oily mixture having an oil content of more than 100 parts per million within 50 miles from land and in certain special areas.

c) **The International Convention for the Prevention of Pollution from Ships 1973** ('MARPOL') deals much more specifically with pollution from vessels, its main aim is to prevent or regulate deliberate operational discharges rather than to deal with its consequences. It covers various technical aspects of pollution from ships at sea.

d) **The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969** (the 'Intervention Convention') allows coastal states to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave or threatened danger to their coastline of related interests from pollution or threat of pollution from oil as a result of a maritime casualty.

e) **The International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990** (the 'OPRC' Convention') obliges parties to take all appropriate measures to prepare for and respond to an oil pollution incident. It applies not only to ships but also to 'offshore units' and 'sea ports and oil handling facilities'.

f) The object of the **International Convention on Civil Liability for Oil Pollution Damage 1969** is to establish a uniform regime allowing victims of oil pollution damage to seek compensation against owners of vessels which caused the harm. It does so by imposing strict liability for oil pollution damage subject to certain exceptions. The convention limits liability to certain stipulated amounts provided the owner constitutes a fund for the total sum representing the limit of his or her liability. The liability of a ship owner is limited to an amount of 210 million francs (roughly equal to US$ 210 million) if the ship owner carries insurance. Claims can only be made if the damage occurs on the territory of a state up to the extent of the territorial sea. The convention defines pollution damage as:

> "loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures".

The question arises whether the definition includes only physical damage or whether pure economic loss would also be recoverable. A second problem arises; that of quantifying "environmental damage", but these are not within the scope of this essay.

g) The **Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972** (the "London Convention") defines dumping as the deliberate disposal of land-based wastes from ships and aircraft, but excludes the disposal of waste from the normal operation of ships and aircraft which is covered by MARPOL as seen above. Under the London Convention, the dumping of oil is prohibited altogether.

4.4.2 National Legislation

a) Section 10 of the **Maritime Zones Act, 15 of 1994** provides that the Republic may take whatever measures are necessary in the sea or airspace above it which may be necessary to protect the coastline "from pollution or threat from pollution". As mentioned the Act stipulates that all the laws of the Republic, including the common law. applies to offshore installations. These would include those applying to marine pollution.

b) According to the **Marine Traffic Act, 2 of 1981**, the Minister is empowered to declare safety zones in respect of off-shore installations which also have relevance to pollution.

c) The **Sea-Shore Act, 21 of 1935** is indirectly relevant to marine pollution as it lays down the legal status of the sea and sea-shore as well as providing for administration of the area. It provides the Minister with the authority to make regulations "for the prevention or the regulation of the depositing or the discharging upon the sea-shore or on the sea of offal, rubbish or anything liable to be a nuisance or danger to health".

d) The **Marine Pollution (Prevention of Pollution from Ships) Act, 2 of 1986** (the "MARPOL Act") was previously titled the International Convention for the Prevention of Pollution from Ships Act. and incorporates the MARPOL Convention into South African law.

e) The **Marine Pollution (Intervention) Act 64** of gives domestic effect to both the Intervention Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties as well as the Protocol Relating to Intervention on the High Seas in cases of Marine Pollution by Substances other than Oil, 1973.

f) The **Marine Pollution (Control and Liability) Act 6 of 1981** was previously titled the Prevention and Combating of Pollution of the Sea By Oil Act. It by and large deals with criminal an civil liability after a 'discharge' causing pollution of the sea has occurred.

The Act is not limited to discharges of oil, nor is it limited to discharges from vessels as discharges from offshore installations are also included. Moreover the wide definition of 'discharge' includes operational discharges as well from accidents. "Discharge" is defined as:

> "in relation to harmful substance, means any release, howsoever caused, from a ship, a tanker or an offshore installation into a part of the sea which is a prohibited area, and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying; and 'discharge' being used as a verb, has a corresponding meaning"

'Oil' is defined as follows "...in relation to-

> (a) a discharge of oil from a ship, a tanker or an offshore installation, means oil as defined in regulation 1 of Annex I to MARPOL 1973/78 and includes an oily mixture as defined in that regulation; and
>
> (b) loss or damage caused as contemplated in section 9(1)(a) where the discharge in question took place from a tanker, and for the purposes of section 13 (1), means oil as defined in paragraph 5 of Article 1 of the Convention.

The definition of 'discharge' also refers to 'prohibited area' which in turn is defined as:

> "...the internal waters, the territorial waters and the exclusive economic zone and in relation to offshore installation, includes the sea within the limits of the continental shelf".

The Act holds the owner criminally liable if any oil is discharged from a ship, tanker or off-shore installation, barring three specified exceptions. The same section provides that:

> "If in any prosecution for an offence under subsection (1) it is proved that a mixture containing oil was discharged from a ship tanker of off-shore installation in the part of the prohibited area which adjoins the prohibited area of the Republic to the seaward side thereof, it shall be deemed unless the contrary is proved, that such mixture contained one hundred parts or more of oil in a million parts of the mixture"

In essence this requires the accused to prove that evidentiary samples taken by the state are not representative of the discharge, rather than the state proving that they are (the constitutionality of this can be challenged).

The Act also provides for civil liability by providing for liability for loss, damage or costs caused by discharge of oil into the sea. Such liability is also strict and applies not only to vessels but also to off-shore installations. The relevant section provides:

"...the owner of any ship, tanker or off-shore installation... shall be liable for-

(a) any loss or damage caused elsewhere than on such ship, tanker, ship or offshore installation in the area of the Republic by pollution resulting from the discharge of oil from such ship...."

"...(b) the costs of any measures taken or caused to be taken by the Minister in terms of this Act after an incident has occurred... for the purposes of reducing loss or damage caused as contemplated in paragraph (a)... or for the purposes of preventing such loss or damage being caused..."

"...(c) any loss or damage caused in the area of the Republic by any measures so taken or caused to be taken after discharge as contemplated in paragraph (a) has occurred".

g) The **Dumping at Sea Control Act, 73 of 1985** is more or less modeled in its totality on the London Dumping convention described above. The applicable areas include the internal waters, territorial sea and exclusive economic zone.

5. CONCLUSIONS

The legal regime governing the exploration and exploitation of natural oil and gas in South Africa's offshore zone, has as its foundation, the Maritime Zones Act, which applies the entire body of South African legislation to installations. Other national acts also have extra-territorial applications, either by an auto extension of their statutes, or by being extended via the provisions of other statutes. International law allows South Africa to make provisions for this extra-territorial jurisdiction. Pollution prevention and control is governed by numerous international conventions to which South Africa is a party, as well as numerous national acts. While is not the intention of this essay to deal with enforcement issues, it can be noted that the fragmented nature of the legislation governing the oil & gas regime, as well as the difficulty in proving contravention in certain instances (see definition of oil in Act 6 of 1981), does lend itself to enforcement problems.

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An Overview of the Law Governing Mariculture

1999

For Prof. J Glazewski
By J Bruk

Coastal Zone Law

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1. Introduction

There appears to be a unique fascination with fish in captivity. This is borne out by the aquarists hobby. The fascination seems to span the Ancient Roman festivities associated with holding parties to watch the physiological effects of death on Red Mullet[1] and extends to the "fish cam" an Internet site consisting merely of a camera pointing at a goldfish bowl. There are other ostensibly more constructive uses of aquatic biota in captivity.

The advances in technology have lead to more efficient fishing techniques which among other factors has lead to severe depletion of fish stocks. This has prompted investigation into methods to remedy excessive exploitation and to find alternative sources to the traditional harvest.

Mariculture is seen to provide that alternative source of fish but its role is more extensive.

Mariculture has a unique role to play in development it can provide employment and food to underdeveloped regions

I will consider in broad terms the regulation of mariculture under South African Law and pay particular concern to some of the unique problems posed by mariculture.

1.1 Mariculture in South Africa

Peter Cook[2] in provides an overview of the types of aquaculture currently being conducted in South Africa. He mentions a variety of mariculture operations including:

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[1] Mediterranean Seafood

[2] Aquaculture in South Africa Current Status and Regional Potential.

1.1.1 mussels

Here ropes are suspended from rafts moored in sheltered estuaries or bays. Mussel larvae attach to the ropes and are harvested at maturity. The harvest of farmed mussel is estimated to have been in the region of 1892 tons in 1993.

Rafts of this type require a situation where they are safe from the extreme wave action to which much of the South African coast is exposed. The principle mussel farm is located near Saldanha in the Langebaan Lagoon.

1.1.2 Pacific oysters

These are raised in the Knysna area from spat. and a variety of techniques are employed. Cook[3] points out that the Pacific oyster has not shown signs of becoming invasive. Cook estimates the oyster industry produced in the region of 4,5 million oysters in 1993[4]

1.1.3 Perlemoen

As will be more fully considered below, the nature of the perlemoen mariculture operations challenges the definitions of aquaculture. The perlemeon are grown in tanks with water pumped in from the sea. They are fed kelp which is harvested from the sea. Cook provides a rough estimate of production at an amount of about 500 tons.

1.1.4 Sea Weed

Cook describes the sea weeds production as being either in tanks or rafts as with mussels. He alludes to a successful gracilaria farming enterprise in Namibia which is based on the raft method.

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[3] op cit

1.2 Definitions

There does not appear to be a legal definition of Mariculture. Fuggle and Rabie in "Environmental management in South Africa" provide only the most cursory of definitions of aquaculture. They describe it at page 652 as follows

> *"aquaculture consists of the commercial cultivation and harvesting of aquatic organisms."*

This is not an overly useful definition in that it seeks to include only the commercial operator and excludes those involved in mariculture exclusively for research purposes

There is also a difficulty in distinguishing mariculture from aquaculture. Aquaculture implies the raising of aquatic biota in captivity. Mariculture carries with it the implication that the activity is conducted in or around the sea. Both these attempts at definition are problematised by the nature of the activity. Some Mariculture takes place in a closed tank with sea water piped some distance. This is the case with perlemoen (haliotis midae) farming near Port Elizabeth. Is this activity mariculture because it is a marine species, even though there is no direct contact between the biota and the sea? The corollary is posed in certain types of salmon farming which can take place vast distances inshore in mountain streams where the fish farmer releases his or her anadromous charges into spawning streams to travel to the sea. The fish later return to breed and are captured by the fish farmer.

The fact that the salmon are released further challenges the component of captivity. A more encompassing definition would require merely control and the spawning instinct would establish sufficient control to conform to the definition. A possible solution is to look at the type and degree of control with the wild animal to establish whether control is in place.

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[4] op cit at 470

The absence of an exhaustive definition of mariculture perhaps speaks to the variety of types of operation and the extent of human enterprise in the field.

1.3 Concerns and focus areas

Mariculture provides unique challenges in many regards. A very fundamental concern is the ability of a person to appropriate a public area such as parts of the sea and conduct mariculture to the exclusion of third parties. The problem could be crisply stated as follows. The sea is (subject to the Sea Shore Act[5]) a *res publicis* and not readily capable of private appropriation. The robustness of the old authorities and their ability to address this concern is discussed below in an "historical note"

A further key concern is the demands and effects of aquaculture on its immediate environment. This would entail elements such as water quality and inter -species Competition. Mariculture operations are reliant on an environment which will sustain maximum productivity. Pollutants could visit ruin on an mariculture and at the same time mariculture is capable of being a polluter.

The operations are reliant on pesticides and piscicides as well as other veterinary applications.

1.3.1 Competing uses of the resource

The mussel rafts at Saldanha are located a few hundred metered from the iron ore terminal which is the port through which iron ore from the Northern Cape interior is exported. The Langebaan Lagoon is also an important tourist area and the wetland enjoys Ramsar proclamation. The shallow mudflats provide a "waystation" for the aquatic birds which gather there on annual migration routes to feed on fish molluscs and worms. The mussel farming operations may pose a threat to these sea birds if the operation is allowed to use pesticides which restrict the types of biota which attach to the ropes. The iron ore terminal poses a threat from pollution and through possible

damage through navigational error and collision. Mariculture rafts are a fairly crude affair and are not necessarily aesthetically pleasing. The wave free environments of estuaries and lagoons so suited to mariculture operations are also favourite tourist destinations where unspoilt seascapes are placed at a premium.

A particular concern not confined to mariculture but common to any enterprise where a species is raised in captivity and then released into the wild is that a particular genetic strain might be chosen and propagated to the exclusion of others. This can have the effect of weakening genetic diversity which in turn reduces a species ability to cope with disaster.

The question of scale of the operation should also be noted. The larger the scale of the operation the greater the extent of the consumption of freely occurring food (such as in the mussel industry). A greater scale would involve more chemicals to treat disease or to fertilise the operation.

1.4 Historical Note

It would be amiss to attempt to consider the current regime governing mariculture without a short excursus into the way mariculture was viewed under Roman Dutch Law. This is particularly true in view of the statutory interpretation which asks that a statute be interpreted to cause as little disturbance to the common law as possible.

The approach of the old authorities appears to be satisfyingly robust and common sense. Grotius in De Mare Liberum[6] readily accords the protection of the Law to a person conducting mariculture activities in the marine.

Grotius readily overcomes the difficulty posed by having uniquely private rights in what is a public domain. Grotius suggests that the private- public contradiction is not

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6 see generally at page 87

insurmountable and that private rights could accrue to a person engaged in mariculture :

> *"... The same principle which applies to navigation also applies to fishing namely that it remains open to all. Nevertheless there shall be no prejudice if anyone shall by fencing off with stakes an inlet of the sea, make a fish pond for himself and so establish a private reserve... "*

He continues that:

> *"If anyone had prevented Lucullus or Appollinaris from fishing in private fish ponds which they had made by enclosing a small portion of the sea, according to Paulus they would have the right of bringing an injunction (interdictum), not merely an action for damages based on private ownership."*
>
> *Indeed if I have staked off an enclosure in an inlet of the sea just as in a branch of a river, and have fished there, especially if by doing so for many years I shall have given proof of my intention to establish private ownership. I shall certainly prevent anyone else from enjoying the same rights. I gather from Marcianus that this case is identical to ownership of a lake and is true as long as Occupatoin lasts."*

2. Regulation by Statute

There has been extensive statutory intervention into the realm of mariculture. Unlike the mariculture operator in the time of Grotius who could content himself to stake off his or her little inlet, the modern operator would face a suite of legislation which demands compliance

2.1 The Marine Living Resources Act

The main area of regulation of Mariculture is governed by the Marine Living resources Act (MLA). This act provides for both the granting of rights and the conditions under which those rights can be exercised

2.1.1 Granting of Rights

Section 18 of MLA provides that "no person shall ...engage in mariculture... unless a right to engage in such activity... has been granted by the minister. The same section also deals with the rights of the various classes of fishers as well.

The minister is empowered to grant leases over rights in Mariculture. In section 22 "The Minister may prescribe the method of allocation and payment in" in respect of such leases

The value of the lease construction lies perhaps in its ability to grant to the tenant those rights of the landlord which the landlord enjoys against Third Parties[7]. This should perhaps be seen against the provisions of the Sea Shore Act[8]. Where rights in the Sea Bed are held by the President.

The lease construction provides *locus standi* to a person conducting mariculture to seek protection from harm visited or threatened by a third party. It manages to import the "Objective reasonableness principle" which is used to determine competing rights.[9] The lease construction provides a well developed body of Law to govern the regulation of what is in fact an unusual construction.

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[7] See Generally Coopers "Landlord and Tenant" Particularly at

[8]

[9] see generally the discussion of the principle of Neighbour Law provided by V d Merwe in the Law of Things

2.1.2 Empowering provisions

The main source of regulation is by regulations created under the act. The empowering section is section 77(2)(cc) Pursuant to this section the minister may promulgate regulations "to ensure the orderly development and control of mariculture in the Republic".

As will be more fully discussed below the regulations provide for a regime involving a permit system where applications for permits can be considered and possible environmental impacts evaluated. Permits may be granted subject to conditions and the mariculture operator is obliged to furnish information surrounding the operation, on demand to the State.

2.2 The regulations

2.2.1 Areas covered.

The regulations begin by pointing out that it applies to "mariculture undertaken for commercial, experimental or research purposes"[10] This is significant in that it casts such a wide net. This broad scope is perhaps to discourage a commercial mariculture practitioner from purporting to be conducting a mariculture operation under the guise of research[11].

What is not specifically clarified is precisely what mariculture is. As mentioned above the absence of a legal definition is compounded by the provision in the regulations for other fish raising activities.

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[10] s60

[11] Concerns in the area of whaling regulation could perhaps be referenced where whaling nations harvested extensively under the banner of research and the objects of the research were rumoured to have found their way onto the floor of the Tokyo fish market.

S24 of the regulations provides for "Marine Aquarium Fish". The regulations that "Except on the Authority of a Permit no person shall...engage in fishing or collecting any marine aquarium fish, or keep in any aquarium any fish for any purpose."

This can lead to some confusion in that certain types of mariculture closely resemble aquaria. (As was mentioned in the discussion of perlemoen)

2.2.2 Permits and Applications

The Regulations proceed to detail the requirements that an Applicant for a mariculture a permit is obliged to provide. It is quite extensive and bears cataloguing.

As regards the biota which is to be raised the applicant is required to state the name of the species[12], its origin and in the case of imported species the applicant must state the steps that would be taken to "avoid the introduction of exotic commensals, parasites and pathogens"[13]

The applicant must provide details both of "method of cultivation" as well as "mitigating against potential environmental impacts"[14]

The prospective operator must further provide details as to the "chemicals such as antifoulants, fertilisers, disinfectants, therapeutants, pesticides, herbicides, hormones and anaesthetics" and their methods of application[15]

The applicant is further obliged to provide other information including a map of the site where the operation is to occur[16] together with a marketing strategy[17] and the extent of the "facilities and employment opportunities that will be created."[18]

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[12] s6 i(1)
[13] s6 i(c)
[14] s6 i(d)
[15] s6 i(e)
[16] ss(f)
[17] ss(g)
[18] ss(i.)

2.2.3 Environmental Impact assessment.

The applicant is required to provide an Environmental impact assessment (EIA). The report of any body reviewing the EIA is to accompany the Application. The Minister has the further power under section 69 to serve notice on the permit holder or potential permit holder which requires the applicant or permit holder to provide that an EIA to be done within a certain time by an independent party. A possible exception are mariculture development areas where EIAs have already been performed.

Section 69 continues to provide for follow up testing of water quality and other tests if the EIA suggests such a monitoring regime.

The provision in the Regulations of such a developed EIA procedure would suggest that parallel provisions elsewhere in the Law might be ousted. Section 61(2) provides that should a report be prepared under the Act or any other law the report is to be provided to the minister.

2.2.4 Granting of permits and conditions

Should the permit be granted then the minister is empowered to impose conditions on the conduct of the operator.[19] These include aspects of production and marketing and the provision of information relating to the operation to Minister concerning "the mass, size and number of mariculture products harvested" and "details regarding price, sales and purchasers"[20]

These provisions clearly correspond to the Ministers empowering provisions in that they are geared toward an orderly development. More importantly they provide the Minister with an opportunity for long term monitoring.

2.2.5 Mitigation of possible harm

The operator has a duty to conduct the operation in a manner which causes the minimum of harm as far as both water quality and inter species competition is concerned. The main parts of the regulations which provide for this are to be found in

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[19] generally at s62
[20] op cit

s 63 where it is stated quite clearly that "a mariculture permit holder shall take all reasonable measures to avoid or minimise any harmful environmental impacts" this is extended to include "the discharge of effluent and the disposal of sludge" "effluent" is defined as "liquid waste produced by mariculture" and "sludge" is defined as "solid or semi solid organic waste"

An important section[21] deals with the release of fish and provides that "Except for indigenous wild fish caught in the Republic, no person shall release into South African waters any fish without the written permission of the Minister." This is an important section and addresses a vital concern in mariculture that local populations should be protected against alien species imported for reasons such as their adaptability to a wide spectrum of conditions and perhaps that they are prolific breeders.

Consistent with the threat of other species is the spectre of the genetically altered fish or marine organism. S 70 provides that the Ministers permission is required to use genetically altered organism in a mariculture operation.

Section 72 addresses the problem of the use of pharmaceuticals in the operation. It provides that "any person intending to use any chemical, piscicide, pharmaceutical, bio remediation product or its derivative" is to give the Minister advance notice and any extra information that the minister may require. The permit holder is to cease to use or modify his or her use of the chemical if ordered to do so by the Minister.

2.2.6 Consumer Protection

Section 73 prohibits the establishment of a mariculture operation in a contaminated site be the contamination through "toxic substances, faecal matter human pathogens or marine bio toxins." Harvesting may also be restricted during temporary degeneration of water quality "such as marine bio toxin events, oil spills and sewage contamination."

2.3 The Sea Shore Act[22]

One of the key contributions of this Act is that it provides a framework in terms of which rights in the marine environment can be delegated to a private individual. Under the Act the president is the owner of the shore below the high water mark and the Sea Bed as well as the column of water above it. S4 of the Act provides the empowering provision to allow the minister to enter into leases in respect of the sea shore. The purposes for which a lease may be entered into do not specifically include

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[21] s68

[22] 21 of 1935

mariculture but do not exclude it The purpose of the lease could include "The construction of structures[23]. As well as the erection of whaling stations or fish canning or other factories[24] or the catch all provision provided in subsection o provides for "the carrying on of any work which in the opinion of the minister serves a necessary and useful purpose"

2.4 The Health Act

Although this does not deal specifically with mariculture. The Minister of Health is empowered to make regulations dealing with food related activities which might have taken place in polluted water.[25]

3. Common Law Aspects

An exhaustive examination of the Common Law and its regulation of mariculture is beyond the scope of this paper. A more realistic exercise would be to examine a particular problem and see how it would be dealt with in South Africa.

3.1 Mull Shellfish v Golden Sea Produce Ltd[26]

The facts can be summarised as follows[27]. The pursuers were Mull Shellfish (Mull). They carried on the business of farming Mussels by growing on rafts with ropes attached. The mussel larvae would attach to the rope, mature and be harvested. Golden Sea Products (Golden) ran a salmon farm in the same loch as Mull. They raised salmon in cages. Golden treated their cages with anti foulant, to stop marine

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[23] s3(g)
[24] s3(i.)
[25] s37A
[26] 1992 SLT 703
[27] See generally at 704 D to F

organisms from attaching to the cages. As mentioned above Mull's whole business required the attachment of marine biota to structures.

Two types of damage appeared to have been caused to Mull the first being the disease and malformation of mussels attached to the ropes. The second was that free swimming larvae did not attach to the ropes as they ordinarily did.[28]

Golden challenged Mull's locus standi to claim for unattached larvae. Lord Murray examined the origin of Mulls rights to conduct their farm and found that they had been granted a lease from the crown to conduct their operation. The court found that the states right to have larvae attach to objects at sea was passed on to Mull under the lease[29].

The case would have been decided similarly under South African Law. The problem of locus would not necessarily have proved an obstacle. The lease construction would function similarly in conferring on the mariculture operator the ability to act in his own name.

The south African approach to neighbour Law differs from the English approach and a strongly analogous example of competing interests of land (water?) users bears consideration.

3.2 Regal v African Superslate[30]

The Facts briefly were as follows: Superslate and Regal owned adjoining properties. The owner of the property before Superslate had allowed an accumulation of Slate sludge to build up. This sludge had in turn washed down onto Regal's property causing damage.

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[28] see generally at 705 I to K
[29] op cit at 706 G to I and 707 C to E
[30] 1963 (1) S A 102 (A)

The Court on appeal considered a series of issues. The first is the law to be applied. It was held that the English approach did not form part of South African Law and the reasonableness of one land users use of his property with regard to another had to be considered separately.

The other finding of the Court was that the English Law approach which appeared to allow a claim for damages in the nuisance context was inappropriate. It was held that any claim for damages was to be brought with the Aquilian Action where fault in the form of negligence and intention had to be proved. The other requirements in the form of causation, harm or loss manifesting itself as damages, and a wrongful act are all necessary.

4. International Aspects

Many of the concerns alluded to above can be applied at an international level. Ocean currents could carry harmful pollutants or introduced exotic species to neighbouring states. An extensive examination will not be undertaken but the principles set out in the Trail Smelter Arbitration of 1938 and 1941 have a bearing. A state should conduct itself to cause the minimum of harm to another state.

In the Trail Smelter Arbitration the harm complained of was the emissions from a smelter which carried across the border from the USA and into Canada where they caused harm. A direct analogy could be drawn with any of the emissions from a mariculture operation or any escaped or released exotic species.

Paragraph 12 and 13 of the Law of the Sea Convention also regulate pollution of the sea.

5. Concluding Remarks

I have sought to conduct a brief overview of some of the issues which might face a mariculture operator. The South African regime as it now stands appears to address the needs of the operator by not being overly draconian and yet allow for efficient management and controls through the permit system.

INTERNATIONAL AND DOMESTIC LAW ISSUES

CONCERNING

OWNERSHIP AND CONSERVATION

OF

HISTORIC WRECK

ANDREW GILDER
COASTAL ZONE LAW - 1999 (PBL603E)
RESEARCH ESSAY

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INTRODUCTION

Much has been written about the importance of historic wrecks as 'time-capsules', providing a glimpse of a former period, kept unchanging by immersion. Whereas previously only a minority of wrecks were accessible, advances in technology are allowing access to increasing numbers of them, with the consequent danger of uncontrolled exploitation and loss of historically and archaeologically important material.

South Africa's rich maritime history has left our coasts littered with the remains of some 1500-1700 wrecks. Most are found in traditional anchoring spots - Table Bays boasts some 200 and Algoa 150. These were largely 'outward' and 'inward-bound' East Indiamen carrying a variety of goods, including money, war and building materials, spices, porcelain, silk, slaves, and (due to the increase in the nineteenth and twentieth Centuries of the carriage of raw materials and manufactured goods), manganese ore and motor car spares or railway lines.[1]

The need to protect underwater sites of an historic or archaeological nature has been recognised both in International law and the laws of various countries, including South Africa. The international law on the subject has imposed a duty on states to conserve this heritage without adversely affecting the rights of identifiable owners. National legislation has similar effect. But neither kinds of law give an indication of how this owner should be identified. General notions of Property law need to be reconsidered in light of this duty to protect, because serious inroads into owners' rights are often envisaged by legislation. The arrival of the National Heritage Resources Act (No. 25 of 1999), has thrown this debate into focus due to the significant impact certain provisions of the Act have on these rights.

This essay will investigate the determination of the rights of owners of historic wreck under the South African common law; and consider these in light of the law of other countries, international law (prevailing and draft), and prevailing, draft and defunct South African legislation.

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[1] Pugh, L. W. G., The Protection of Historic Wrecks in South African Waters, Department of Marine Law, UCT, Cape Town, 1996, at p 9

1. WHO OWNS HISTORIC WRECK?

1.1 SOUTH AFRICAN COMMON LAW

1.1.1 *OCCUPATIO*

In theory, if the owner of a historic wreck can be identified, problems of protection and preservation of the wreck can more easily be resolved. In practice, of course, the nature and location of many South African wrecks makes them a very difficult resource to police. The unscrupulous gathering of artefacts by collectors and others makes clarity of ownership a priority but, "...even clear title does not protect the owner from piracy."[2] In spite of this it is still necessary to seek such owner, and the proper place to start, it is submitted, is in the common law.

Perhaps the first consideration is whether the notion of a movable accruing to an immovable, to which it becomes attached, is relevant in a discussion of wreck. "Movable things are such as can be moved from one place to another without injury to themselves, while immovable things are those which cannot be moved."[3] While it is possible for a movable to become an immovable (for example by becoming affixed to such immovable by natural or artificial means[4]), where this takes place the new status of the movable must be determined by considering: "...objectively, the nature of the thing and the manner of its annexation and, subjectively, ...the intention of the owner of the movable at the time of its annexation."[5] It is submitted that, on both these tests, a wreck can never become an immovable. The manner of annexation of wreck is fortuitous, its nature militates against it acceding to the ocean floor, and it "..was never intended to be regarded as an immovable, however difficult the removal from its base may factually prove to be."[6] Thus, even though parts of a wreck may become 'physically' attached to the seabed, they never become so in a 'legal' sense.

From the Roman law South Africa has inherited the notion of 'res nullius' - something which does not belong to anyone, but which can be owned though 'occupatio.' There are two main classes of 'res nullius' - wild animals not in captivity and things abandoned by their owners ('res derelictae'). Joubert JA made a succinct statement of the Roman law when he said: "Volgens die Romeinse reg indien A n wilde dier jag en verwond maar B slaag daarin om dit te vang word B deur *occupatio* eienaar daarvan.....Die rede is omdat B fisieke beheer oor die wilde dier verkry met die bedoeling om eienaar daarvan te word. "[7] This principle was also enunciated in Roman-Dutch Law, but B (in the above example), would have found himself fined in terms of hunting laws. Despite this, Joubert JA says that: "*Van der Kessel* stel dit onomwonde dat die vanger eienaar word."[8]

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[2] Scheepers, G. P. J., 'The South African Law of Shipwreck: Contemporary and International Law. Perspective', Sea Changes, 10 (1989), 41 at 44. The writer also speaks about the "buccaneering-mentality" of sports divers.

[3] Wille's Principles of South African Law, (8th ed.), Juta, Cape Town, 1991 at 251.

[4] As in MacDonald v Radin and Potchefstroom Dairies 1915 AD 454.

[5] Silberberg and Shoeman, The Law of Property, Kleyn and Boraine (eds.), Butterworths, Durban, 1992, at 32.

[6] Van Meurs, L. H., Legal Aspects of Marine Archaeological Research, Institute of Marine Law, UCT, 1985, at 40.

[7] Reck v Mills en n Ander 1990 (1) SA 751 at 758F.

[8] ibid. 785G.

Reck's case was an appeal on a judgement granting one Mills an interdict against R's working on the wreck of the *Antipolis*. Initially R and M had been doing salvage work together but R had become dissatisfied with M and had begun an independent operation. At the point the application was made neither side had removed any part of the wreck, but both "...had made cuts with a view to separating the condenser in order to salvage the copper pipes it contained."[9] M sought to restrain R from interfering further with the condenser.

A previous case in point was that of Bell[10] in which B removed from the seabed, next to the wreck of the *Hypatia*, two of the four bronze propellers originally attached to the ship. All four had been removed from the wreck by the Underwater Construction Company, which had taken two to the surface, leaving the other two for their return, marked with a float-line, where B had found them. The court held that removal of the propellers from the wreck established sufficient control over them and consequently Underwater Construction had become the owner. The obvious difference between the two cases, as Lewis points out, is the element of separation.

The court *a quo* in Reck's case found a preferential right for M based on a reference of the Roman jurist Gaius to the view of Trebatius "...to the effect that if a hunter wounds an animal it at once becomes the property of the hunter, and remains his for so long as he follows it. If, therefore, while the hunter is pursuing the animal another person takes it, the latter will be guilty of theft."[11]

Lewis criticises the decision on the grounds that *occupatio* demands "taking control"[12] of a thing and that "...the grant of protection to a person who has not even managed to acquire possession of the thing defeats the object of the rules of *occupatio*."[13] The criticism is vindicated in the appeal court decision quoted above where Joubert JA held that the correct test would have been to decide if M had physical control ("fisieke beheer") over the condenser. The learned judge quotes the German jurist Von Savigny in the following terms on this topic:

> "The *factum* must be such as to place the person who desires to obtain possession in a position which shall enable him, and only him, to deal with the subject at pleasure;..." and "...viz, the physical power of dealing with the subject immediately, and of excluding any foreign agency over it..."[14]

Joubert JA found that M had not come to exercise the requisite control and amended the decision of the lower court.

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[9] Lewis, C., 'How Reck lost the Wreck', (1988) 18 Businessman's Law, 16 at 16.
[10] Underwater Construction & Salvage Co. (Pty) Ltd. V Bell 1968 (4) SA 190.
[11] Lewis, supra, 17. Burgher J in the lower court of Reck's case (Mills v Reck 1988 (3) 92 (C) at 98D-E) says: "There is a competition between the original possessor and the person intervening and in the absence of regulation by the court the situation could give rise to 'quarrels and brawls'. By analogy the original salvor or hunter should be given preference over the person intervening or gate-crashing." In the appeal court decision Joubert JA makes of this statement the remark (at 759A): "Dit is verkeerd an ongegrond." It has been suggested that the *a quo* decision is better in terms of the English law concept of equity. It is submitted that it would be quite possible for a South African court to interpret the Roman law more loosely, with regard to the concept of 'sufficient' control, to give voice to modern notions of what is equitable.
[12] Lewis, at p. 18.
[13] ibid.
[14] Reck v Mills, supra, 759 C and D.

1.1.2 ABANDONMENT

It seems obvious that wreck would fall into the category of 'res derelictae,' (i.e. things abandoned by their owners), and become capable of ownership through *occupatio*. Van Meurs, in approving an American law principle as applying to South Africa, says: "Marine antiquities are probably best described as abandoned property."[15] Although this may well be the case in many circumstances, it is submitted that a clear idea of what constitutes 'abandonment' is necessary to judge whether a wreck is truly abandoned by the owner.

Silberberg and Shoeman define ownership as an "absolute and individualistic"[16] right. This notion implies an unrestricted and exclusive control over the thing owned. It includes (not exhaustively) the right to use, consume, destroy, alienate, possess, to claim from an unlawful possessor and to resist unlawful invasion.[17] "Ownership is unlimited in duration and is not subject to a time limit."[18] Most significantly for a discussion of historic wreck, Silberberg and Shoeman go on to say that: "ownership is lost when the owner abandons his property with the intention that it should become a *res nullius*."[19] But mere loss of physical control does not does not result in loss of ownership except in the case of captured wild animals. "A thing that has merely been lost does not thereby become a *res nullius* and neither is ownership *ipso facto* lost in a thing which is abandoned in an emergency."[20]

This means that although a ship ceases to be a ship on sinking, it does not become a *res nullius* by the simple fact of its sinking and moving out of the physical control of the owner. This common law principle has been approved in case law[21] and by commentators such as Bamford who, in supporting the importance of the owner's intention in determining whether a wreck is abandoned or not, says: "Abandonment will not lightly be presumed."[22] Willes [23] adds the principle of value to the test of abandonment by the statement that: "If the property has any value the intention of the owner to abandon is not presumed." Van Meurs states, correctly it is submitted, that this "...presumption of non-abandonment would certainly diminish with the increased age of the shipwreck."[24]

During the Second Reading Debate on the National Monuments Act Amendment Bill (No. 35 of 1979), a speaker pointed out that for some wrecks the identity of the owner was "...lost in the mists of time." It is significant that he went on to say that where the owner was still identifiable "... the exploitation of the shipwreck...can only take place with the approval of the owner."[25] [26]

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[15] Van Meurs, supra, 37

[16] Silberberg and Shoeman, supra, 162.

[17] ibid. p. 162.

[18] ibid. p. 163.

[19] ibid. p. 315.

[20] ibid. See infra: 1.2 - the judicial opinion in the British case of the *Lusitania.*

[21] Salvage Association of London v SA Salvage Syndicate Ltd. (1906) 23 SC 169.

[22] Bamford, The Law of Shipping and Carriage in South Africa - Third Edition, Juta, Cape Town, 1983, at p 85. See infra (2.3.2) on the suggestion in South African draft legislation to reverse this presumption of the common law, and the effect of S 35(2) of the National Heritage Resources Act.

[23] Supra, at 284.

[24] Van Meurs, supra, 39.

[25] Mr. P. J. Clase, quoted in the House of Assembly Debates, 1 March, 1979, col. 1640 and by Van Meurs, ibid. 39

[26] Historical note: In Lighton, A.W., 'A Question of Abandonment', (27) THRHR, 1964, 138, the author discusses a policy of the Department of Customs and Excise, in terms of S 294 of the Merchant Shipping Act, No. 57 of 1951, which purported to allow for 'automatic abandonment'. Under this policy the owner

1.2 AMERICAN AND BRITISH CASE LAW

Both Britain and the United States have similar common law roots to South Africa. A brief consideration of pertinent court rulings in these jurisdictions is instructive.

Larsen, [27] enunciates the American law principle that abandonment demands two requirements - intention to abandon and actual abandonment - and is of the opinion that US case law shows: "...the mere passage of time does not conclusively establish abandonment; however, a significant passage of time does raise the inference of abandonment."[28] The learned author suggests US courts regard sixty years as the minimum for abandonment to be presumed.

In a case involving one Zych[29], Z claimed ownership - by *occupatio* of an abandoned *res nullius* - of a wreck he found on the bed of Lake Michigan. The successor-in-title, which had gained title from the successor to the original underwriters, (who had paid out on the claim in 1860, thus gaining title from the owner), asserted that the wreck was not abandoned. The court found that the wreck could not have been located before the arrival of late-1980's technology, and that letters written by the original insurers showed there was no intention to abandon. Accordingly it was held "...that Zych had failed to show more than a mere passage of time, which was insufficient for a finding of abandonment."[30]

In the English case of Pierce v Bemis[31], which involved a claim for property lost when the *Lusitania* was torpedoed, it was held that ownership of contents of the wreck had been lost where the owners had done nothing about the property for a significant period of time. This case is interesting because there were two categories of goods under discussion - the hull and fixtures of the ship, and privately owned, personal goods. Ownership of the hull and fixtures was found to have passed onto the underwriters when they paid out on the claim - this action being regarded as sufficient interest taken in the goods.

It was common cause that the owners of the other category had not shown interest in their goods prior to this action. In this regard, Sheen J found that "...when the master and crew ...abandoned the *Lusitania*, they did so in order to save their own lives and without any hope or intention of returning to her...,"[32] and accordingly held: "... it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salve the contents that the owners of the contents abandoned their property..."[33].

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of a wreck, who failed to take steps to salvage, lost his right of ownership to the state after a period of one year and six weeks. The author challenges the policy, supposedly based on a statement of Grotius, and concludes that ownership rights were not lost, but the wreck went into the custody of the state, from where it could be reclaimed by the owner. S 294 was repealed in 1996.

[27] Larsen, D. P., 'Ownership of Historic Ship Wrecks in US Law', (1994) 10, TIJMCL, 31

[28] ibid., p. 39.

[29] Zych v Unidentified, Wrecked and Abandoned Vessel 755 F Supp. 213 (N.D. Ill. 1990), cited in Larsen, supra.

[30] Larsen, supra, 41

[31] 1986 (1) AER 1011 QBD

[32] ibid at 1015 C

[33] ibid at 1015 D

It is submitted that, in determining abandonment of a wreck, the following principles can be extracted from these cases: (1) the need for the elapse of a significant time; (2) during which the owners had not displayed sufficient interest in their goods. In both cases the element of 'interest shown' is an important one. Indeed in Pierce's case, interest taken in the first category of goods was enough to safeguard ownership - whereas being neglectful of showing interest in the second was detrimental to ownership. This is similar to the 'need to show more than a mere passage of time' test, enunciated in Zych's case.[34] It is submitted that these decisions in foreign jurisdictions are in line with the South African common law and may well be regarded as persuasive by a court in this country in determining whether abandonment had taken place.

1.3 INTERNATIONAL LAW ON UNDERWATER ANTIQUITIES

In terms of international law: "States have a duty to protect objects of an archaeological and historical nature found at sea."[35] Attendant is the injunction to respect private law rights that may exist in these objects.[36]
The Law of the Seas Convention (hereafter LOSC) extends coastal state sovereignty to the extent of the Territorial Sea, described as 12 n.m. from baseline.[37] Sovereignty is exercised subject to the LOSC itself and other rules of international law.[38]

Caflisch[39] is of the opinion that LOSC art. 2(1)&(2) is clear on the sovereignty of the coastal state in its internal waters and territorial sea and "...this means that activities connected with submarine antiquities conducted in these areas fall within the exclusive jurisdiction of that state..."[40]. In considering the limits of this sovereignty the learned author concludes that

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[34] The Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, Article 1(2), deems underwater cultural heritage to have been abandoned: "(a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of the heritage within 25 years after discovery of the technology; or, (b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last assertion of interest by the owner in the underwater cultural heritage."
The draft does not make clear what an "assertion of interest" would amount to. These provisions would, it is submitted, be valuable guidelines for a court to follow in a case involving determination of abandonment. Article 2(2) makes the draft Convention non-applicable to public ships - thus these can never be abandoned under the treaty-regime. This is in line with the international practice that a 'mere passage of time' is not enough to show abandonment of a public ship. (This concept discussed in Roach, A., J., 'Sunken Warships and Military Aircraft', (20) MP, 1996, 351). No such provision is found in the South African law. (Buenos Aires Draft text in: O'Keefe, P. J., 'Protecting the Underwater Cultural Heritage (The International Law Association Draft Convention)', (20), MP, 1996, 297 at 305).
Devine and Glazewsky, Opinion on Suggested Legislation concerning the Conservation of Historic Shipwrecks, UCT, Institute of Marine Law, 1989, p. 1, disagree with this notion, and, after suggesting the law of the flag state as the best law to apply in determining ownership issues, (see text associated with fn. 46, infra), conclude: "...in the matter of abandonment one should explicitly exclude a South African court from applying any presumption which might be applicable in that (flag) law to the effect that public ships have not been abandoned," (the authors' emphasis).

[35] Law of the Seas Convention, Art. 303(1). It is submitted that historic wreck would be included under this article. The Buenos Aires Draft, supra, Art. 3, modifies this duty by stipulating: "State parties shall take all reasonable measures to preserve underwater cultural heritage for the benefit of mankind."

[36] LOSC, Art. 303(3).

[37] ibid, Art. 2(1) and Art. 3.

[38] ibid, Art. 2(3)

[39] Caflisch, L., 'Submarine Antiquities and the International Law of the Sea', NYIL, 1982, at p. 2

[40] ibid, p. 11. The learned author is reading Art. 2 and Art. 303 together to achieve this result.

Art. 303(3) - which subjects Art. 303 generally to owners' rights and the law of salvage or other rules of admiralty - retains the sovereignty of the coastal state intact as far as is possible in the territorial sea. Thus the 'admiralty rules' mentioned in this article mean those of the coastal state, and not of third states.

On this subject of the extent of sovereignty Caflisch also mentions an informal proposal, made by the Soviet Union, to insert into the LOSC draft, a rule prescribing that ships sunk beyond the territorial sea should be salvaged only by the flag state or with the latter's consent. The proposal argued that a rule of International Customary Law had developed "... whereby a flag state and the owner of a ship...do not forfeit their rights to a ship...sunk at sea...," because "...such rights are absolute and are not subject to any time-limit, provided that the ship...(sinks)...beyond the territorial water of the state,"[41] (my emphasis).

It is submitted that this notion would serve further to emphasise coastal state sovereignty in the territorial sea because the corollary of this statement is that, within the limits of the territorial sea, owner and flag state rights are not absolute and are subject to a time limit. A circumspect acceptance of such limitation of owners' rights is found in the South African common and case law, and the British and American case law in that it is conceivable that such rights can be abrogated. Caflisch's notion of the limits of sovereignty are important because the LOSC, while protecting owners' rights in submarine antiquities, does not give any indication of which legal regime should be consulted in identifying such owner. Whether the coastal state has such jurisdiction, it is submitted, depends on the extent of its powers in the geographical area in which the wreck is situated.

Also in terms of LOSC coastal states enjoy limited control in a zone contiguous to its territorial sea which "...may not extend beyond 24 nautical miles from the baselines from which the territorial sea is measured."[42] In this contiguous zone the coastal state is entitled "...to apply its customs and fiscal laws and regulations to the removal of antiquities as if such removal had taken place in its territory or territorial sea."[43] It is submitted that this 'limited control' does not amount to sovereignty in this zone.

1.4 THE PROBLEM OF HISTORIC WRECK

As this essay is limited geographically by the South African legislation to be discussed, the situation up to the extent of control exercised by the Republic in terms of Articles 303 and 33, LOSC, only, will be considered; i.e. up to the seaward limit of the contiguous zone. (See fn. 54 for discussion of the provisions of the Maritime Zones Act).

A ship at sea is owned and operated under the law of its flag-state. It seems to follow that, in determining ownership issues when the ship has become a historic wreck, the flag state law

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[41] ibid, p. 21&22, at fn. 71. The author regards it as doubtful whether this actually does reflect International Customary Law. It is submitted the rationale behind the proposal is good on the grounds that it seeks definitive rules in a situation where these are sadly lacking.

[42] LOSC, Art. 33(2). Art 33(2)(a) and (b), define the control that can be exercised in the contiguous zone as being to:

> "(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea."

[43] Caflisch, at p. 31, where the learned author is explaining LOSC, Art. 303(2) and Art. 33(2), read together.

should be consulted. This is not the clear answer however. Depending on the location of sinking and the nature of the claimant, there are three legal systems that could potentially have jurisdiction - that of the flag state, the personal law of the finder of the wreck, or that of a coastal state if the wreck is sufficiently close to land. Ultimately the problem is that of a choice of laws. An attempt will be made below to seek clarity on this issue.

1.4.1 THE CHOICE OF LAWS

It goes, almost without saying, that many wrecks falling into the ambit of 'archaeological' and 'historical' in the South African territorial sea and contiguous zone will be of vessels originally owned and operated under flags of foreign countries.[44] If LOSC Art. 303(2) is to be respected, it must clearly be established if there is a *bona fide* owner of a wreck before any other claim can be brought to bear. As has been demonstrated above this is primarily a question of whether the owner at the time of sinking has abandoned his rights to ownership or not. Under which legal jurisdiction should this question of abandonment be decided - that of the original flag-state, South African, or some other?

Von Glahn is of the opinion that, due to the link between the flag and the ship and because the owner operated under the law of the flag state, it is this law that should govern his decision to relinquish ownership.[45] This solution has also been suggested by Devine and Glazewsky at S 2(3) of their draft Conservation of Historic Shipwrecks Act [46] where it states:

> "Whether a historic shipwreck has been abandoned or not shall be determined by the application of the law of the flag state of the wreck."

While this is clearly sensible in terms of clarity, Caflisch's notion of retaining coastal state sovereignty as far as possible is also persuasive. In this regard attention should again be paid, it is submitted, to the distinction between movable and immovable property. Forsyth states clearly that "...it is a well established rule that the *forum rei sitae*, has exclusive jurisdiction in claims involving title to immovables."[47]

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[44] For example, by article 247 of the Constitution of the Batavian Republic (1798), the Netherlands, as the creator of the Dutch East India Company, became successor to the company in the wake of its bankruptcy. Holland's ownership of DEIC wrecks has been recognised by the UK courts (in the case of *De Liefde*), and by an agreement between Australia and the Netherlands (1972) whereby the latter transferred its rights in specific wrecks to the State of Western Australia. There would thus be a strong argument for ownership of DEIC wrecks off the South African coast still to vest in the Dutch government. Indeed, if a dispute on this issue arose with the Netherlands, it is most likely the Dutch government would cite its assertion of ownership rights in DEIC wrecks in Australian and British waters, as support for such a claim in South African waters. Devine and Glazewsky (at p.9), are of the contrary opinion. In commenting on the Australia/Holland agreement they say: "There are no such parallel agreements in South Africa and hence we would suggest not following Australian legislation here...". See infra for the learned authors' solution to the issue of the choice of laws. The case of the *The Birkenhead* is an example of a British ship, sunk in South African waters, the ownership of whose wreck has been disputed.

[45] Von Glahn's opinion cited in Lewer Allen, B., Coastal State Control Over Historic Wrecks Situated on the Continental Shelf as Defined in Article 76 of the Law of the Sea Convention 1982, UCT, Institute of Marine Law, 1991, p. 16, fn. 35.

[46] Draft Act contained in Devine and Glazewsky, supra.

[47] Forsyth, C. F., Private International Law, (3rd ed.), Juta, Cape Town, 1996, at p. 202.

By analogy with this rule the author argues that for movables the *forum rei sitae* would also apply because "...it has, at least temporary, control over the property."[48] But the answer is not as clear as this statement would make it appear. Forsyth goes on to say that in Roman and Roman-Dutch Law the *forum domicilii res* also had jurisdiction and that "...this view was probably in part derived from the old notion that *mobilia sepuuntur personam*, i.e. that movables were considered to be where their owner was."[49] Despite this classical rule the learned author goes on to say that today the *lex domicilii* is exceptional on the grounds of common sense and the expectation of the parties of the application of the *lex situs*. He cites Corbett JA as accepting that "...the *lex situs* governed in disputes concerning the ownership of movables..."[50]

Pistorius is in agreement with the above but adds that the *forum rei sitae* was at first unknown in Roman law and thus concludes that: "If...the movable property ... is situate in the Republic, there seems no reason why the *forum domicilii* should not also have jurisdiction to determine the title to property in a claim where the defendant is an *incola*."[51] Again the element of control exercised by the court is present, and the choice between the two systems is recognised. The situation is different if the property is outside the Republic.

Pistorius uses an early case[52] in which the Transvaal court decided it had no jurisdiction to determine title in immovables outside the Transvaal colony, where the defendant was an *incola* of its jurisdiction, for the proposition that, in similar circumstances, a South African court has no power over movables outside the Republic. In terms of the LOSC, South African socereignty extends up to the extent of the territorial sea thus, it is submitted, this principle would apply to movables beyond this limit.

1.4.2 SUBMISSIONS

The following submissions are made to provide means of determining which legal system to use, in light of the confusion that appears from the above discussion of the South African authorities, and international law and commentary:

1. For the purposes of the determination of a claim for ownership of historic wreck found under waters over which South African has full or limited control, in terms of LOSC, the *lex rei sitae* should mean the law of the Republic.

2. In such a claim the *lex domicilii rei* should mean the law of the plaintiff. This could be that of the flag state where the claimant purports to derive title from the original owner, or the personal law of the finder of the wreck.

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[48] ibid, 207. A similar conclusion is reached in Pistorius, D., Pollack on Jurisdiction, (2nd ed.), Juta, Cape Town , 1993 at 101 where it says: "A state in which movable property is situate has control over such property and can therefore properly authorize its courts to determine the title to movable property within its borders."

[49] Forsyth, supra, 207.

[50] Standard Bank of South Africa Ltd. v Ocean Commodities Inc. 1983(1) SA 276(A) at 294D, quoted by Forsyth, supra, at p. 322. This case involved shares held in South Africa by a former Rhodesian. The cause of action was held to be "analogous to the *rei vindicatio* in terms of property situated within the jurisdiction and that, in that event, the *lex situs* (i.e. South African law) would be the correct *lex*." (from headnotes, p. 277)

[51] Pistorius, supra, 102.

[52] Rosa's Heirs v Inhambane Sugar Estates Ltd. 1907 TH 11, quoted by Pistorius, supra, at 102.

3. Where the historic wreck that is the subject of such claim is within the limits of the territorial sea of the Republic, the *lex rei sitae* should apply. This is because the movable property is in the control of the South African court by virtue of the sovereignty bestowed upon a coastal state in the territorial sea and internal waters by LOSC. In terms of the National Heritage Resources Act[53] the defendant will always be the South African state and thus the defendant would be an *incola.* - a notion that adds strength to this solution. In terms of this arrangement coastal state sovereignty, as argued for by Caflisch, would be further retained. Indeed anything other than this arrangement would, it is submitted, amount to a subtraction from sovereignty. This notion removes the common law choice between the *lex rei sitae* and the *lex domicilii rei*, but would, it is submitted, bring clarity to this question..

4. In areas where the Republic does not have sovereignty, the benefit of the doubt should, it is submitted, weigh in favour of the *lex domiclii rei*. In terms of LOSC, coastal state jurisdiction beyond the limit of the territorial sea is something less than sovereignty. Thus, strictly speaking, outside of the territorial sea, and up to the limit of the contiguous zone, a South African court would not have control over the historic wreck except to the degree stipulated in LOSC Art. 33(2), mentioned supra. Clearly this limited authority in the contiguous zone does not translate into court jurisdiction to determine so fundamental a question as ownership. It is submitted that the legal jurisdiction of a South African court in these matters must end at the geographical limit of the territorial sea, unless extended by statute. Such extension should be clear in its intention to allow a South African court the power to determine ownership and not merely limited control of the property.[54] In this way the prominence given to owners' rights by LOSC and South African legislation will be interfered with as little as possible.

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[53] Heritage Resources Act S 35(2), it is submitted, removes the common law notion of *res nullius* wrecks by vesting ownership in the state. The South African state is obviously an *incola* in a South African court. (See infra 2.3.2).

[54] In fact the Maritime Zones Act (No. 15 of 1994), at S 6(1), does seek to apply South African law outside of the territorial sea. This act creates a Maritime Cultural Zone extending to 24 n.m. from baseline, (* - see end of this footnote). In terms of S 6(2) the Republic has the same jurisdiction over objects of an archaeological or historical nature in the new zone as it has in the territorial sea. This jurisdiction in the territorial sea is that found in the National Monuments Act (No. 28 of 1969). Devine, (Devine, D., '1994 South African Maritime Zones Legislation: Principles Inherent in the Act and their Implementation', (10), TIJMCL, 1995, at p.556), is of the opinion that "...the net effect of MZA is the extension of the 1969 Act to the zone."
It is submitted the rights asserted by the National Monuments Act are in the nature of 'control of property' and not those needed for a 'determination of ownership'. The basis for this submission is S 10 of this act, "Declaration of national monuments by the Minister", where, at S 10(3)(a), it reads:

> "(3) The Minister shall not give effect to any recommendation made under subsection (1) or (2) in respect of any property belonging to any person other than the State or the council, without the consent of such person..." (my emphasis)

The act presumes, therefore, that it is possible for an identifiable, non-state, owner of property likely to be declared a monument, to exist; but does not give an indication of how such owner's title should be established. It is submitted that the suggestions outlined supra would contribute to the smoothness of such a determination. The National Heritage Resources Act (No. 25 of 1999), at S 60 and S 58, repeals and replaces the National Monuments Act. The new Act, while making mention of owners' rights in heritage resources, does not stipulate how such rights are to be determined. Thus, it is submitted, the same situation as for the National Monuments Act will continue to prevail in these questions, and the value of the present investigation continues to be relevant under the new regime.

1.5 SUMMATION

The South African common law envisages a situation where an owner can abandon a wreck, thus forfeiting his rights. Ownership of such wreck can be gained by another through *occupatio*. In the event of a dispute a court must consider whether the owner had the intention to abandon. Abandonment is not easily presumed. If the wreck is very old, the elapse of significant time, during which the owner did not assert interest, will weigh against him. Depending on the geographical location of the wreck, the flag under which it sailed as a ship and the local law of the finder, there may be a dispute as to the legal system to employ in deciding ownership issues. Both South African legislation and the Law of the Seas Convention recognise the priority of owners' rights in underwater historical and archaeological resources, but neither provides a guide on how to determine ownership of such resource. Outlined above (1.4.2) are certain submissions intended to provide guidelines for such a determination. The rest of this essay will identify provisions of the National Heritage Resources Bill with regards to the rights of such an owner once identification has occurred.

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*(The Buenos Aires Draft, supra, at Art. 5 (1), allows a State to establish a 'Cultural Heritage Zone', within which it has jurisdiction over activities affecting underwater cultural heritage. Art. 1(3) extends this zone up to the extent of the Continental Shelf. These provisions are in light of a UNESCO feasibility study of a previous version of the Draft Convention which approves such extension, in keeping with the practice of various states of broadening, by national legislation, their jurisdiction to zones contiguous to the territorial sea. [UNESCO study found in: Clement, E., 'Current Developments at UNESCO concerning the Protection of the Underwater Cultural Heritage', (20), MP, 1996, 309 at 315.] In Brown E. D., 'Protection of the underwater cultural heritage. Draft principles and guidelines for the implementation of Article 303 of the United Nations Convention on the Law of the Sea, 1982', (20) MP, 1996, at 325, the writer (at 329), mentions that in 'UNGA Guidelines and Principles for Implementation of Article 303', intended to promote swift acceptance of the Buenos Aires Draft, no mention is made of a 'Cultural Heritage Zone' due to concerns of governments about the "creeping impact" of such a zone. This international opinion illustrates the continued debate on the subject of extending coastal state jurisdiction beyond the limits allowed by LOSC, and speaks for a limitation on this right beyond the territorial sea). Devine and Glazewsky, at S 1(iv)(b) of their proposed legislation, are in favour of a zone, in essence that created by the Maritime Zones Act.

2. THE NATIONAL HERITAGE RESOURCES ACT (No. 25 of 1999)

The appearance of the bill preceding this act (B 24 - 99), lead to criticism on the grounds of inroads it makes into private ownership rights in heritage resources, such resources being very widely defined. Rule of Law concerns, in light of broad powers of delegation of responsibility, were also raised[55]. A second version of the bill (B 24B - 99) only partially addressed some of these issues. The draft is characterised by inconsistencies, repetition and only slight adjustment to the provisions affecting ownership of heritage resources - under which banner can be included historic wreck. The Act, not appearing to deviate substantially from this second text , was accepted into law by the State President on 28 April 1999.

The Constitution of the Republic of South Africa Act (No. 108 of 1996), provides a scale against which to measure new legislation, and mechanisms whereby matters not meeting constitutional requirements can be dealt with. Perhaps the most broadly stated provision, for the purposes of this essay, is S 36(2), 'Limitation of Rights', which provides that "...except as provided in subsection (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights."[56] 'Rights to Property' and 'Just Administrative Action' are both entrenched in the Bill of Rights.[57] It is submitted that it is against these sections the National Heritage Resources Act ,(hereafter the Act), must be tested in the present enquiry into how its provisions affect the rights of an owner of historic wreck. At the same time, prevailing legislation, in the form of the National Monuments Act [58], and suggested legislation, (Devine and Glazewsky's draft Conservation of Historic Shipwrecks Act), will be considered.[59]

2.1 GENERAL PROVISIONS

The new Act repeals the National Monuments Act and S 41(2) of the Environment Conservation Act (No. 73 of 1989).[60] This section of the ECA excludes the jurisdiction of that act "in respect of any matter to which the provisions of the National Monuments Act....apply." Thus it appears that the ECA is no longer subordinate to heritage resource legislation. At S 58(8) the new Act stipulates: "...any reference in any law, document or register, to the National Monuments Council must be construed as a reference to SAHRA...."; thereby placing national authority in heritage resources in the hands of this new body.[61]

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[55] Peter Leon, 'Planned bill fails to consider property rights', Business Day, 4 -3-99

[56] S 36(1) provides for the limitation of rights only by laws of general application and "...to the extent that the limitation is reasonable and justifiable..," and goes on to list factors that should be considered in deciding 'reasonable and justifiable'.

[57] Sections 25 & 33 respectively.

[58] S 61 of the new Act provides that it will only come into operation on a date fixed by the State President in the gazette.

[59] For the purposes of the rest of this essay the National Monuments Act (No. 28 of 1969) and the proposed Conservation of Historic Shipwrecks Act will be referred to as the NMA and CHSA respectively.

[60] S 60

[61] " 'SAHRA' means the South African Heritage Resources Agency..." (S 2(xil)). S 11 establishes the agency, S 12 states its object, S 13 details its powers, functions and duties. The agency is run by the SAHRA Council, established in terms of S 14, which is responsible for these functions, powers and duties, and advises the Minister on heritage resources management, (S 16). Decisions of the Council are taken by majority of members present at a meeting, with the person presiding having a casting as well as a deliberative vote, (S 17).

Heritage resources are categorised into Grades I, II and III, each grade being subject to national, provincial and local authority, respectively.[62] Archaeological resources fall within the responsibility of a provincial authority. However, while one of the definitions of historic wreck is as an 'archaeological' resource (see infra 2.3.1), it is specifically placed under the protection of the nationally constituted SAHRA, and all archaeological objects are made the property of the State.[63] The national agency must compile and maintain an inventory of the national estate to which any person should be allowed access. Information may be withheld under various circumstances.[64]

2.2 PRINCIPLES OF RESOURCE MANAGEMENT

In keeping with other recent legislation, (for example S 2 of the National Environment Management Act, No. 107 of 1998), the new Heritage Resources Act prescribes certain general principles to be followed in the management of heritage resources.[65] The capacity of heritage to promote reconciliation and its value, both intrinsically and as evidence of the origins of South African society, is enumerated.[66] Criteria for assessing a resource are laid down[67] and SAHRA is charged with the task of determining specific principles for management.[68] Decisions under the Act must be consistent with S5&6 principles and policy.[69]

2.3 THE PRIVATE OWNER AND THE ACT

The notion of ownership as a 'bundle of servitudes' opens the way to derogation from this right in a variety of ways other than through mere deprivation of title. Among others the new Act interferes with the right of the private owner to use, damage, alter, excavate, move and alienate his property. In order to limit such rights in historic wreck, the Act creates a broad definition of this resource.

2.3.1 DEFINITIONS OF HISTORIC WRECK

Clearly the wider the definition of historic wreck the greater the number of wrecks that will fall under the ambit of the Act. In fact this new legislation goes further than any previous law in defining the parameters for the inclusion of a resource as 'heritage'. The definition of historic wreck is demonstrative of a tendency within the Act to conceive, very broadly, of what constitutes a 'heritage resource'.

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[62] S 7(1)(a)(b)&(c) and S 8(1)(2)(3)&(4). Provincial authorities are established in terms of S 23.
[63] S 35(1)&(2).

[64] S 39(1)&(6). It is submitted that this provision could well see challenge under S 32 of the Constitution, 'Access to Information'. Devine and Glazewsky (S 14, CHSA) stipulate that a Register of Historic Shipwrecks be kept, and that it be open for inspection by any person. Pugh (supra, p. 31) suggests that only persons affiliated to museums should be allowed to inspect the register in order to afford wrecks better protection. The NMA stipulates that no person may disturb or remove wreck older than 50 years except by virtue of a permit. Such permit can only be issued to a person providing written proof of affiliation to a museum approved by the NMC, after notice in the *Gazette* has afforded opportunity for submissions and these have been considered, and in which the location of the wreck is not disclosed, (S 12 (2C)(a)(b)(c)).
[65] Generally S5&6.
[66] S 5(1)(a)&(c).
[67] S 5(7).
[68] S 6.
[69] S 10(2)(a).

The Act defines 'archaeological' as including: "wrecks, being any vessel or aircraft, or any part thereof, which was wrecked in South Africa...," up to the extent of the Maritime Cultural Zone, "... and any cargo, debris or artefacts found or associated therewith, which is older than 60 years or which SAHRA considers to be worthy of conservation..."[70], (my emphasis). It is submitted that the discretion granted to the SAHRA by the last phrase opens the way for the inclusion of 'any' wreck within these waters, whether it be of advanced age or not, to be subject to the Act. This is wider than both the CHSA and the NMA which define 'historical wreck' in terms of geographical and age criteria only[71]. The proposed CHSA regards historic wreck as any ship or aircraft, at least fifty years old, situated in the Republic within 24 n.m from low-water mark; while the NMA holds "...any wreck in the Republic, including the 'sea', as defined in section 1 of the Sea-shore Act, 1935 (Act No. 21 of 1935), which is fifty years old or older or which the council upon reasonable grounds believes to be fifty years old or older..." as subject to the provisions of that act.[72]

While the new Act's definition of historic wreck is already very broad, other provisions could also bring a wreck into its ambit. 'Archaeological' is further defined as: "...material remains resulting from human activity which are in a state of disuse and are in or on land and which are older than 100 years, including artefacts, ... and artificial features and structures;"[73] and, "features, structures and artefacts associated with military history which are older than 75 years and the sites on which they are found."[74]

A 'site' means "...any area of land, including land covered by water, and including any structures or objects thereon."[75] An 'object' means "...any movable property of cultural significance," including "any archaeological artefact."[76] [77]

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[70] S 2(ii)(c). See fn. 54, supra, for a discussion of the Maritime Cultural Zone.

[71] Devine and Glazewsky favour the age criterion, as opposed to stipulating a particular date prior to which a wreck is regarded as historic, because age "... has the advantage of flexibility in that as time progresses younger wrecks would attain the necessary age and thus automatically qualify for protection," supra, p. 3. The Buenos Aires Draft, at Art. 2(1), makes the convention applicable to cultural heritage that has "...been lost or abandoned and is submerged underwater for at least 100 years." The way is left open, however for a state to protect underwater heritage submerged for less than 100 years. Larsen (supra, at p. 34, fn. 31) notes that the American Abandoned Shipwreck Act, does not include an age criterion, but that there is mention, in 'Criteria Considerations for National Registry', of a 'site' being eligible for inclusion under this act, "if it has achieved significance within the last 50 years". Age is used as a criterion in Finland, the Netherlands, Greece and Sweden; but not in Australia and France, where wrecks are protected by declaration. (Devine and Glazewsky, supra, p. 3)

[72] CHSA S 1(iv)(a)&b), and NMA S 10A(1). The NMA defines 'wreck' by referring to S 112 of the Customs and Excise Act (No. 91 of 1964) which reads so as to mean any ship or aircraft, abandoned or stranded, including flotsam, jetsam and laggan.

[73] S 2(ii)(a). Land "includes land covered by water." (S 2 (xx)).

[74] S 2(ii)(d)

[75] S 2(xiil). A 'place' includes a 'site' and "in relation to the management of a place, includes the immediate surroundings of a place", (S 2(xxxii). Devine and Glazewsky give a specific measurement to 'site' by defining the term as meaning an area where a historic wreck is found, not exceeding 100 hectares in extent, (CHSA, S 1(v)(a)&(d)). The NMA (S 1) says: " 'historical site' means any identifiable building or part thereof, marker, milestone, gravestone, landmark or tell older than 50 years." This would not include 'wreck', it is submitted.

[76] S 2(xxix)(a)

[77] It is submitted that graves would not be included within the notion of historic wreck under this Act because 'grave' is defined as "...a place of interment..." (S 2(xiii)). 'Interment' has a dictionary definition referring to 'burial' which is further defined as 'burying of a corpse', or 'funeral', (The Oxford Dictionary and Thesaurus). The implication is of a preconceived process, not the fortuitous occurrence in which a

In addition, the notion of the 'National Estate' as being "...those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations...,"[78] casts the net even wider. Section 3(2), without limiting the generality of S 3(1), provides a non-exhaustive list of things that "may" be included in the national estate. Here is found reference to, among others, archaeological sites[79], movable objects[80] (including "objects recovered from the soil or waters of South Africa, including archaeological objects ... and material"[81]), military objects[82], and objects of scientific interest[83]. The Act introduces the concept of "sites of significance relating to the history of slavery in South Africa,"[84] as a criterion for acceptance as culturally important.

These broadly stated principles are further widened by S 3(3) which says: "Without limiting the generality of subsections (1) and (2), a place or object is to be considered part of the national estate if it has cultural significance or other special value because of, its importance in the pattern of the country's history[85]; "its possession of uncommon, rare or endangered aspects of South Africa's ... cultural heritage," and its potential to reveal information relating to this cultural heritage[86]; "its strong or special association with ... [a] group or organisation of importance in the history of South Africa"[87]; or because of its significance in the history of slavery in South Africa.[88]

It is submitted that a case could be made for the inclusion of historic wreck under any of the above-mentioned criteria. In consequence a great many wrecks, that may not have been regarded as historic under the NMA, will fall under the new Act. Thus the ownership of a larger body of wrecks is thrown into doubt.

2.3.2 *RES NULLIUS*

S 35(2) of the Act, it is submitted, removes the common law notion of *res nullius* wrecks by vesting ownership of all "archaeological" material in the State. However the Act is clear, by its frequent reference to such, that there can be an owner of a heritage resource that is not the state. Thus there are, in terms of the Act, only two kinds of historic wreck in waters under South African control; i.e., wreck with a pre-existing, identifiable owner, and wreck owned by the State itself. This disallows, it is submitted, *occupatio* of a *res nullius* wreck because there can no longer be an unowned (abandoned) wreck.

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wreck would become a tomb. Victims of conflict covered by the Commonwealth War Graves Act (No. 8 of 1992), are excluded from the ambit of the Act generally by S 2(xviii)(a).

[78] S 3(1)
[79] S 3(2)(f)
[80] S 3(2)(i)
[81] S 3(2)(i)(i)
[82] S 3(2)(i)(iv)
[83] S 3(2)(i)(vi)
[84] S 3(2)(h). Although the major slave-routes from Africa were across the Atlantic from North Africa to the Americas, wrecks of ships carrying indentured labourers or slaves from India or Malaysia to South Africa across the Indian Ocean would fall under this standard, (if such exist).
[85] S 3(3)(a)
[86] S 3(3)(b) & (c)
[87] S 3(3)(h)
[88] S 3(3)(i)

In effect the common law presumption of non-abandonment is reversed. Although stated differently, this is precisely the effect of Devine and Glazewsky's CHSA. Their proposal determines all historic wreck and artefacts to be presumed abandoned until the contrary is shown, and all such to be owned by the State,[89] - a solution that would also do away with *res nullius* wrecks, because all historic wreck would have an identifiable owner.[90]

2.3.3 POWERS AND DELEGATION

A heritage resources authority is enjoined to educate the public with regard to heritage, maintain a list of conservation bodies who have registered their interest in heritage, protect and inspect heritage resources and assist bodies or persons with established interest in a resource to gain access thereto.[91] However an authority "may" also inspect and document a site which it has reason to believe has the potential to become protected, or which it wishes to document for research purposes.[92] In doing so it may erect beacons on the site.[93]The authority is granted the power to "lend anything under its control to a museum or public institution,"[94] and may affix a notice or badge to a protected resource, indicating its status.[95]

It is submitted that the Act allows an authority to exert control over a resource in a way that infringes on the rights of an owner. To take the actions mentioned above the authority does not have to seek the permission of the owner of the resource. Thus an owner can be deprived of control of his property, and then have no say in its being leant to a museum, or its having a notice affixed to it. Both of these actions restrict an owner's right to use his *res*.

Extensive powers of delegation are contemplated. The Minister or MEC "may make regulations to enable a heritage resources authority to delegate in writing any of its functions or powers" to a wide range of individuals including "any employee, heritage inspector, volunteer, or other representative of the authority."[96]

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[89] CHSA, S 2(1)&(2). The learned authors' suggestion would shift the onus of proving non-abandonment onto the claimant, whereas at present, under the common law presumption, the respondent has to prove abandonment. Other suggestions are that rules should be introduced to determine ownership issues (see supra, 1.4.1), and that the creation of new private law rights in abandoned wrecks and artefacts should be prevented. (Devine and Glazewsky, supra, generally at p. 7).

[90] Declaring the State as owner of historic wreck is not an unusual procedure internationally. Larsen (supra), notes that the American Abandoned Shipwreck Act attempts to protect historic wreck in two ways. Firstly, title is deemed to vest in the federal government (S 2105(a)); and secondly, federal courts are expressly forbidden to apply the law of 'shipwreck' to historic wreck (S 2106(a)). This removes historic wrecks from the purview of the law of salvage, a solution also adopted by the Buenos Aires Draft (Art. 4). Devine and Glazewsky conclude that SA legislation referring to salvage makes no distinction between contemporary and historic wrecks, and argue that entirely excluding historic wrecks from salvage law goes too far, (p. 10 & 11). Where salvage rights do exist, therefore, they allow the holder to establish them within a year of the wreck being declared historic. These rights can only exist, however, if they pre-date the wreck first existing as historic, (CHSA S 3(1)).

[91] S 25(1) generally.

[92] S 25(2)(c).

[93] S 25(2)(d)(i).

[94] S 25(2)(g).

[95] S 25(2)(j).

[96] S 26(1)(d).

Each member of the South African Police Services and each customs and excise officer is deemed to be a heritage inspector.[97] Heritage inspectors are granted, subject to the provisions of any other law, and on that inspector's reasonable belief, or on reasonable grounds, powers to enter into premises, inspect, search, confiscate and detain a heritage resource, take action in order to prevent commission of an offence and order cessation of work being carried out in contravention of the Act.[98] The exercise of a delegated power is deemed to be exercised by the delegating authority, and those exercising delegated powers are responsible to the heritage resources authority concerned and not to an autonomous body.[99] Thus someone as loosely connected to the authority as a 'volunteer' can take on 'any' of the powers of the authority and not be independently responsible.[100] A delegation by SAHRA of any power to a provincial heritage authority, in terms of S 26(1)(f)), can only be revoked by SAHRA after it has consulted with the authority, and only with the consent of the Minister.[101] If the authority has further delegated its delegated power, and this power is being misused (by, for example, a volunteer), this delegation is, therefore, not very easy to rescind.

2.3.4 PROTECTION OF THE OWNER

Significant changes were made to the first bill with regard to the appeal procedure. The Minister or MEC must make regulations providing for "a system of appeal to the SAHRA Council or a provincial heritage resources council against a decision of a committee or other delegated representative of SAHRA or a provincial heritage resources authority."[102]

If the appeal is against a decision of the SAHRA council or a provincial heritage resource authority, the appellant must notify the Minister or MEC within 30 days. The Minister or MEC shall then appoint an independent tribunal of three experts who must consider the appeal in light of a list of criteria.[103] Meetings of competent authorities, involving decisions pertaining to management and administration of heritage resources, must be open to the public. However when the majority of members present consider there to be good reason for doing so, a matter may be declared confidential and removed from public scrutiny.

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[97] S 50(2). 'Heritage inspectors' are appointed under S 50(1). Under the new Act there is a semantic distinction made between a 'heritage inspector' and a 'volunteer', but no indication is given of the difference in the powers they can assume. Indeed S 50 generally controls the exercise of powers granted to inspectors, but there is no equivalent section for powers delegated to the other categories of individual mentioned in S 26(1) generally. A limited list of powers that may not be delegated is provided at S 26(3). These are not such as would not impact on an owners' rights directly. Powers that do so, however, are among those delegated.

[98] S 50(7)(8)(9)(10).

[99] S 26(2). It is submitted that this provision could be challenged under S 33(3)(a) of the Constitution which stipulates that national legislation must provide for a review of administrative action by a court or independent tribunal.

[100] Both the CHSA and the NMA, at S 13 and S 7&7A respectively, allow for delegation, but only within clear limits. The CHSA, at S 20, lists the kinds of individuals that can be appointed as 'wreck inspectors'. These include naval officers, fishery control officers and police officers, and should they produce an identity card on request of a person affected by their inspection.

[101] S 26(4).

[102] S 49(1).

[103] S 49(2)(3).

Persons who may be affected by these decisions have a right of appearance at such a meeting. Written reasons for decisions must be given.[104] The Act further provides that law, procedures and administrative practices must "give further content to the fundamental rights set out in the Constitution."[105]

The Minister is empowered to expropriate any property if this is in the public interest.[106] However, the expropriation must be compensated according to S 25(3) of the Constitution and the owner of the property must be given a hearing before this action is taken.[107] Many provisions stipulate that an action taken by the authority must be done, 'with the consent of the owner', or 'by agreement with the owner'.[108] There is no indication of what this may mean, or of a method whereby such acquiescence can be achieved. The armoury of protections granted to the owner is limited. It is submitted that the sections outlined here provide the 'teeth' of the Act, and, given the context of other, broadly conceived, sections affecting rights of owners, these sections, offering a modicum of protection will see much use during the Act's life-span.[109]

2.3.5 DECLARATION OF HISTORIC WRECK [110]

It is in regard to the broad prerogatives granted to a heritage resources authority to declare a resource as a heritage resource protected under the Act, that the most important inroads into private ownership rights can occur. Clearly a historic wreck, brought into the ambit of the Act under any of the plethora of definitions mentioned above, would be a heritage resource.

It is submitted that a historic wreck could be included under the Act in the context of a heritage site, heritage area, heritage object, or archaeology.[111] Thus there are a myriad, overlapping controls on use of a historic wreck that may apply under this legislation.

2.3.5.1 HERITAGE SITES

SAHRA may, by notice in the *Gazette*, and a provincial authority by notice in the *Provincial Gazette*, declare a place to be a national heritage site.[112] It may also amend or withdraw any such notice.[113]

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[104] S 10(2) generally. This is in line with S 33(2) of the Constitution.
[105] S 5(3)(c).
[106] S 46(1).
[107] S 46(3).
[108] For example S 42(1)(a), which allows a heritage authority to enter into a heritage agreement to provide for the protection of a heritage resource with a variety of interest groups. These agreements are made subject to the consent of the owner of the resource.
[109] The owner of a place under guardianship of the Act, continues to enjoy, subject to the express prohibitions of the legislation, the same "estate, right, title and interest in and to the place as before." (S 42(10)). In some cases, it is submitted, the owner will be hard put to find rights remaining that he can still enjoy.
[110] The CHSA and the NMA do not have the very broad heritage resource definitions contained in the new Act. Therefore, at S 8(1)(k) of the CHSA, the National Monuments Council is given the power to declare any property a historic wreck or wreck site; and the NMA, at S 10, allows the Minister, on recommendation of the NMC, and subject to the owner having one month prior warning of the impending recommendation, to declare property a national monument.
[111] Although this not their chronology in the Act, it is convenient to deal with these concepts in this order.
[112] S 27(1),(5)&(6). One of the inconsistencies of the legislation is the interchangeable use of terms. The definitions section gives 'place' a specific meaning, which includes a 'site', (cf. fn. 73) - yet for the whole of S 27 the wording reads so as to mean a 'place' is not a 'heritage site' until it is declared as such.
[113] S 27(7)(a)&(b).

Before such declaration the owner of the place must be notified and given "reasonable opportunity for representations or submissions to be made in regard to the proposed notification."[114] The authority must further notify all conservation bodies who have registered their interest in the geographical area in which the proposed heritage site is situated, "and give them at least 60 days to make submissions regarding the proposed declaration, amendment or withdrawal...," while allowing the owner the ability "to propose conditions under which the action will be acceptable.[115] It is submitted that the owner appears to have different rights in terms of the different subsections.

In the first he can make submissions and representations in regard to the proposed "notification"[116], and in the second he may only suggest ways in which the "action" will become acceptable. A conservation body seems to be granted a greater say in the fate of the site than its owner. The conservation body gets 60 days to make submissions on the proposed "declaration", while the owner gets a 'reasonable' time; and, the conservation body can make submissions on the amendment or withdrawal of the notice of declaration, whereas the owner may only make the general submissions, representations and suggestions, mentioned above. The authority must "consider" all submissions before making a final decision. It is submitted that this does not mean it has to act on them. Once notice to the owner of the intention to declare his place as a heritage site has been served, or until it is withdrawn or the place is finally declared a heritage site, the place is protected as a heritage site for six months from service of the notice[117]. If the owner objects to the proposed declaration, or proposes conditions which the heritage authority reasonably considers to be unacceptable, the authority may, prior to the expiry of the six month notice, re-notify the owner of the intention to declare his place a heritage site - which will have the affect of renewing the six month protection. If, after such renewal, there is still no agreement between the authority and the owner, the authority may declare the place to be a heritage site, without further reference to the owner.[118]

This last provision is extremely problematic in terms of the entrenchment of 'just administrative action' in the Constitution. It appears that if there is no agreement between the owner and the authority, there is no safeguard, other than those already enumerated, (supra, 2.3.4), against an owner's place being declared a heritage site. The S 49 appeal, it is submitted, will be time-consuming and should be only a last resort. Its use could be limited by the institution of an

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[114] S 27(8)(a)&(d). Under the NMA, the owner must be given one month's notice of a mere 'recommendation' to the Minister that he declare property a national monument. (fn. 110, supra). The CHSA permits the National Monuments Council "to allow a further period of time beyond one year from registration as a historic wreck for the institution of legal proceedings for the purpose of establishing ownership", (S 8(1)(p)).

[115] S 27(8)(c).

[116] One presumes this means the 'notification' in the *Gazette* of the declaration of the place as a heritage site. The other alternative is the 'notification' to the owner, in terms of S 27(8)(a), of the 'notification' in the *Gazette* of the place as a heritage site. This would make no sense because the owner would be granted the ability to make representations or submissions about the 'notice' to be served on him informing him of the 'notice' to declare his place a heritage site - whereas he needs only the ability to comment on this second, *Gazette*, notification. In fact, the different epithets used for the process on which the owner and the conservation body can make comments is confusing. The owner can make submissions about the 'notification' and the 'action,' while the conservation body can make submissions about the proposed 'declaration' (and its amendment or withdrawal). In the absence of clarity from the legislation itself, it is submitted that the better view is to consider all these to mean the proposed 'declaration' of a place as a heritage site. This confusion would be overcome by the addition of the words 'of the declaration of the place as a heritage site in the *Gazette*' at the end of S 27(8)(d), and using this nomenclature throughout.

[117] S 27(10).

[118] S 27(11).

independent, deadlock-breaking mechanism which would operate to create agreement between the owner and the authority at a point before the place is declared a heritage site. Such mechanism does not exist in the Act.

The control exercised by a heritage authority over a place, once it has been declared a protected site under the Act, deprives the owner of some of the fundamental rights of ownership. "With the consent of the owner," an authority may make regulations concerning safety, use, admission and payment for admission of the public.[119] "By agreement with the owner," the authority may conserve or improve a site, construct walls, gates, access roads on or over a site and erect signs on or near a site.[120] An authority may mark a site with a badge indicating its status.[121] "No person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site."[122]

It should be noted that while much of this may appear reasonable in the context of protecting heritage, the problems inherent in the wording of S 27(8)&(11), indicated above, may lead to these limitations on the use of property occurring without the owner's consent.

While, in respect of historic wreck, some of these provisions would be difficult to implement practically[123], (for example, how does one erect a gate to a wreck), their effect is to intrude on the 'bundle of rights' a wreck-owner may expect to hold in his property. S 27(18) poses the question of an owner's right to salvage his wreck if it should be brought under the authority of this legislation.[124] As pointed out, (2.3.1, supra - the discussion of S 2(ii)(c)), it is possible for quite a young wreck to be declared a heritage resource, thus raising the possibility of salvage of a heritage resource.

2.3.5.2 PROTECTED AREAS

A heritage authority may, with the consent of the owner of the area, designate a protected area which, in respect of historic wreck, is defined as "such area of land surrounding any wreck as is reasonably necessary to ensure its protection.[125]

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[119] S 27(19). See 2.3.4, supra for discussion of 'consent of the owner'.
[120] S 27(21).
[121] S 27(17).
[122] S 27(18). 'No person', it is submitted, would include the owner. 'Excavate', 'alter' and 'remove' could refer to actions taken during a salvage operation.
[123] Reproduction rights "either in one or two dimensions" in respect of a heritage site, "subject to existing rights and the agreement of the owner" belong to the State, and no person other than the owner can make reproductions of the site for gain without a permit issued by SAHRA, (S 27(23)(a)&(b)). Leon, supra, points out that, on this wording, "if Table Mountain were declared a national heritage site, no one would lawfully be able to photograph or paint it without the agency's express permission and the payment of a fee: a proposition that is as absurd as it is impracticable."
[124] Cf. fn. 90, supra, for a discussion of salvage in respect of historic wreck.
[125] S 28(1)(b). S 31 deals with 'heritage areas'. These, by virtue of reference, at S 31(1), to such areas being investigated for inclusion under the Act on the initiative of planning and provincial heritage authorities, would not include historic wreck. A planning body would not deal with such issues, and historic wreck is a national competence, see 2.1, supra.

No person may "damage, disfigure, alter or subdivide or in any other way develop any part of a protected area", without consulting the authority on what procedures to follow, at least 60 days prior to the initiation of the changes.[126] The authority may make regulations "...providing for specific protections for any protected area which it has designated, including the prohibition or control of specified activities by any person in the designated area."[127]

2.3.5.3 HERITAGE OBJECTS

The section dealing with heritage objects is fraught with obstacles to clarity. From a close reading it appears that there are, in fact, two kinds of heritage objects contemplated. The Act does not specifically say this however.

A) "An object or collection of objects, or a type of object or list of objects, whether specific or generic, that is part of the national estate and the export of which SAHRA deems it necessary to control, may be declared a heritage object, including -

> (a) objects recovered from the soil or waters of South Africa, including archaeological.... objects."[128]

With regard to this first category: "an object within a type of objects declared to be a heritage object is deemed to be a heritage object."[129] This provision further widens the very extensive definitions that could bring a wreck, or part of a wreck, into the ambit of the Act. Whereas in the first Bill preceding the Act, there was no provision made for an owner to make comment prior to this subsection coming into force, the final text does allow this. However, it is submitted that the wording is so weighted against the owner as to be almost useless as an instrument to protect his rights. This is because before declaring an object contemplated in S 32(1) as a heritage object, SAHRA has only to give "... prior opportunity for representations or submissions to be made in regard to the proposed declaration as may be practicable in the circumstances... (and)...nothing herein contained shall oblige SAHRA to give such prior opportunity if the circumstances militate against this."[130]

B) At this point the section seems to repeat itself: "SAHRA with the approval of the Minister may, by notice in the *Gazette* - (a) declare an object, or a collection thereof, or a type of object or list of objects, whether specific or generic, to be a heritage object..."[131]. The next subsection then determines that such declaration cannot be made unless SAHRA follows a set of detailed procedures.

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[126] S 28(3). It is submitted that 'no person' would include the owner.
[127] S 28(5). It is submitted that 'any person' would include the owner.
[128] S 32(1)(a), my emphasis. The rest of the subsection continues with a list of other objects eligible for inclusion in this first category, e.g., visual arts (b) and military objects (c), and objects of cultural, historical (e) and scientific value (g). All of these could, it is submitted, involve some aspect of the ownership of historic wreck.
[129] S 32(2). Leon (supra) points out that a close reading of this wording could lead to the conclusion that, if a painting by an expatriate artist is declared a heritage object, all paintings by expatriate artists could be deemed to be heritage objects and subject to the control of the Act.
[130] S 32(3). It is submitted that this provision can be challenged under S 33(1) of the Constitution - the right to reasonable and procedurally fair administrative action.
[131] S 32(4)(a).

In the case of a specific object or collection SAHRA must serve on the owner "a notice of its intention and ... (give) him or her at least 60 days to lodge an objection or suggest reasonable conditions regarding the care and custody of such object under which such declaration is acceptable".[132] With regard to a type of objects a notice of provisional declaration must be published in the *Gazette*, the effect of the declaration must be publicised, and SAHRA must invite any person who may be adversely affected "to make submissions or to lodge objections with SAHRA within 60 days from the date of the notice."[133] An object is deemed protected as a heritage object for six months from the time of service of the notice to the owner of the specific object or collection of objects, or the publication in the *Gazette* of the notice with regard to a type of object, or until the notice is withdrawn or the collection or type is declared to be a heritage object.[134]

The Act thus creates two categories of heritage object, the semantic distinction between which is the S 32(1) phrase: "the export of which SAHRA deems it necessary to control". Procedurally the differences are more marked, with ownership rights in objects liable to be exported being more severely curtailed. There are, however, other curtailments placed on the use of objects. "No person may destroy, damage, disfigure or alter any heritage object... listed in Part II of the register, without a permit issued by SAHRA."[135] The owner or custodian of the heritage object must keep it in good condition and in a safe place[136], and report loss or damage thereof to SAHRA.[137] No person may carry out work of repair or restoration, or export such object without a permit.[138]

SAHRA must maintain a register of heritage objects,[139] a summary of which must be available to the public, subject to the provisions that "...no information which may identify the location of the object must be accessible to any person except with the express consent of SAHRA, for so long as SAHRA may determine".[140] SAHRA must provide to the owner a badge or certificate indicating the status of the object. [141]

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[132] S 32(5)(a).
[133] S 32(5)(b).
[134] S 32(6).
[135] S 32(13). 'No person' would, it is submitted, include the owner. The NMA provides that no person shall destroy, damage, alter or export from the Republic, any object or group or collection of objects that are generally accepted to have been in the country for longer then 100 years, or wreck or any portion thereof or any object derived therefrom, known to have been in South African territorial waters for longer than 50 years, (S 12(2B)(b)&(d)).
[136] S 32(15).
[137] S 32(16).
[138] S 32(17)&(19). Subsections 19 to 32 deal with the export of a heritage object from South Africa.
[139] S 32(7). The register of heritage objects is divided into: Part I, heritage objects listed by type; Part II A, specific objects on display in museums or in other secure conditions; Part II B, other specific objects. This register is in addition to the 'Inventory of the National Estate', which is defined as being one of "places and objects", (S 39(1)(a)(b)(c)(d)).
[140] S 32(8)&(9). This provision is in keeping with the submission made by Pugh, (supra, fn. 63), to limit the right of access to information on the register of historic shipwreck suggested by Devine and Glazewsky in CHSA.
[141] S 32(11).

The owner must notify SAHRA of the name and address of the new owner, and pass the certificate or badge onto the new owner.[142] Clearly, then, the Act contemplates the alienation of an object by the owner. To "disperse any collection", listed in the register, a permit is required[143], but there is no provision requiring permission to alienate an individual object that is not part of a collection, which seems, then, to be possible without such permission.[144]

2.3.5.4 ARCHAEOLOGY [145]

As mentioned previously (supra, 2.1), the Act defines historic wreck as 'archaeological, and "the protection of any wreck in the territorial sea and the maritime cultural zone shall be the responsibility of the SAHRA.".[146]

The Act determines that all archaeological objects are the property of the state, subject to their remaining in the "ownership of the possessor" for the duration of his lifetime, and SAHRA being notified of the identity of the successor .[147] Thus an archaeological object, which includes historic wreck, becomes the property of the State although the possessor, who now appears also to own it, retains custody.[148] However, this retention of custody does not amount to an owner's right to use the archaeological object. No person may, without permission, destroy, damage, excavate, remove from its original position, collect, own, trade in, sell for private gain, export or attempt to export any archaeological ... material or object, or any category of archaeological ... material or object.[149] In addition permission is needed to "bring onto or use at an archaeological ... site any excavation equipment or any equipment which assist(s) in the detection of ... archaeological material or objects...".[150] Thus an owner of a wreck brought under the protection of the Act under the wide range of definitions enumerated may not excavate the wreck site or search for archaeological objects with equipment.

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[142] S 32(12).

[143] S 32(13).

[144] A problem of nomenclature arises in regard to S 41. While S 32 gives the notion of 'heritage object' a very particular meaning, outside of the more general concept of 'heritage resource', S 41, entitled 'Restitution of Heritage Objects', does not mention 'objects', only 'resources.'

[145] Note that the definition of 'archaeological' under the Act includes wreck, and an 'object' is defined as 'any movable property of cultural significance,' (cf. 4.1, supra), wreck is always a movable (cf. 1.1.1, supra). Historic wreck is therefore an archaeological object.

[146] S 35(1).

[147] S 35(2), S 35(8)(a). S 35(1) places the protection of "archaeological...sites...and material" in the hands of a provincial authority, while S 35(2) says, "all archaeological objects ...are the property of the State." Thus, in regard to archaeology, there are three categories, viz. 'sites', 'material' and 'objects', and only 'objects' are specifically made the property of the State. It is submitted that an 'object' could be considered to be 'material'. In this case at least part of 'material' is owned by the State. Clearly, however, a 'site' is not 'material' because these terms are named as distinct from each other in S 35(1). It appears, then, that the State does not own archaeological 'sites', but does own the 'objects' deriving from such a site. 'Material' is not defined by the Act, but 'site' and 'object' are (cf. 2.3.1, fn. 74 & 75, supra).
The Act does not provide a distinction between an 'archaeological object', under S 35(2), and a 'heritage object', (S 32, see supra, 2.3.5.3). S 32(1) provides that an 'object' which is part of the National Estate can be declared a 'heritage object'. It is submitted that an 'archaeological object', as contemplated by S 35(2), could be part of the National Estate and thus eligible, not only for State ownership, but also for declaration as a 'heritage object'. The Act is not clear on the relationship between these two types of 'object'.
As Leon, supra, points out, S 35(2) is tantamount to expropriation of all archaeological objects in private ownership. It is submitted that this is so, even though the subsection does not specifically name the vesting of ownership of archaeological objects in the State as such. S 46 of the Act, entitled 'Expropriation', allows for the purchase or, subject to compensation, expropriation, of any property for conservation, or for a purpose that is a public purpose, or is in the public interest. Such action may only be taken by the Minister

S 35(2) further provides that the heritage authority must, at its discretion, make sure that archaeological objects are lodged with a museum.[151]

With regard to an archaeological site - which, it is submitted, includes a historic wreck site - no person may destroy, damage, excavate, alter, deface or otherwise disturb such site without permission.[152] If the heritage authority has reasonable cause to believe that any development which will destroy, damage or alter an archaeological site is being carried without permission having been sought, and no heritage management procedure in terms of the Act having been followed, it may serve on the owner or occupier of the site, or the person undertaking the development, a cessation order[153]. It may further carry out an investigation into whether or not an archaeological site exists and, if this is shown, may help the person on whom the order has been served to apply for the necessary permission.[154] If this application is not received within two weeks of the cessation order being issued the costs of the investigation can be recovered from the owner of the land on which the site is located, or from the person wishing to undertake the development.[155] The authority may, "after consultation with the owner of the land on which an archaeological ....site...is situated, serve a notice on the owner..., to prevent activities within a specified distance from such site."[156]

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on the advice of SAHRA and after consultation with the Minister of Finance, (S 46(1)). It is submitted that it is not clear whether these limiting provisions of S 46(1) will apply to S 35(2) as the Act seems to create a separate expropriation-regime for archaeological objects. However, it is further submitted that any change of ownership under S 35(2) will have to comply with the standards set out in S 25(2) of the Constitution which allows for expropriation, subject to compensation, for a public purpose or which is in the public interest. The amount of compensation and the time and manner of payment must be agreed to by those affected or approved by a court.

[148] An issue arises in relation to the words: "an object ... remains in the ownership of the possessor, and SAHRA must be notified who the successor is", (S 35(8)(a) - my emphasis). From this it seems that the possessor, even if he is not the *bona* fide owner, is granted title in the object he possesses, and that this title can be passed onto his successor, as long as SAHRA is notified. This is confusing because S 35(2) has already passed ownership onto the State, thus it is the owner of the object, and not the possessor. The actual owner of the object is not mentioned at all. It is submitted that some of this confusion could be removed if the words 'possession of the owner' were substituted for 'ownership of the possessor', and some device introduced to cover the situation where the *de facto* owner is not the possessor.
[149] S 35(4)(b)(c).
[150] S 35(4)(d).

[151] In terms of the NMA all material recovered from a wreck must go to a museum (cf. fn. 64), which will decide on its disposal, in consultation with the NMC and the holder of a permit (who must already be affiliated to a museum) allowing such removal. Disputes as to disposal must be submitted to arbitration, (S 12 (2C)(f)), There is no such dispute settlement provision in the new Act with regard to historic wreck.
[152] S 35(4)(a).
[153] S 35(5)(a). The cessation order may be for a period specified in the order. The NMA provides that no person shall destroy, damage, excavate, alter, remove from its original site or export any archaeological find, material or object, (S 12(2A)).
[154] S 35(5)(b)&(c).
[155] S 35(5)(d). It is submitted that this provision would be better worded so as to allow two weeks from the outcome of the investigation being made known before the investigation costs are recovered. This would allow unforeseen delays in the investigation process to be catered for.
[156] S 35(6).

Within two years of the commencement of the Act any person in possession of any archaeological material or object, acquired other than in terms of this Act, must lodge lists of such with the heritage authority concerned. Failure to do so will result in the deeming of the object or material to have been acquired after the date of the Act coming into force.[157] This provision may affect rights of an owner which he claims as a result of title established prior to the commencement of the Act.

Whereas previously the Act has allowed for submissions or suggestions from the owner, or other interested parties, on actions taken under the Act that affect entitled rights, there is no such allowance made in this section dealing with 'Archaeology'. Thus it seems that the above actions, with regard to archaeological material, can be taken without the owner being able to make comment thereon. It is submitted that there would be clear grounds for challenge of this section under sections 25 and 33 of the Constitution.[158]

2.3.6 PROVISIONAL PROTECTION

SAHRA may, subject to written notification of the owner, by notice in the *Gazette*, provisionally protect for up to two years, any protected area, or heritage resource which it considers to be threatened and which threat it believes can be alleviated by negotiation and consultation, or the protection of which it wishes to investigate in terms of the Act.[159] Historic wreck would, it is submitted, fall into these categories. A heritage resource is deemed to be provisionally protected for thirty days from the service of the notice on the owner, or until the notice is withdrawn or the resource is provisionally protected.[160] "No person may damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of a provisionally protected place or object without a permit..."[161]

Thus, to provisionally protect a heritage resource or protected area, SAHRA has merely to notify the owner of its intention. This simple notification is sufficient to effect immediate provisional protection and suspension of owner's rights, a situation that could endure for up to two years, during which time the property could become formally declared protected as a heritage resource. Depending on the definition of resource the property happens to fall under, this position may well lead to the variety of inroads into title described supra.

Provisional protection under the new Act is in contrast to that under the NMA. Under that act, whenever a notice of proposed declaration or provisional declaration of monument has been served in respect of any property, such property shall, for the purposes of alienation, protection, removal or export, "...in respect of any person who is aware of such notice, be deemed to be a monument from the date of service of such notice, for a period of six months..." (my emphasis), or until the notice is cancelled or the property is declared a monument.[162] Provisional protection is therefore limited by the phrase "in respect of any person who is aware of such notice", and by the six month period of protection.

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[157] S 35(7)(a).

[158] S 25 of the Constitution entrenches property rights and S 32 rights to just administrative action.

[159] S 29(1)(a)(i)(ii)(iii), S 29(4). A 'heritage resource' means any place or object of cultural significance, (S 2(xvi)), cf. 4.1, supra).

[160] S 29(5).

[161] S 29(10). The issue of nomenclature arises here. S 29(1)(a) permits provisional protection for 'protected areas' and 'heritage resources'. S 29(10) disallows certain actions with regard to 'protected places' or 'objects', which are both lesser components of the S 29(1)(a) concepts. Thus it appears as if provisional protection is extended to a greater range of concepts than are protected against specific activities.

[162] NMA, S 11(1).

2.3.7 PENALTIES

The Act contains a general section and a Schedule prescribing sanctions for contravention of its provisions. Most notable, from the point of view of the private owner of historic wreck is S 51(9) which stipulates that if the owner of a place is convicted of an offence under the Act, involving the destruction or damage of the place, the Minister, on advice of SAHRA, may serve on the owner an order disallowing any development of the place, except making good the damage and maintaining the cultural value of the place, for a period of up to ten years.[163]

A reasonable period must be given to "any person with a registered interest in the land"[164],(which presumably would include the owner), to make submissions on whether the order should be made and for how long. In this circumstance if, after consideration of the submissions the order is made, owners' rights can effectively be frozen for the period of the notice.

2.4 CONCLUSION

The Preamble to the Act states as follows:

> "Our heritage is unique and precious and cannot be renewed. It helps us define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation."

Such elevated sentiments are, it is submitted, valuable for the 'nation-building' exercise currently underway in this country. However, while the National Heritage Resources Act may have, at its core, the notion of the preservation of South Africa's cultural heritage, it goes about its stated aim in too rough-shod a manner.

It is submitted that concerns of uncertain terminology, broadness of definition and the clear intention to deprive owners of their entitlement, raised in this essay, will mean certain challenge to the constitutionality of many provisions of the Act. Such action may result in the legislation becoming ham-strung. This is unfortunate, but is due to the fact that the purposes of the Act, although noble, have been pursued in an entirely inappropriate manner.

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[163] S 51(9). Cf. 2.3.1, supra, for the definition of a 'place'.
[164] S 51(10). 'Land' includes land covered by water, (S 2(xx)).

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1999

A LEGAL REGIME FOR PLANNING IN THE COASTAL REGION

CASE STUDY: MUIZENBERG / PELICAN PARK GROWTH MANAGEMENT STRATEGY

COASTAL ZONE LAW:
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A LEGAL REGIME FOR PLANNING IN THE COASTAL REGION – CASE STUDY MUIZENBERG/ PELICAN -PARK GROWTH MANAGEMENT STRATEGY

Mark Twain : "Invest in land my boy, they ain't making it anymore."

1 INTRODUCTION

Planning is the application of scientific method –however crude- to policy making. What this means is that conscious efforts are made to increase the validity of policies in terms of the present and anticipated future of the built environment.

"*The practice of planning is fundamentally a matter of transaction and negotiation between competing interests and that therefore the outcome of executive action relies not so much on the merits of a particular plan or scheme, but on the force, or power of persuasion, of the various actors concerned with its success or failure.*"[1]

The legal regime for planning in the coastal region provides no absolute protection of this environment.

The aims of planning in general are idealistic, these include:

- The achievement of ends
- The exercise of choice
- An orientation towards the future
- Action and results
- Comprehensiveness

However, in practice this is not often achieved.

Spatial planning according to Claassen in Fuggle and Rabie[2] in the form of laying out of new townships , housing estates , recreational amenities and industrial zones is continuing apace in the coastal zone. There are no laws specifically governing planning and development in the coastal zone.

A feature of planning law until recently was that the pertinent legislation was found at Provincial government level rather than at National government. Therefore the key legislation governing planning were ordinances. One reason for this could be the influences of the British and American planning systems on the South African Planning system .

The British Planning system is nominally devoted to the pursuit of the Public interest, but the concept of state control in the public interest , crucial to the definition

[1] Gordon E Cherry: Town and Regional Planning: University of Stellenbosch : No 4 April 1990 pg 3
[2] Fuggle and Rabie Juta and Co Ltd Cape Town : 1990

of planning in Britain is absent in the united states . There the planning operations are designed in the interest of particular groups. The Americans talk of the need for coordinated planning unlike the British view, which is supposed to imply coordination.

The British Central Government, holds the final policy responsibility and the final administrative authority, but local authorities are expected to take much of the initiative in carrying out policy [3]

South African Planning was strongly influenced by the British Planning system in terms of administrative land use law and introduced the concept of structure plans, however, the American system passed on the emphasis on zoning , based on the Euclidean model. Using the 1926 case of Euclid Vs Ambler Realty (272 US 365) the Supreme Court ruled that Local Government has the right to control the use of land . This ruling forms the basis for all subsequent land use zoning in the United States. Each class of area receives a single use designation such as agriculture, residential or commercial.

South Africa was also influenced by regional planning schemes in the USA such as the Tennessee Valley Authority . This scheme was created during the depression of the 1930's to alleviate poverty through effective resource utilisation (Fuggle and Rabie)[4]

Therefore Town Planning developed as a control orientated physical planning system . For this reason it developed strongly at the Local Level , but long range policy formulation at National Level were never developed fully.

Town Planning at the Local Level is primarily a problem solving arbitration system and seldom provides absolute control . Therefore other legislation is needed to provide protection for environmental issues such as protection of the coastal zone.

2 PLANNING DEFINITION OF THE COASTAL ZONE

The coastal zone as defined planning terms is wider than that described in the Seashore Act (21 of 1935). It includes the area between the high and low water mark and also includes, beaches, wetlands, water catchment areas and development from at least 1km to as much 20 kilometers from the high water mark. Planning usually deals with the effect of human activities on the environment.

The problems occurring in this segment of the coastline cover a whole range of environmental problems that are not covered by planning law. There is often an overlap of environmental issues and hence laws in the planning sphere.

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[3] Andreas Faludi: A Reader in Planning Theory : Pergamon Press: 1991

[4] Fuggle and Rabie : Chapter 28

3 OVERVIEW OF CURRENT AND FUTURE PLANNING LAWS

The following is an overview of current and future planning legislation that does or can have an influence on planning in the coastal zone. However, the comprehensiveness of the current planning laws is shown to be inefficient in the next section of this report, which addresses an actual case study.

The most important legislation is that which is provided at Provincial Level.

3.1 Land Use Planning Ordinance 15 of 1985

The Land Use Planning Ordinance makes provision for the creation of structure plans the purpose of which is :

"To lay down guidelines for the future spatial planning development of the area to which it relates (including urban renewal, urban design or the preparation of development plans) in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned."

There are two levels of structure plans:

- Section 4(6) Structure Plan –
  A Local authority or joint local authorities can submit a structure plan to the **administrator** , which is valid for 10 years. The structure usually comprises a report outlining the principles of the plan a well as a map indicating potential land use.

- Or a section 4(10) Structure Plan : A town clerk or secretary may submit a structure plan to their local **Council** for approval of a structure plan within their area of jurisdiction or part thereof.

Significantly, the structure plan neither confers nor takes away rights in respect of land. It is merely a means to guide development control decisions made at the local level.

The second method of land use control which allocates rights to a land owner in terms of use, building heights, bulk, floor area, coverage and setback lines is the zoning map.

A zoning map is prepared in terms of section 10 of the Ordinance . This is accompanied by a zoning scheme. the purpose of the zoning scheme is to determine use rights and to provide for control over use rights and over the utilization of land in the area of jurisdiction of the Local Authority.

Applications for departure from the rights on a particular zoning can be granted by a Local Authority in terms of section:

15(10 An owner of land may apply in writing to the town clerk or secretary concerned as the case may be

a) For an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned, or
ii) to utilize land on a temporary basis for a purpose for which for which no provision has been made in said regulations.

Similarly a rezoning from one form of zoning to another usually of a higher order can also be permitted in terms of section:

17(1) An owner of land may apply in writing to the town clerk or secretary concerned as the case may be , for a rezoning of the land under section 16

2)The town clerk shall

a) cause such application to be advertised
b) where objections against the said applications are received, submit them to the said owners for comment;
c) Obtain the relevant comment of any person of the council of the council and furnish the director with a copy thereof.

22 (1) No application for subdivision involving a change of zoning shall be considered unless the land concerned has been zoned in a manner permitting of subdivision (subdivisional area)

If the new zoning is not exercised within two years of approval it will lapse and revert to the previous zoning.

The refusal of an application shall be solely on the basis of a lack of desirability of the contemplated utilization of land concerned including the **guideline proposals included in the relevant structure plan** in so far as it relates to **desirability** or on the basis of its effect on existing rights concerned (except any alleged right to protect against trade competition)

Where an application.. is not refused by virtue of the above matters , ..regard shall be had, in considering relevant particulars , to only the **safety and welfare of the members** of the community concerned, **the preservation of the natural and developed environment** concerned or the effect of the application on existing rights concerned . (except any alleged right to protect against trade competition)

The applicant has the right of appeal to an appeal committee. The Appeal committee is a Provincial function. A Planning Advisory Board is established to advise the Minister on appeals.

3.2 Development Facilitation Act(67 of 1995) [5]

Although the DFA has not been adopted by the Western Cape , its importance as a piece of legislation is significant in light of its influence on the New Western Cape Planning and Development Act (7 of 1999).

The DFA was established at National government level to speed up development in the light of the government's RDP program.

The DFA was the first coherent attempt to bring about uniformity in township establishment , land registration and planning systems , with special focus being placed on low-income development. It does not repeal any existing legislation in the different Provinces but allows developers a choice between LUPO, the less formal township development act or the DFA. It contains a provision that allows for low-income housing projects to be given priority.

The DFA establishes Development Tribunals in each province composed of experts appointed by the Premier. They consider all development applications and can override certain legislation e.g. restrictive conditions of title and removal of servitudes and can deal with disputes resolution and mediation.
In terms of section

32 (2) In approving a land development application a tribunal may, either of its own accord or in response to that application, impose any condition of establishment relating to-

(d) the suspension of restrictive conditions or servitudes affecting the land on which a land development area is to be established;
(l)(iv) any law requiring the approval of an authority for the subdivision of land;
(n) the environment or environmental evaluations;

One of the Principles of the DFA is the promotion of Sustainability. Therefore policies and practices should aim to promote land development that is fiscally, institutionally and administratively viable, that establishes communities and is environmentally sustainable.

Although the DFA was adopted by the rest of South Africa, the Western Cape have created a new act to replace the Land Use Planning ordinance and the DFA . This act follows many of the principles of the DFA.

3.3 Western Cape Planning and development Act 7 of 1999

Part of the definition of this act is to provide for principles and lay down policies, guidelines and parameters for planning and sustainable development where provisional and regional interest require, including environmental protection and land development management.

[5] Erica Emdon:Urban Forum 5:2: 1994)

The new Planning and Development act makes provision for three levels of plans Chapter 1 (3) (1):

- (a)The Integrated Development Framework : implemented at Provincial level for the entire Province.

⇒ "means *a development framework which deals with the integration of various strategies and sectoral plans relating to development, such as economic, spatial, social, infrastructural, housing, institutional, fiscal, land reform, transport environmental and water plans, to obtain the optimal allocation of scarce resources in a particular geographic area, and includes an integrated development plan as defined in section 10B of the Local Government Transition Act, 1993*

- (a)Sectoral plan – region (2 district councils or an area larger than the Metropolitan area)

⇒ *A sectoral plan means any written strategy or plan which deals mainly with one of the sectors or elements or particular subjects that form part of an integrated development framework and which may be a spatial, economic, land reform, environmental, housing, water or transport plan'.*

- Local Government IDF- usually at Municipal level

Any existing structure plan is to be reviewed by the year 2001 and every five years thereafter.

5(1) The aim of the Integrated development Framework (IDF) is to lay down strategies, proposals and guidelines, including development objectives and an implementation plan by means of development planning so that the general principles of this act are promoted.

This goes beyond spatial planning it looks at creating a vision for an area , promoting Land Development Objectives, local Economic Development- budgeting for coordinated planning that goes beyond spatial planning . This will relate to the coastal zone only insofar as the vision for the area is concerned which is mainly above the high tide.

The act in section 9 (3) includes some additional functions of the zoning schemes.

c) *the imposition of development rules in respect of land uses , districts or zones , which may include development rules applicable to a specific type of natural environmentally sensitive , cultural , architectural , historic and developed environment.*

i) *protective measures in respect of areas of the natural environment and environmentally sensitive areas such as wetlands, flood plains, dunes, steep slopes and the environment in general,*

These measures may provide for additional protection of sensitive environmental areas that are found in the coastal zone such as dunes and wetlands.

When applying for a departure in terms of section 15 (1) the process is slightly different from the previous Land Use Planning Ordinance , the council may refuse or approve the application based on the desirability in terms of an Integrated development framework or Sectoral plan.

When applying for a rezoning the same is true and the rezoning will lapse after a period of three years if not taken up by the applicant , compared to the two years provided for in LUPO.

Section 67 of the act describes additional motivation for environmental impact assessments.
1)The Provincial Minister may identify activities, which require environmental impact assessments
3) The Provincial Minister may require that certain prescribed activities shall not be – undertaken except in accordance with a written authorization issued by the Provincial Minister or the council of a municipality.
5) The Provincial Minister may declare any area in the Province as defined in a notice in the government gazette as an environmentally sensitive area and may prohibit any development or activities in such areas.

It is difficult to foresee this section being applied widely in practice to the coastal zone unless the area in question is extremely controversial or under immediate threat, in light of similar legislation being passed under the Environmental Conservation Act (73 of 1989) in which only one area has been identified as an environmentally sensitive area since its inception.

3.4 Physical Planning Act 21 of 1991

The Physical Planning Act is a piece of National Legislation that preserves guideplans that were drawn up during apartheid times in terms of the Physical Planning Act 88 of 1967.

The aims of the act are:

"*To promote the orderly physical development of the Republic, and for that purpose to provide for the division of the Republic into regions, for the preparation of national development plans, regional development plans, regional structure plans and urban structure plans by the various authorities responsible for physical planning, and for matters connected therewith.*"

Section 1 (1) In order to achieve the objects of this Act, the Minister may by himself or in collaboration with or through any other Minister, any Administrator, any government, any regional or local authority or any other person do research or cause research to be done, institute any inquiry or cause any inquiry to be instituted or collect information or cause information to be collected, whether in the Republic or

elsewhere, in connection with any matter which has or is likely to have an effect on the **physical development** of any area in the Republic, including-

(a) the physical, social and economic characteristics of that area and, in so far as any neighboring area has or is likely to have any effect on the physical development of that area, the physical, social and economic characteristics of any such neighboring area;

(b) the distribution, increase and movement and the urbanization of the population in that area;

(c) **the natural and other resources and the economic development potential of that area;**

(d) the existing and the planned infrastructure, such as water, electricity, communication networks and transport systems, in that area;

(e) the general land utilization pattern;

(f) **the sensitivity of the natural environment.**

The Minister shall ensure that physical planning is promoted and co-ordinated on a national and regional basis.

3.5 Local Government Transition Act 209 of 1993.

The Local Government Transition Act was initiated as an interim measure to control local government during the transition phase from the commencement of the new government after the elections in 1994.

The aim of the act is defined as:

- *To provide for revised interim measures with a view to promoting the restructuring of local government, and for that purpose*
- *to provide for **the establishment of Provincial Committees for Local Government** in respect of the various provinces;*
- *to provide for the **recognition and establishment of forums** for negotiating such restructuring of local government;*
- *for the **exemption of certain local government bodies from certain provisions of the Act;***
- *for the establishment of **appointed transitional councils** in the pre-interim phase;*
- *for the **delimitation of areas of jurisdiction and the election of transitional councils** in the interim phase; for the **establishment of transitional rural local government structures**; for the issuing of proclamations by the MECs of the various provinces;*
- ***for the establishment of Local Government Demarcation Boards in respect of the various provinces;***
- *and for the repeal of certain laws; and to provide for matters connected therewith.*

The Local Government Transition Act, 209 of 1993 makes provision for the creation of integrated development plans. These are defined as:

"a plan aimed at the integrated development and management of the area of jurisdiction of the municipality concerned in terms of its powers and duties, and which has been compiled having regard to the general principles contained in Chapter 1 of the Development Facilitation Act

The Local Government Transition Act will be replaced by The Municipal Structures act 117 of 1998 in about July 2001 with the creation of a uni-city in the Cape Metropolitan Area.

3.6 Municipal Structures Act 117 of 1998

- The act was established to provide for the establishment of municipalities in accordance with the requirements relating to categories and types of municipality;
- to establish criteria for determining the category of municipality to be established in an area;
- to define the types of municipality that may be established within each category;
- to provide for an appropriate division of functions and powers between categories of municipality;
- to regulate the internal systems, structures and office-bearers of municipalities;
- to provide for appropriate electoral systems;
- and to provide for matters in connection therewith.

The preamble to the act is interesting in that it defines the role of Local Government in terms of the constitution as a distinctive **sphere** of government, interdependent, and interrelated with national and provincial spheres of government. This elaborates on the role of local government as defined in the New Constitution (200 of 1994).

There is agreement on the fundamental importance of local government to democracy, development and nation building ;

Past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services, and disrupted spatial, social and economic environments in which people continue to live and work;

Municipalities therefore need to embark on the final phase in the local government transition process to be transformed in line with the vision of a democratic and developmental local government;

The MEC for local government in a province may assign powers to a Local Authority . The act makes provision for the establishment of Ward Councils that are nominated bodies and for an executive committee along with an executive mayor who will take over the old role of the EXCO chairperson.

The executive mayor must-

(a) Identify the needs of the municipality;

(b) Review and evaluate those needs in order of priority;

(c) Recommend to the municipal council strategies, programs and services to address priority needs through the integrated development plan, and the estimates of revenue and expenditure, taking into account any applicable national and provincial development plans;

This act replaces Ordinance 15 of 1985, Cape Land Use Planning, Section 46 (1) in so far as it relates to sections 23 (1) and 39 (2)

24(1) In order to give effect to the general objectives of integrated environmental management laid out in this chapter, the potential impact on –

a) the environment
b) Socio economic conditions
c) The cultural heritage

of activities that require authorization or permission by law and which may significantly affect the environment, must be considered , investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorizing permitting or otherwise allowing the implementation of the activity. This is also effective for the coastal zone although it is not specifically mentioned in the act.

2) The Minister may with the concurrence of the MEC.
a) identify activities, which may not be commenced without prior authorization from the Minister or MEC.
b) **identify geographical areas in which specified activities may not be commenced without prior authorization from the Minister and specify such activities.**
(c)make regulations in accordance with subsections (3) and (4) in respect of such authorizations;
(d) identify existing authorized and permitted activities which must be considered, assessed, evaluated and reported on; and
prepare compilations of information and maps that specify the attributes of the environment in particular geographical areas, including the sensitivity, extent, interrelationship and significance of such attributes which must be taken into account by every organ of state charged by law with authorizing, permitting or otherwise allowing the implementation of a new activity, or with considering, assessing and evaluating an existing activity:

4 APPLICATION OF PLANNING LEGISLATION TO MUIZENBERG PELICAN PARK GROWTH MANAGEMENT STRATEGY

An Explanation of the study area is necessary for a greater understanding of the plans governing it. Muizenberg Pelican Park growth management strategy covers an area

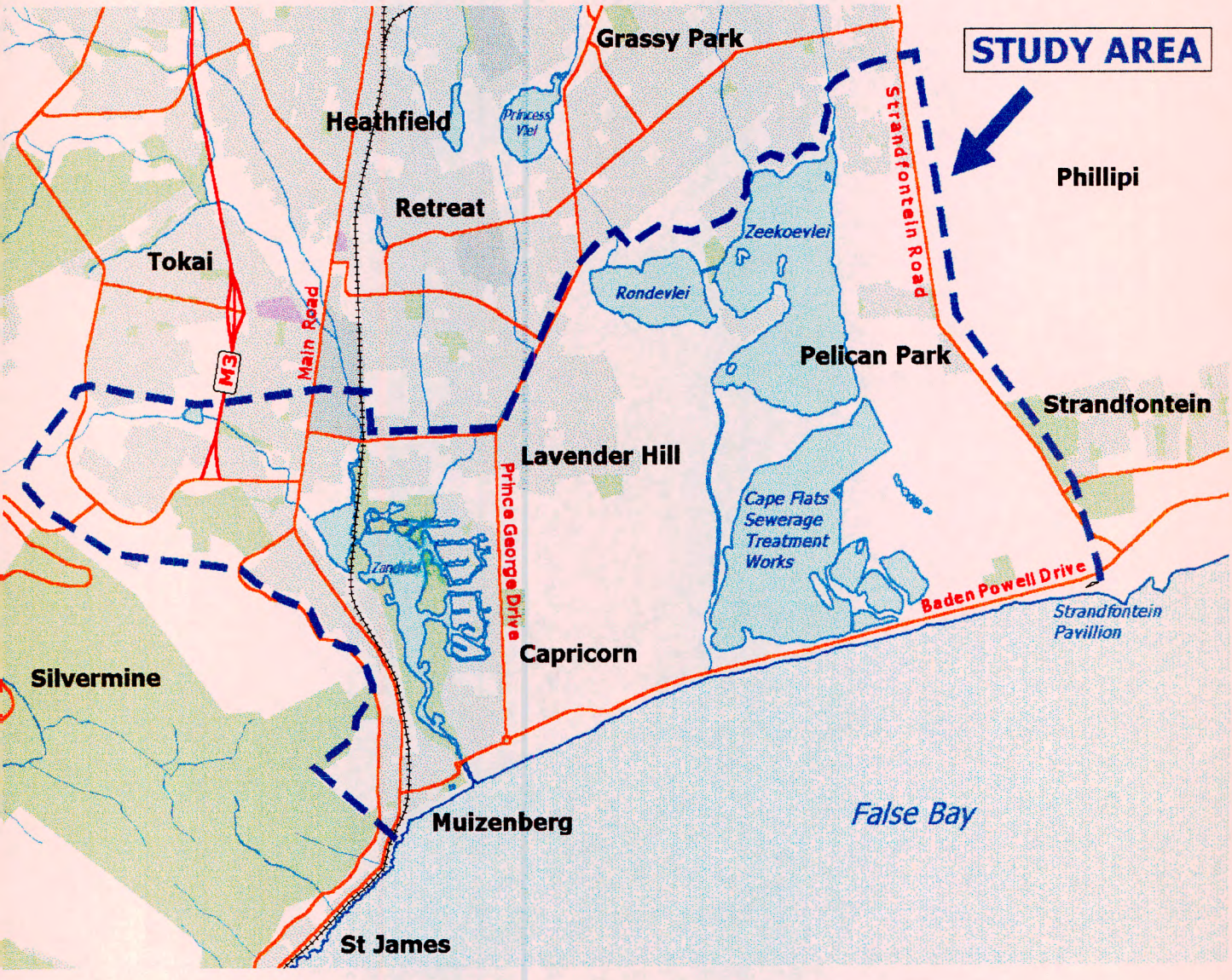
that stretches along the coastline from the Strandfontein Road that runs between Phillipi and Pelican Park and Muizenberg. (see figure 1) It incorporates two catchment areas namely Sandvlei catchment that includes the Langevlei and Keysers River canals as well as the Westlake wetlands and river. The other catchment area is Zeekoevlei of which the Lotus canals that run from the Cape Flats drain into the larger Zeekoevlei water body.

Most urbanization in Cape Town has taken place in the catchment area of the Sand , Zeekoe, Salt , Black and Kuilsriver catchment areas. The remaining areas of Cape Town are dominated by agriculture and mountains.[6]

95% of the informal housing populations are located in the False Bay Catchment area, which runs into the Zeekoevlei catchment system.

[6] AJR Quick:: Urban Growth in Metropolitan Cape Town: implications for inland and coastal waters: Town and Regional Planning: No 35 September 1993: pg 3

FIGURE 1: STUDY AREA



Virtually the entire metropolitan coastline is utilized for recreation. There are only four inland water bodies that are used for water contact recreation these include Sandvlei and Zeekoevlei.

This paper describes the study area and its problems in geographical order from east to west in order to illustrate how different land uses and their location can create disputes or problems in a coastal planning area.

4.1 Pelican Park

The residential area of Pelican Park ~~which~~ was originally built as a former House of Representatives Indian settlement in terms of the Pelican Park Structure Plan (1977). This structure plan was proclaimed in terms of the old "Townships Ordinance", 1934 (Ordinance 33 of 1934 (Cape) (Figure 2). Of this structure plan phases 1 to 3 have already been built. Phases 4, 5 and 6 are the subject of a Provincial Housing Board Subsidized scheme. Phases 7 and 8 are proposed on a sensitive dune area that has been identified by an independent environmental consultant as containing 5 red data book species. That is species that are rare and endangered following internationally set criteria; and in this case found nowhere else in the world. Although the Structure Plan was produced in terms of the Ordinance 33 of 34 which has been repealed by the Land Use Planning Act 15 of 1985,and the Structure Plan is not valid any longer it has not yet been replaced by a new Structure Plan in terms of the Ordinance. Therefore in the absence of anything else , it provides guidance to the Local Authority on development in that area

As noted previously, the Land Use Planning Ordinance makes provision for the creation of structure plans the purpose of which is :

"To lay down guidelines for the future spatial planning development of the area to which it relates (including urban renewal, urban design or the preparation of development plans) in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned."

The refusal of an application in terms of a structure plan, shall be solely on the basis of a lack of desirability of the contemplated utilization of land concerned or , ..regard shall be had , in considering relevant particulars , to only the **safety and welfare of the members** of the community concerned, **the preservation of the natural and developed environment** concerned or the effect of the application on existing rights concerned

However, this act has no specific reference to the coastal zone or the protection thereof and there is no specific regulation aimed at protection of the coastal area. Where the safety and welfare of the members of the community conflict with the preservation of the natural and developed environment, no specific remedy is offered.

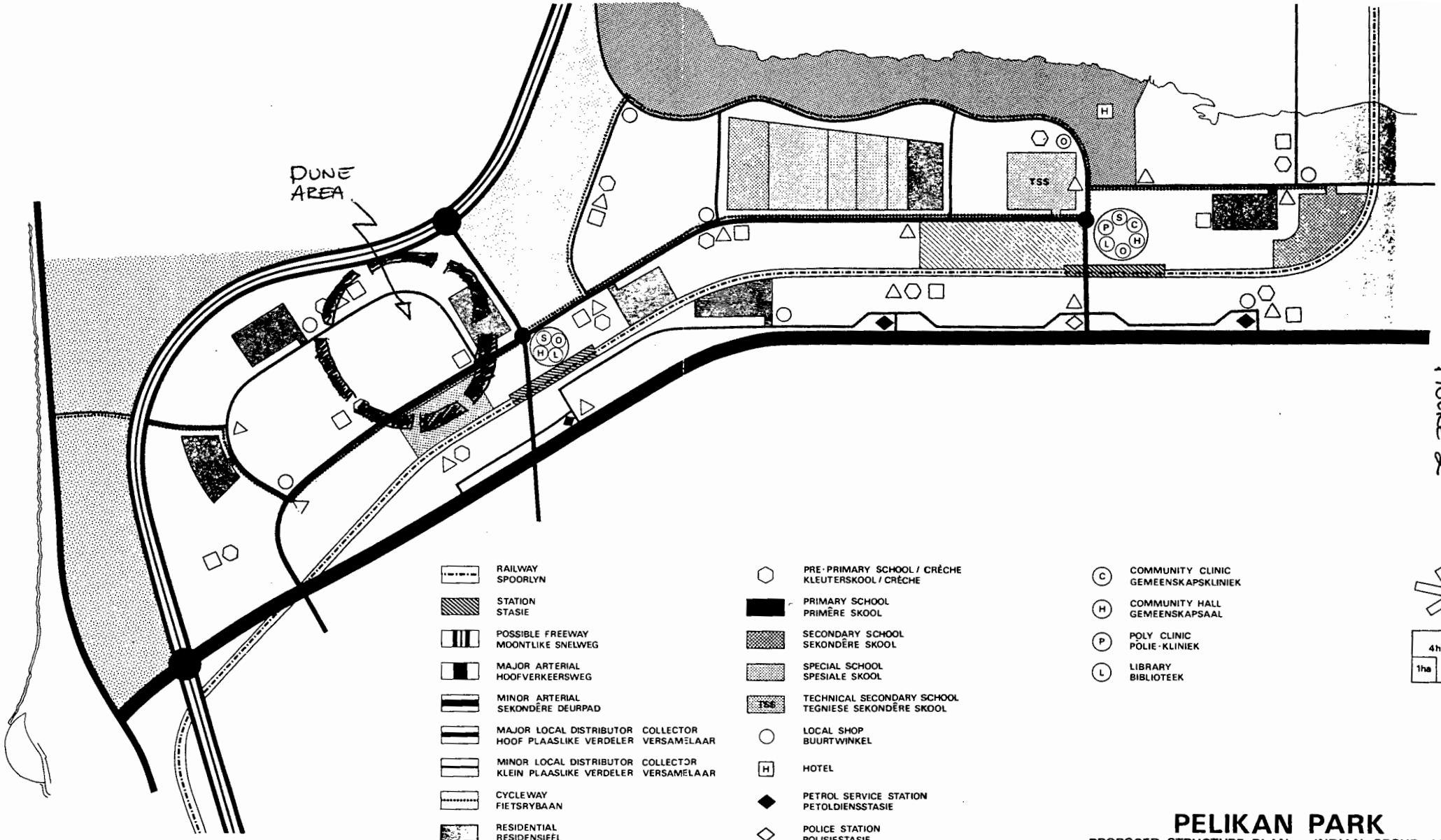


FIGURE 2

RAILWAY
SPOORLYN

STATION
STASIE

POSSIBLE FREEWAY
MOONTLIKE SNELWEG

MAJOR ARTERIAL
HOOFVERKEERSWEG

MINOR ARTERIAL
SEKONDÊRE DEURPAD

MAJOR LOCAL DISTRIBUTOR COLLECTOR
HOOF PLAASLIKE VERDELER VERSAMELAAR

MINOR LOCAL DISTRIBUTOR COLLECTOR
KLEIN PLAASLIKE VERDELER VERSAMELAAR

CYCLEWAY
FIETSRYBAAN

RESIDENTIAL
RESIDENSIEEL

DETAILED INVESTIGATION AREA
DETAIL-ONDERSOEKGEBIED

SPECIAL AREA
SPESIALE GEBIED

RECREATION AREA
ONTSPANNINGSGEBIED

CENTRAL SPORTS COMPLEX
SENTRALE SPORTKOMPLEKS

PLAYGROUNDS

PRE-PRIMARY SCHOOL / CRÊCHE
KLEUTERSKOOL / CRÊCHE

PRIMARY SCHOOL
PRIMÊRE SKOOL

SECONDARY SCHOOL
SEKONDÊRE SKOOL

SPECIAL SCHOOL
SPESIALE SKOOL

TSS TECHNICAL SECONDARY SCHOOL
TEGNIESE SEKONDÊRE SKOOL

LOCAL SHOP
BUURTWINKEL

H HOTEL

PETROL SERVICE STATION
PETOLDIENSSTASIE

POLICE STATION
POLISIESTASIE

OLO AGE HOME
OUETEHUIS

PLACE OF WORSHIP
PLEK VAN AANBIDDING

S COMMUNITY SHOPS
GEMEENSKAPWINKELS

COMMUNITY CENTRE
GEMEENSKAPSENTRUM

C COMMUNITY CLINIC
GEMEENSKAPSKLINIEK

H COMMUNITY HALL
GEMEENSKAPSAAL

P POLY CLINIC
POLIE-KLINIEK

L LIBRARY
BIBLIOTEEK

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S
N

Potential Overheating
Potensiële Oorverhitting

Optimum Orientation
Optimale Oriëntasie

Prevailing Winds

PELIKAN PARK

PROPOSED STRUCTURE PLAN INDIAN GROUP AREA
VOORGESTELDE STRUKTUURPLAN INDIËR GROEPSGEBIED

PROPOSED STRUCTURE PLAN
VOORGESTELDE STRUKTUURPLAN

Divisional Council of the Cape — Afdelingsraad van die Kaa

Date Sept. '83
Datum

50 200 400
0 100 300

T.P. Z.V. 18/6
FIG. 4

As the Structure Plan is over twenty years old, its relevance to current problems and issues is questionable , particularly with regard to environmental issues. It does not confer rights on the land , but it is supposed to help the Local Authority to guide development in the area.

The part of the Land Use Planning Ordinance that allocates rights to land in terms of use is the zoning map.(see figure 3)

The land is currently zoned as Rural in terms of the zoning scheme. This implies that the owner of the land cannot develop the land for housing as intended. It is first necessary to obtain a rezoning to Single or General Residential.

A rezoning from one form of zoning to another usually of a higher order can be permitted in terms of section:

17(1) An owner of land may apply in writing to the town clerk or secretary concerned as the case may be , for a rezoning of the land under section 16

2)The town clerk shall

a) cause such application to be advertised
b) where objections against the said applications are received, submit them to the said owners for comment;
c) Obtain the relevant comment of any person of the council of the council and furnish the director with a copy thereof.

22 (1) No application for subdivision involving a change of zoning shall be considered unless the land concerned has been zoned in a manner permitting of subdivision (subdivisional area)

If the new zoning is not exercised within two years of approval it will lapse and revert to the previous zoning.


Growth Management Strategy
Zoning
Agricultural
Business
Cemetery
Civic & Community
Commercial
Community Facilities
Deferred
Education
Industrial
Military
Parking
Public Open Space
Public Utility
Railways
Reserved
Residential
Residential Informal
Roads
Rural
State
Undetermined
Unsuitable
Water
Scale: 1:50000
@ A3
N
0
0.5 Kilometers
Sweet Valley
Dennendal
Tokai
Kirstenhof
Retreat
Pollsmoor
Steenberg
Westlake
Tech
Westlake Golf Course
Lakeside
Muizenberg
Marina Da Gama
Vrygrond
Zandvlei
Capricorn
Lavender Hill
Rondevlei
Zeekoevlei
Pelican Park
Phillipi
Strandfontei
Cape Flats
Waste Water Treatment Works
False Bay
Dam

FIGURE 3

However in terms of the National Environmental Management Act (**NEMA) 107 1998**

"Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure."

The regulations of NEMA Volume 1 provide a list of activities and environments that should be subject to an environmental impact assessment.

Those relevant to the study area include:

- ✓ The establishment of townships
- ✓ Subdivisions
- ✓ Rezoning

Within the list of environments, the following are applicable:

- Sites of conservation significance
- Dunes
- Landscapes
- Biotic assemblages
- Habitat of Red Data species
- Aquifers and aquifer recharge areas
- Bird migration sites
- Areas with a high natural water table

In terms of these criteria, the rezoning of this land to residential will first involve an Environmental Impact Assessment as the land in question complies with most of the above criteria. This is the only means of control in this regard. The Environmental Impact Assessments have been assessed by Cape Nature Conservation until now. However, there is a problem with capacity in this regard and many developers can apply for an exemption from an EIA if it is warranted by Cape Nature Conservation. The application for rezoning is then assessed directly by the Provincial Administration of the Western Cape.

However, in January 2000, a new planning act will come into effect. The Western Cape Planning and Development Act 7 of 1999. The New act makes provision for accelerated development.

In terms of Chapter 3 , land can be made urgently available for subsidized housing where human need , the restitution of land rights so require. The process for making land available is quicker than normally required . The municipality identifies the land for development, it is then advertised in the prescribed manner . The municipality

may ask that any legislative restriction or legal provision be removed and the Provincial minister can do so by a notice in the Government Gazette
In terms of section 41 (4) Settlement on land allocated in terms of subsection (1) shall take place only after a surveyor with a view to preparation of the general plan has been approved or provisionally approved.
A land unit may be allocated with or without the payment of compensation as the owner may determine.

This has environmental implications in that the EIA regulation provisions can be removed in terms of this act.

In a situation like Pelican Park where the land has historically been earmarked for subsidized housing and in anticipation thereof there is already squatting on part of the land , the application of this legislation will be destructive to the coastal environment.

4.2 Zeekoevlei

Simultaneously the land adjacent to Pelican Park comprises the Zeekoevlei Recreational area, which is currently in the process of being proclaimed as a Local Authority Nature Reserve in terms of the Environmental Conservation Act 73 of 1989(Part 3 section 16(1). This application has been advertised for comment to the public, has passed approval at local council level and is currently being processed by Provincial Government. This is not the only method that the Local Authority could have followed in order to provide protective status to the area.

Although the Environmental Conservation Act (73 of 1989) has been replaced by the National Environmental management act, the following sections have not been repealed, these are all methods of controlling growth and protecting environmentally sensitive areas:

Part iii
Protection of the natural environment
16. 1*) A competent authority may by notice in the Official gazette concerned declare any area defined by him, to be a protected natural environment and may allocate a name to such area. Provided that such protected natural environment may only be declared-*

a) *if in the opinion of the competent authority there are adequate grounds to presume that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general;*

In order to achieve the general policy and object of the act, the Administrator may issue directions relating to any land or water in a protected natural environment.

18). Special nature reserves-
1) The Minister may by notice in the Gazette declare any area defined by him and situated in the republic of South Africa, including the territorial waters as defined in section 4 of The Maritime Zones Act 1994(15/1994) to be a special nature reserve.
The declaration of a special nature reserve may not be withdrawn or its boundaries altered except by resolution of parliament. The minister may assign the control of a special nature reserve to any local authority or government institution; the governing authority strictly controls Entry into a special nature reserve.

The third category of protected environment in terms of the Environmental Conservation Act section 23 is limited development areas-
1) A competent authority may by notice in the official gazette declare any area defined by him or her, as a limited development area.
2) No person shall undertake in a limited development area any development or activity prohibited by the competent authority by notice in the official gazette, or cause such development or activity to be undertaken unless he or she has on application been authorized thereto by the competent authority.

In considering an application for this authorization, the Minister of Local Authority may request the submission of a report concerning the influence of an activity on the environment.

There are other options open to the Municipality to create a protected natural environment or park.

Protected areas under international instruments
The Minister can make provisions in terms of an international treaty or agreement relating to the protection of the environment which has been entered into or been ratified on behalf of the government of South Africa[7]. These regulations may relate for example to wetland areas or world heritage sites. In this case south of both Rondevlei and Zeekoevlei is the Cape Town Municipal Sewerage Treatment works. This area is an important habitat for many bird species and has been proclaimed as a RAMSAR site. In terms of the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl habitats (1971)

If the area was to be proclaimed as a protected natural environment by the Minister, any person that contravenes the provisions is guilty of an offence.

National Parks Act (57 of 1976)
Another method of protection of a natural environment is to declare an area a National Park in terms of the National Parks Act.

The object of a park is defined in section 4 of the act as:

[7] Fuggle and Rabie : page 703
Section 23 (1), (2) and (3) of act.

"the establishment, preservation and study therein of wild animals, ***marine and plant life*** *and objects of geological, archeological, historical, ethnological, oceanographic, educational and other scientific interests and objects relating to the said life or the first-mentioned objects or to events in or the history of the park, in such a manner that the area which constitutes the park shall, as far as may be and for the benefit and enjoyment of visitors, be retained in its natural state.*

Section 5 of the act makes provision for a National Parks Board .

(2) The board may within a park-

(a) subject to any conditions which may be determined by the Minister of Minerals and Energy and the Minister of Public Works in respect of land declared to be a park or to be part of a park under section 2A (1) and section 2B (1); and

(b) subject to the provisions of any agreement entered into in respect of land declared to be a park under section 2B (1) (b)-

i) construct and erect such roads, bridges, buildings, dams, fences, breakwaters, seawalls, boathouses, landing stages, mooring places, swimming pools, oceanariums and underwater tunnels and carry out such other works as it may consider necessary for the control, management or maintenance of the park;

(ii) take such steps as will ensure the security of visitors, the animal and plant life in the park, and the preservation of the park and the animals and vegetation therein in a natural state;

In terms of schedule 1 (b) , Scheduled parks are enumerated and their areas defined in schedule one of the act. The Minister of Environmental Affairs is authorized to declare by notice in the Government Gazette any other area to be a National Park.

In terms of the act state land can be used for the establishment of a park . Alternatively land can be purchased from private owners for the purpose of establishing a park.

4.3 Rondevlei Nature Area

Abutting Zeekoevlei is the Rondevlei Local Authority Nature Reserve, which was proclaimed as such in 1952 . This park contains 16 red data species as well as several examples of indigenous flora and fauna including Cape Otters and Hippopotamus and therefore qualified as a Local Authority Nature Reserve in that "there (were) adequate grounds to presume that the declaration (would) substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general.[8]

[8] 16(1) Environmental Conservation Act 73 of 1989

4.4 Zeekoevlei Township

Between Rondevlei and Zeekoevlei is the residential suburb of Zeekoevlei. Part of this township is undeveloped and it is the wish of the Local authority that this area be incorporated into Rondevlei reserve. To do so the land will have to be rezoned from single residential to nature area zoning in terms of the Land Use Planning ordinance 15 of 1985. In order to get the owner of the township land to accede to this proposal, a land exchange is being negotiated. The land to be exchanged is currently zoned Educational and this will also have to be rezoned to Single Residential in order that the owner of the land should have the same rights in terms of the zoning that he had before.

The establishment of Zeekoevlei Township in the first place is a contentious issue. The Township was established in a wetland area and this would have been considered to be under the one in fifty year floodline. In terms of the new National Water Act (36 of 1998) this development would probably not have been allowed to commence. The vlei also has experienced seasonal occurrences of blue green algae which is toxic to humans. The sewerage system, which is based on a system of septic tanks, periodically gets flooded and soaks into the vlei causing health hazards.

Part 3 of the National Water Act requires certain information relating to floods, droughts and potential risks to be made available to the public. Township layout plans must indicate a specific floodline. Water management institutions must use the most appropriate means to inform the public about anticipated floods, droughts or risks posed by water quality, the failure of any dam or any other waterworks or any other related matter. The Minister may establish early warning systems to anticipate such events.

- Floodlines on plans for establishment of townships

  For the purposes of ensuring that all persons who might be affected have access to information regarding potential flood hazards, no person may establish a township unless the layout plan shows, in a form acceptable to the local authority concerned, lines indicating the maximum level likely to be reached by floodwaters on average once in every 100 years.

- Duty to make information available to public

  A water management institution must, at its own expense, make information at its disposal available to the public in an appropriate manner, in respect of-

  (a) a flood which has occurred or which is likely to occur;

  (b) a drought which has occurred or which is likely to occur;

(c) a waterwork which might fail or has failed, if the failure might endanger life or property;

(d) any risk posed by any dam;

(e) levels likely to be reached by floodwaters from time to time;

(f) any risk posed by the quality of any water to life, health or property; and

(g) any matter connected with water or water resources, which the public needs to know.

4.5 False Bay Coastal Park

There is currently a proposal to create a False Bay Coastal Park that will incorporate Zeekoevlei, Rondevlei, the Sewerage works and phases 7 and 8 of Pelican Park. It will also incorporate the area from the high water mark along the coast from the development at Capricorn Science Park and create a link with Wolfgat Nature Reserve thus creating a continuous natural area along the coast. An attempt was made to proclaim the park as a National park in terms of the National Parks Act , however it was rejected by the National Parks Board of South Africa on the grounds that it did not constitute a natural undisturbed habitat of conservation importance.

4.6 Baden Powell Drive

Running right through the coastal link of the park and also along a natural foredune is Baden Powell Drive. This road was built with the authority of the Provincial Roads Engineer in terms of the overall transport planning at the time. No Environmental Impact Assessment was necessary at the time when this road was built.

There is a plan to move this road higher up away from the foredune and to use a piece of the Municipal sewerage facility for this purpose. The road reserve will have to be deproclaimed as Road Reserve and rezoned as Nature Area. Similarly the new piece of road will have to advertised in the government gazette and advertised as road reserve in terms of LUPO.

4.7 Capricorn Science Park

Adjacent to the False Bay Coastal Park is the Capricorn Science Park. Which was hailed as the economic savior of an area characterized by high unemployment rates and huge socio economic problems. This park is an industrial area . The land on which it is located originally belonged to the South Peninsula Municipality and was zoned Public Open Space. To have this land rezoned in terms of the Land Use Planing Ordinance, an Environmental Impact Assessment was needed in terms of the Environmental Conservation Act 73 of 1989. The environmental impact assessment

showed that part of the site contained dwarf fynbos, which is an extremely rare form of flora found only in this area of the Cape Flats coastal zone. The site also revealed archaeological middens and remains of a historical fishing village. The development of the site had to be planned around these natural phenomenon. An agreement was reached with the developer of the park and the Local Authority Parks Branch that the developer would cordon off and manage the dwarf fynbos area. However, the take up on Capricorn has been slow due to various factors and most of the site is empty. The developers have not been managing the fynbos colony and it is in imminent danger. The management of the fynbos reserve was one of the conditions of the rezoning. However, the zoning rights have already been conferred, the title has been transferred and the Municipality has little recourse other than with a civil court.

The discovery of the archaeological middens was governed by the **National Monuments Act (28 of 1969.)**

In terms of this act, Section 12 (a) No person shall destroy, damage, excavate, alter, remove from its original site or export from the republic:

d) any implement, ornament, or structure known or commonly believed to have used or erected by people in paragraphs (b) or (c); or

e) the anthropological or archaeological contents of graves, caves and rockshelters, middens, shell mounds, or other sites used by such people; or

f) any historical site, archaeological or palaeontological finds, material or object

except under the authority of an in accordance with a permit issued under this section.

A permit was obtained by the developers in terms of this act. However, in terms of the new **Draft Heritage Bill 34b (1998)**

Section 31 (1) of the act states that a planning authority must at the time of revision of a town and regional planning scheme, or the compilation or revision of a spatial plan, or at the initiative of the provincial heritage resources authority where in the opinion of the provincial heritage resources authority the need exists, investigate the need for the designation of heritage areas to protect any place of environmental or cultural interest.

31(7) A local authority must provide for the protection of a heritage area through the provisions of its town planning scheme or by laws under this act.

54) A local authority may with the approval of the Provincial heritage resources authority make by laws (a) regulating the admission of the public to any place protected under this act to which the public is allowed access and which is under its control and the fees payable for such admission.

3(1) national estate includes:

a) Places or buildings, structures and equipment of cultural significance,
b) Places to which oral traditions are attached or which are associated with living heritage, historical settlements and townscapes,
c) Landscapes and Natural features of cultural significance,
d) Geological sites of cultural and scientific significance,
e) Archaeological and palaeontological sites of cultural or historical significance.

Included in the growth management plan for Muizenberg Pelican Park will be guidelines for any future discovery of archaeological importance.

4.8 Muizenberg- Alienation Of State Land

Muizenberg was once an enormously popular coastal resort town with large recreational infrastructure In the past two decades it has seen a steady decline in popularity as a holiday destination with subsequent decline in property values and infrastructure. Current infrastructure includes a pavilion, conference hall, meeting rooms and a restaurant, waterslide, boat pond, children's playground and putt- putt course; and large stretches of wide beach, which are safe for swimming and also utilized for surfing and other water sports. There are large areas of Municipal land, which have development potential. This land is currently zoned Public Open Space and mostly runs between Muizenberg and Capricorn. To develop on this land the Municipality will most likely form a partnership with a private developer . The land will have to be rezoned for whatever purpose in terms of the Land Use Planning Ordinance 15 of 1985 .

The municipality may also include the land between the current pavilion and the potential recreational node that is proposed at Capricorn. There is a large amount of land falling just above the high water mark of the coastal area that has development potential.

This land does not fall under the jurisdiction of **the Seashore Act 21 of 1935** directly but development on this land , may affect the ~~land~~ seashore. However in terms of this act, the Minister may, on such conditions as he may deem expedient, let any portion of the sea-shore and the sea of which the State President is by section two declared to be the owner, for any of the following purposes:

(a) The erection of bathing boxes or tents;

(b) the erection of beach shelters;

(c) the erection of tearooms and refreshment places;

(d) the training of horses, the holding of races (including motor car and motor cycle races) and the provision of places for recreation, amusements or displays;

(e) the provision of landing sites for aircraft and the establishment of aerodromes;

(f) the construction or improvement of wharves, piers, jetties and landing stages;

(g) the construction of breakwaters, sea walls, promenades, embankments, esplanades, buildings or other structures;

(h) the construction of bathing pools and enclosures;

(i) the erection of whaling stations or fish-canning or other factories;

(j) to legalize any encroachments;

(k) the carrying out of any work of public utility;

(l) the laying of drainage or sewerage systems;

(m) the laying of water pipes or cables;

(n) the erection of boathouses;

(o) the carrying out of any work which in the opinion of the Minister serves a necessary or useful purpose;

These may well be invoked if a large recreational facility is developed that makes use of the safe beaches and beautiful coastline.

There is some land that ~~need~~ belongs to SPOORNET along the coastal zone . The possibility remains for the possible alienation of this land for private use. In order to ensure that this land is as far as possible retained for the enjoyment of the general public it is recommended that public private partnerships be formed. Where the state does not lose complete control of the land , but rather becomes involved in its development .

This will ensure that the seashore remains *res publicae* so that future generations can use beaches and other coastal resorts. This will comply with the act in such letting either is in the interests of the general public or will not seriously affect the general public's enjoyment of the seashore and the sea.

4.9 Sandvlei catchment area and Marina Da Gama

Zandvlei is fairly typical of the recreational waters of the South Western Cape Province. Located adjacent to Muizenberg on the shores of False Bay. The vlei, originally an inlet, has developed as a result of human manipulation of the original estuarine system. Zandvlei is a popular recreational waterbody. Boardsailing, braaing, picnicking and walking through the area are some of the recreational uses associated with the vlei. Most of Zandvlei is zoned as public open space and is owned by the South Peninsula Municipality. The northern tip of the area has been proclaimed as a bird sanctuary and is classified as a Local Authority Nature Reserve in terms of the Environmental Conservation Act 73 of 1989. Extensive modification of the lake has taken place by the construction of a marina, dredging, bank stabilisation, water level regulation and the modification of the mouth and outlet channel as a result of urbanisation.

Marina Da Gama was established on the banks of Sandvlei in the late seventies. It consists of a medium density development set along a number of canals feeding of the vlei system. It is a fairly wealthy suburb, but has experienced environmental problems as a result of its proximity to the vlei. These include the increased presence of water hyacinth clogging up the vlei and making boating and other water based recreational activities difficult; the outfall into the sea from the vlei causes a pollution discharge into False Bay because of pollutants going into the vlei as a result of urbanisation; inadequate pondweed standing stock and tubeworm as well as low ambient salinities as salt water is prevented from entering the vlei through the man made inlet. This has resulted in an impoverished fish population and marine nursery function.

Should a higher level of ambient salinity not be restored, the vlei could experience noxious blue – green algae blooms, which will further impair the already disturbed sensitivity of the ecosystem. (Figure 4)

Due to the often negative influences of development on a lake region, the vlei system is under constant management and care. This is currently undertaken by the South Peninsula Municipality. There was an option, however, for the management of the lake area to be undertaken by the residents in terms of the Lake Areas Development Act.

FIGURE 4

Signage warning of dangerous blue-green algal blooms is up at all times of the year although the algae is periodic.

Lake Areas Development Act 39 of 1975

In terms of this act, the Minister can:

Declare any land comprising or adjoining a natural lake or a river or any part thereof which is within the immediate vicinity of a tidal lagoon or a tidal river, to be a lake area under a name to be assigned to it in that notice.

The minister can also declare a lake Areas Development Board whose powers include the ability to:

a) subdivide, layout, plan or develop such state land
b) sell , let hypothecate or otherwise encumber such state land or any part thereof or exchange it for private land within any lake area, whether before or after development.
d) enter into any contracts with the state including the SAR and harbors Administration, a local authority or any other body or persons for the performance of any act which the board is empowered to perform.

As the Sandvlei catchment area needs constant management and monitoring , the CMC Catchment Management Committee decided to undertake it as a special project in terms of the National Water Act 36 of 1998.

National Water Act (36 of 1998)

The Water Act makes provisions for the establishment of Catchment management strategies for all important water catchment areas :

A catchment management strategy must-

(a) take into account the class of water resources and resource quality objectives contemplated in Chapter 3, the requirements of the Reserve and, where applicable, international obligations;

(b) not be in conflict with the national water resource strategy;

(c) set out the strategies, objectives, plans, guidelines and procedures of the catchment management agency for the protection, use, development, conservation, management and control of water resources within its water management area;

(d) take into account the geology, demography, land use, climate, vegetation and waterworks within its water management area;

(e) contain water allocation plans which are subject to section 23, and which must set out principles for allocating water, taking into account the factors mentioned in section 27 (1);

(f) take account of any relevant national or regional plans prepared in terms of any other law, including any development plan adopted in terms of the Water Services Act, 1997 (Act 108 of 1997);

5 SPATIAL PLANS GUIDING DEVELOPMENT IN THE AREA

There are numerous structure plans, guide plans and strategic development frameworks that guide development in this area . These are sometimes conflicting and often have specific agendas. In terms of the new Western Cape Planning and Development Act (7 of 1999). All future plans will have to fit in with the principles outlined in the Spatial Development Framework. However at the moment there are a bewildering amount of plans and often their role as guides to development can overlook certain aspects of an area such as the environment. The following plans give an indication of different levels of planning that has taken place in the study area. (Figure 5)

5.1 Metropolitan plans

Metropolitan Spatial Development Framework (April 1998) This is a Metropolitan-wide plan that was initiated by the Cape Metropolitan Council to guide development as a whole in the Metropolitan area.

Principles of the MSDf include the management of all urban resources to ensure sustainability in utilisation .Among the CMR's most important resources are scenic landscapes, natural areas, cultural, historical precincts, water, mineral deposits and agricultural horticultural land. These must be protected and conserved and enhanced as appropriate.

The urban edge demarcation in the plan denotes areas such as wetlands, aquifers, high water table areas, large dams, coastal zones, vleis and river corridors as elements that should be excluded from urban development. Water planning and management incorporates many issues such a the protection and supply of water resources, flood protection and water quality. The MSDF addresses these issues only insofar as they are affected by the location of the built environment. E.g. flooding can result from inappropriate development therefore land use policies have a vital role to play in overall water planing.

Policy 42
The CMC and WDC will look to local planning authorities to generally promote and support initiative which seek to conserve or restore or enhance the natural elements of river/vlei corridors, coastal margins and other waterside areas or which encourage appropriate water based and waterside recreation.

The Metropolitan Spatial development Framework is a statutory document much like a structure plan. It neither confers nor takes away rights but guides development.

The second level of plan is one that is provided at sub regional level .

5.2 Regional plans

SOUTHERN PENINSULA SUB REGIONAL PLAN (SEPTEMBER 1988)

The study area covers the rural area of the mountain chain and part of the coastal region and makes the following recommendations:

- No development should occur below the 1:50 year floodline, on the foredune, or below the high water mark.
- Coastal developments should be contained to nodes to prevent urban sprawl and to maintain the pristine nature of the natural environment.

Conservation Worthy Areas
The sub regional plan divides the natural areas into:

- Primary Natural Areas – these areas have a high priority conservation status and conservation Related Areas-which have limited development potential.

At one level beneath a sub regional plan but still on a sub regional basis the Metropolitan South East Plan differs from the sub-regional plan in that it looks at more detailed urban design of the area.

False Bay Coastal Policy Statement (City Of Cape Town-'90

This plan was also formulated a t a regional scale and covers more than the defined study area.
Principles of the plan include the fact that:

- False Bay is a valuable recreation and tourism resource
- Recreation pressure is evident and expected to increase

The plan describes some principles to be followed in the planning of this area. These include the following recommendations:

Development is to be focused at coastal nodes such as Strandfontein and Muizenberg.
Physical access to the coast is to be optimized

Metropolitan South East Plan (CMC :1990)

The purpose of the plan was to provide an institutional and spatial framework for future development of this area South East of the Cape Metropolitan Area.

Aims of the plan:

- Achieve spatial and social integration
- Enhance and conserve natural assets
- Create multi-functional activity centers
- Provide good linkages and access
- Create conditions for effective services delivery

Relevant areas covered

- Strandfontein, Pelican Park, False Bay coastline

Context of this plan

- Embrace the principles and objectives of the RDP, tries to meet the challenges facing society

- Factors relating to lower levels of income accessibility, and environmental quality
- Differences in local economic, social, and environmental
- Heavy inconsistencies in income

Geo-physical and social environment

- Bounded by False Bay coastline
- Coastal dunes to the south
- Characterized by sandy plains
- Wide spread unemployment with concomitant social ills

Phillipi horticultural area

- Pockets of industrial and commercial activity along Lansdowne and Strandfontein roads.
- Major impact on the viability of farming operations (theft and insecurity), area is exposed to passing traffic

History and metropolitan role

- False bay considered an undeveloped coastline
- Baden Powell drive important for access (also a scenic route, potential tourist experience)
- Distance from nearby Muizenberg caused pressure for development of resorts, (Strandfontein, Mnandi, Monwabisi)

Problems

- Catchment areas of rivers discharging into the bay.

Decline of the natural environment along the coast

At the local level some more detailed plans have been formulated such as The Rondevlei Nature Reserve Management Plan :

5.3 Local Plans

Rondevlei Nature Reserve Management Plan(WCRSC-October 87)

The objectives are summarised as follows:

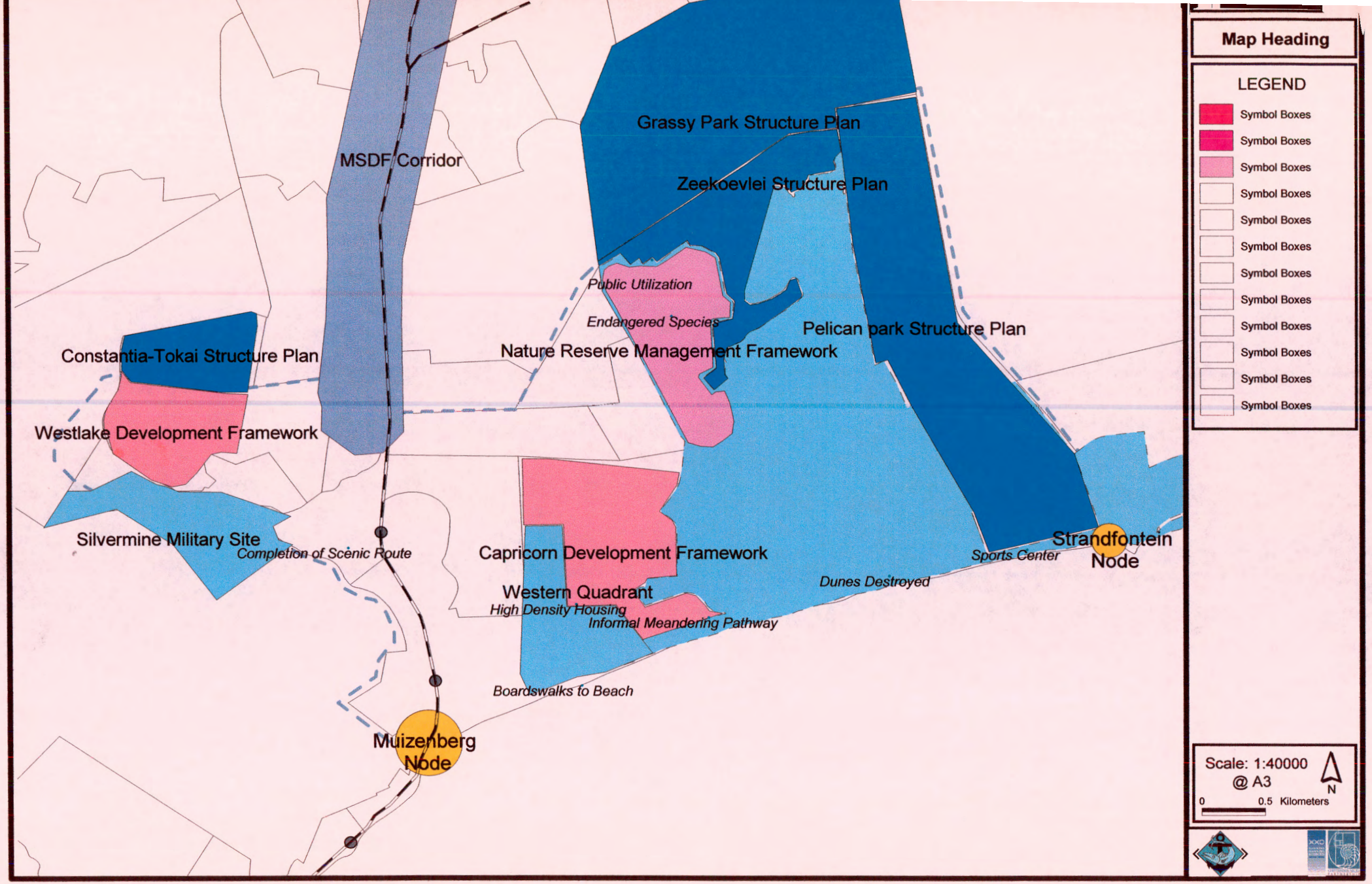
- Conserve and protect the integrated eco-system : FLORAL COMMUNITIES
  : indigenous fauna population especially birds)
  : natural features and habitats

: manipulation and management of habitats

- The reserve will therefore provide : extension of knowledge
  : public experience opportunities
  : environmental education opportunities

The reserve is divided into two zones:

- **Zone 1**
  Special conservation Area therefore :
  - limited development
  - walking trails
  - access roads
  - tracks and paths
- **Zone 2**
  Public Utilization Area therefore :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MSDF Corridor
Grassy Park Structure Plan
Zeekoevlei Structure Plan
Public Utilization
Endangered Species
Nature Reserve Management Framework
Pelican park Structure Plan
Constantia-Tokai Structure Plan
Westlake Development Framework
Silvermine Military Site
Completion of Scenic Route
Capricorn Development Framework
Western Quadrant
High Density Housing
Informal Meandering Pathway
Boardswalks to Beach
Dunes Destroyed
Sports Center
Strandfontein Node
Muizenberg Node
Scale: 1:40000 @ A3
N
0
0.5 Kilometers

FIGURE 5

6 CONCLUSIONS

According to Boelaert-Suominen and Cullinan(1994)[9] , "*in the coastal zone one frequently finds intense and diverse human activity coinciding with ecosystems which are highly productive , biologically diverse, vulnerable and often unique. These areas have a high economic, social and environmental value.*"

"The management and regulatory planning regime found in a highly dynamic natural coastal system do not take into account the integrated nature of natural systems and different sectors of activity on the coast are regulated separately. This sectoral approach is ineffective in providing efficient protection of the coastline."[9]

Authority for land use planning and zoning rests with the local authorities. In most overseas examples of zoning on the coast, intervention by a central authority has been necessary to accommodate new principles and priorities.

Where laws on urbanization are administered locally, they may not guarantee long term protection of the coast, since they are subject to the will of local politicians. Constraints on development set by the national Government may not be well received in local communities as local authorities tend to favor uses on the coast that generate income locally.

[9] Legal and Institutional Aspects of Integrated Coastal Area Management in National legislation : Boalert- Suominen .S and Cullinan C: Food and Agricultural Organisation of the United Nations: Rome : December : 1994.Page 2

IS ENVIRONMENTAL LAW SUFFICIENTLY DYNAMIC TO COPE WITH MOVING BOUNDARIES IN THE COASTAL ZONE? A CRITICAL ANALYSIS.*

Prepared for: Professor J. Glazewski
Prepared by: Nicholas Smith (SMTNIC006)

31 May 1999

Introduction

This essay examines various aspects of our law relevant to the movement of boundaries in the coastal zone. Principally, it considers the question of what these boundaries are and how they are defined from a private and a public law perspective. In the context of public law I aim to highlight present difficulties with ascertaining which organs of state administer the coastal zone and where and how their jurisdiction is determined.

The examination referred to above involves an analysis of the reception into our law of Roman law and Roman Dutch legal principles that governed the boundaries of the sea and the sea-shore and that have been introduced in South African law. I also examine the infusion of certain English law precepts, and the eventual codification of Roman Dutch common law principles in the Sea-Shore Act.[1]

In order to ascertain how South African legal principles relating to the coastal zone have evolved and to properly investigate the part-codified, part common law approach in our jurisprudence, I have undertaken a chronological examination of relevant case law, distilling those principles that plot the development in our law. Some of the common law principles have been carefully refashioned by South African judges to better apply to the particular natural features of this country. Other principles were adopted in our law without a similar precautionary approach and have accordingly been revisited in later case law, where their application has been re-assessed.

The concluding aim of this paper is to consider briefly the degree to which the present definitions regulating boundaries in the coastal zone will continue to be appropriate in the light of changing policies and a shift in mindset regarding integrated coastal zone management.[2] The Coastal Management Policy Programme has recently produced a Draft White Paper for sustainable coastal development in South Africa (the policy).[3] This is the most recent development in a process that will hopefully culminate in the enactment of a coastal management statute that will meet the needs and concerns identified during the extensive participation process that preceded the publication of the Draft White Paper.

It is my submission that the process of drafting a coastal management statute must involve a critical analysis of traditional legal definitions as presently used in the coastal zone. Particularly as regards public law, the new statute should embody a departure from the rigid "administrative line" approach to coastal zone management that has characterised our law in the past. This approach must in particular address these administrative line demarcations in as far as they create difficulties with enforcement in,

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[1] Act 21 of 1935.

[2] Presently embodied in the coastal Policy Green Paper (September 1998). A White Paper will be prepared before the 1999 national elections but policy approval and the legislative process that will culminate in a new statute will only begin after the elections (per B. Glavovic).

[3] Dated March 1999.

* I am indebted to Professor Jan Glazewski for his advice and encouragement in assisting with the draft of this paper. Any errors or omissions in the paper are mine alone.

and administration of, different areas in the coastal zone by the host of different public authorities charged with protecting the (as presently defined) discrete parts of it.

While it is accepted that clear and consistent principles must be applied to ensure certainty from a private and a public law perspective as to where specific areas within the coastal zone "begin" and "end" (and particularly to determine for the sake of certainty and consistency, the boundary between the sea-shore and privately owned land), the coastal zone must be protected holistically from an environmental perspective. This cannot be done by utilising a whole range of different public authorities whose jurisdiction is imposed without regard for the dynamism of the zone as a whole.

It is therefore instructive that for the purpose of the policy, coastal boundaries are seen to extend "as far landwards, and as far seawards, as is necessary for effective coastal management".[4]

The position in Roman and Roman Dutch law

The public character of the sea and the sea-shore originates in Roman law where this area was classified as *res omnium communes*. This meant that it was owned by no one and was incapable of being privately owned. In Roman Dutch law the area was classified as *res publica*, meaning that the feudal lords owned it, not in a private capacity but rather in their capacity as custodians for the people.[5]

The principle that the sea and sea-shore are open to the public has been eroded over history. As evidenced by the case law discussed below, there are occasions where the public has been denied access to the sea-shore by landowners whose land abuts the high-water mark. These landowners excluded people from crossing their land to reach the sea and sea-shore by asserting private property rights. In order to consider the question whether South African environmental laws are sufficiently dynamic to cope with moving boundaries it is appropriate to start by investigating the case law that has evolved the principles for determining where boundaries in the coastal zone actually are.

The case law relating to moving boundaries.

1. *Horne v Struben*[6]

This Privy Council decision was an appeal against a judgment of the Cape of Good Hope Supreme Court, declaring the boundaries of respondents' farm. The respondents (plaintiffs in the court *a quo*) had succeeded in an action in the Supreme Court in 1900, in which they had asked the court to declare certain boundaries on their property as surveyed by a surveyor whom they had consulted. These boundaries were in substitution for boundaries that had previously demarcated the farm when they purchased it. The

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[4] Page 13 of the policy.
[5] *Towards a Coastal Zone Management Act for South Africa"* Jan Glazewski South African Journal of Environmental Law and Policy at page 11.
[6] 1902 AC 454 (19SC317).

controversy related to two parts only of the boundary declared by respondents' surveyors. Only one of these is of interest from the perspective of formulating principles for the determination of boundaries in the coastal zone.

The facts were that respondents were "in right of the original grant on perpetual quitrent, made in 1843" over the disputed property.[7] Prior to 1843 the farm had been held on loan lease, and the grant of quitrent was made under a system established by the Proclamation of 6 August 1813 entitled "Conversion of Loan Places to Perpetual Quitrent". The property (2520 morgen in extent) as described in the grant, extended "west to the sea-shore .....and north to the Steenbras river, as will further appear by the diagram framed by the surveyor". Respondents surveyed the farm on acquisition and thereafter made application to the Surveyor-General for an amended title and diagram in accordance with the diagram, which embodied their surveyor's survey (the 1899 survey).

The matter came to the Court *a quo* by summons, respondents claiming firstly, an order declaring the boundary in accordance with the 1899 survey and secondly, an order for an amended title showing the boundary accordingly. The Supreme Court decided the matter in the respondents (as plaintiffs) favour.

The Surveyor-General had two objections to accepting the 1899 survey and the court *a quo's* decision was appealed to the Privy Council by his office. The first of the two disputed points related to the whole of the western boundary (the one that ran "west to the sea-shore"). The 1899 survey drew a line at the high-water mark, or rather, as that mark was at the top of some rocks on the sea-shore and not nearer the sea than the high-water mark. There was therefore no claim to the foreshore by the respondents. The Privy Council's view was that on the face of it, the respondents' claim was in exact accordance with the words of the grant extending "west to the sea-shore".[8]

Before dealing with the points of controversy between the parties, the Privy Council referred to "one matter which bears equally upon both (parties) and tells in favour of the respondents", on the facts.[9] The Privy Council observed that if the 1899 survey was accepted by it, then far from exceeding the extent of the land granted, respondents would have considerably less.[10] If, however, the appellants' line was accepted (and the appellant contended in the first instance that the applicable line was to be found on the diagram referred to in the title under which the land was granted in 1843 (the 1843 line), then the farm would only be reduced by approximately 25 morgen. For purposes of analysing the judgment "considerably less" must mean considerably less than 25 morgen. There is no suggestion, therefore, that the respondents were trying to claim that the property was any larger in extent, or that the respondents would gain a large tract of land from the state, if successful.

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[7] Page 456.
[8] Page 319.
[9] Page 318
[10] *Ibid.*

In examining the appellants' contention regarding the 1843 line, the Privy Council observed that the "question is thus raised what is the degree of authority of (the) diagram in relation to the text of the grant in which it is mentioned". The words in the grant that introduced the diagram are "....as will further appear by the diagram framed by the surveyor". As a matter of construction, the Privy Council held that this is merely an appeal to the diagram for further elucidation of the text and not a subordination of the text to the diagram. If in a matter not requiring elucidation the diagram is repugnant to the text this merely shows that the diagram is not exact and affords only a rough delineation of the farm. This is, according to the Privy Council, "abundantly proved by other circumstances" in this matter.[11]

The Privy Council cites one of these other circumstances as an example. It pertains to that portion of the farm bounded by the Steenbras River. The boundary is said in the title to be that river. Geographically, the course of the river is perfectly unmistakable. The diagram however ignored the river's course and made the northern boundary a straight line inland from a rock on the sea-shore considerably to the south of the river (which is clearly marked in the diagram). In the face of facts like these, the Privy Council remarked, it would be impossible to override the clear verbal description of the sea-shore merely out of respect to the diagram which, as regards the northern boundary, clearly fails to depict a certain and clear expression in the title. It does so by substituting a wholly arbitrary line for a reference on the diagram to a clearly marked natural feature referred to in the title.

The Privy Council accordingly decided that the objections of the Surveyor-General on the western boundary failed, and that the court *a quo* was correct in deciding the boundary in the respondents' favour.

The principle that can be distilled from *Horne's* case is that when consulting the deed of grant, the degree of authority of a diagram in relation to the text of the grant must give way to that text in cases of conflict. On a matter of construction, the Privy Council found in this case that the diagram was repugnant to the text and therefore the description of the boundaries stipulated in the text of the grant prevailed.

2. *Pharo v Stephan* [12]

The plaintiff in the court *a quo* (respondent on appeal) was the owner of a piece of land at Paternoster, on the Cape west coast. His land was described in a diagram attached to his grant as being "bounded seaward by the Atlantic Ocean". The wording in the grant itself was a description of a piece of land "represented and described in the diagram hereunto annexed". The defendant (appellant) was a fisherman in Paternoster.

The respondent's allegation in the court *a quo* was that the boundary of his land extended down to the foreshore, to the high-water mark of medium tides. He alleged that on

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[11] Page 320.
[12] 1917 AD 1.

various specified dates, appellant had brought fishing boats up onto his land and had thus committed trespass. He claimed one hundred pounds in damages and an interdict restraining Pharo from trespassing in the future.

Pharo, as defendant, had pleaded that the seaward boundary of Stephan's land was the line reached by the Atlantic's highest tides. He admitted that on one occasion he had drawn his boats up on the plaintiff's land (that is, above the line reached by the highest Atlantic tides) but only in order to save them from destruction by the sea, and further, that this caused no damage to the plaintiff. In the alternative, Pharo pleaded that should the court find that his boats were on occasion drawn up onto the plaintiff's land and not on the sea-shore, for a period of thirty years the public had freely and uninterruptedly and as of right drawn up boats on the land as far as the limit reached by the Atlantic's highest tides, and by immemorial user (evolved from the Roman law principle of *vestustas*), a public servitude of placing boats on the land up to that limit had been established.

The court *a quo* (per Buchanan J) held that the South African courts had adopted the ordinary average tide of the sea as the high-water mark. It held further that Stephan had established his right to the land claimed by him and proved trespass and Pharo's defence therefore failed. Buchanan J also refused Pharo's plea based on *vestustas*. Buchanan J held further that had Pharo's trespass been confined to the occasion admitted by him, no damages would have been awarded but that under the circumstances, Stephan should be awarded damages of ten pounds and granted an interdict restraining the fisherman from trespassing on his property (in other words, from going beyond the ordinary line of high tide).

The important question of law on appeal related to the limit of the sea-shore. It was common cause between the parties that "bounded seaward by the Atlantic Ocean" is tantamount to saying that the land is bounded by the sea-shore. The limit of the sea-shore therefore had to be determined. The Appellate Division pointed out that the Cape courts had in a number of cases laid down that the sea-shore extends as far as the high-water mark.[13] But in none of the reported cases had the question in issue before the Appellate Division (what is to be taken as the high-water mark) been raised.

The Appellate Division found that there was no authority for Buchanan J's statement that South African courts had adopted the ordinary average high tide as the limit of the high-water mark. The court then embarked on a comparative historical foray to establish first principles. The court found that the boundary of the shore is the line of the *maximus fluctus* and nothing short of that. A point of difficulty was the exact meaning of *"fluctus"*. The Court had to decide whether *maximus fluctus* was to be understood as meaning the highest tide in ordinary weather, or whether it meant the greatest flow of the sea during the most stormy season of the year.

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[13] Anderson 8 SC 296.
Struben v Colonial Government 17 SC 242.
Colonial Government v Town Council of Cape Town 1902 SC 96.

As the court points out, Roman Dutch jurists do not offer much assistance.[14] As a general rule, they seemed to adopt the definitions in the Corpus Juris Civilis without comment. This led Innes CJ to surmise that the question was not as important in the law of Holland because of the construction and maintenance of dykes that held back the high tides.

The Court concluded that by the use of "*maximus fluctus*" in Roman Dutch law the Roman law authorities' definitions were adopted by Roman Dutch jurists. By *maximus fluctus* (*hybernus*) the latter understood the high-water mark to mean the furthest line reached by the sea during ordinary winter storms, excluding an exceptional or abnormal flood.

On the facts, the court held that there were no grounds for interfering with that part of the court *a quo's* judgment that related to the trespass (because Pharo went well above the high water mark on occasion). However, the court found that the terms of the interdict granted *a quo* had to be altered to conform to the Appellate Division's decision as to the limit of the sea-shore.

This case therefore adopted the position in Roman Dutch law in regard to the limit of the sea-shore.

3. *Surveyor-General (Cape) v Estate de Villiers*[15]

In this matter the facts concerned a grant of land issued in 1818. The title deed described the land granted as extending "Zuidoos tot het zeekust". A diagram of the land granted showed the south-east boundary as a straight line running between two beacons. Between that straight line and the edge of the sea was a narrow but clearly defined area. On these facts, as Innes CJ puts it,[16] "..... the question at once arises whether the "hard line" (as he calls the line between the beacons) or the edge of the sea was the south-eastern boundary of the property.

Innes CJ confirmed the rule established in *Horne's* case that the grant sets out the transaction; the diagram is an elucidating picture that must yield in cases of conflict to the clear language of the deed. He concludes that in 1818 therefore and until 1918 the property extended to the farthest line of the sea in ordinary winter storms (that is, he defined the extent of the sea-shore by following the principles established in *Pharo's* case). The land between that point and the low water mark constituted shore or strand.

In analysing the historical position, Innes CJ found that in Roman law the sea-shore was regarded as *res communis* and its use (like the use of the sea itself) was public *iure gentium*. The shore could however be occupied in a sense in which the sea could not be. This doctrine was modified over time in Western Europe and the sea-shore came to be seen as *res publica*, which vested in the princeps. This was, according to Innes CJ,

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[14] Page 7.
[15] 1923 AD 588.
[16] Page 592.

"certainly the position under Roman Dutch law."[17] In Innes' view, the dominion of the beach therefore vested, at the date of the judgement, in the Crown. He goes on to say that "it does not follow that the rights of the public have been extinguished"[18] but he concedes that the extent of these rights is a matter upon which the authorities are not entirely harmonious. Innes CJ then fudged the issue somewhat. He said the following:

> "....an enquiry into the legal limits of the Crown's user of the foreshore and of the rights of the public thereover would not be an easy enquiry. Nor is it convenient to undertake it in connection with proceedings to which neither the Crown nor a member of the public, as such, is a party. For the purposes of this case it is fortunately unnecessary to do so. I shall assume for the present what was apparently recognised by the grant and was certainly not questioned during argument, namely, that the public have certain rights over the beach for purposes of bathing and recreation without attempting to define their extent."[19]

The court then held that the condition in the grant that the strand should remain open to the public merely entitled the public to demand reasonable access across the land granted, and to the strand. This is fundamental erosion of the position in Roman law, where protection of access rights to the sea and sea-shore was extended to the public without conditions regarding that access.

In my opinion, this view fails properly to take account of the rights of public access that were enshrined in Roman law.

The issues of ownership of the sea and sea-shore and the determination of the high-water mark have been codified in our law, in the Sea-Shore Act. When enacted in 1935, the Sea-Shore Act vested ownership of the sea and sea-shore in the Governor General as representative of the reigning monarch of England (South Africa was a British Dominion under the 1931 Statute of Westminster at that time). Today and by virtue of section 2(1) of that Act, ownership of the sea and sea-shore vests in the State President. The high-water mark is defined in section 1 of the Act. In the context of public access, it should be remembered that a problematic shortcoming in the Sea-Shore Act is its failure to provide for a satisfactory form of public access rights to the sea-shore from above the high-water mark.

4. *Union Government, Minister of Lands and Another v Lovemore* [20]

The issue on appeal in this matter was whether the seaward boundary of the farm Sea View was the sea-shore, or whether the boundary was to be taken as the hard lines shown on the diagram attached to the grant of the land. The Appellate Division reaffirmed the principles laid down in *De Villiers'* case that the grant sets out the transaction and that the diagram merely elucidates the grant. No matter how useful the diagram, in cases of conflict it must yield to the clear language of the deed.[21]

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[17] At page 593, quoting Voet and Groenwegen.
[18] Page 593.
[19] Page 595.
[20] 1930 AD 13.
[21] Page 19.

The court accordingly held that the words "situate on the sea-shore" were clear and unambiguous, and that the seaward boundary was the sea-shore and not the hard lines as shown on the diagram.

5. *Karim v Union Government* [22]

In this matter, the plaintiff claimed a declaration of rights as to the true extent of a portion of land that he owned on the Bluff in Durban. An inaccurate survey prepared in 1851 (the 1851 grant) had been re-examined at the behest of the government, after which a new grant had been issued in 1854 (the 1854 grant). The surveyor had in the case of the surveys that resulted in these grants being issued, been directed to demarcate and maintain a Government Reserve of 150 feet from the high water mark. The stated area of the piece of land that was the subject matter of the dispute differed in the respective grants. In the 1851 grant the property was described as being bounded "north by a Government Reserve" and in the 1854 grant, as "bounded northward by the Bay".

In 1893 and upon subdivision of the land, it was discovered that the boundaries indicated in the 1851 and the 1854 grants did not enclose the area stated. In consequence of this and after a re-survey, the boundaries of the land were extended into the Government Reserve and beacons were erected showing the new boundaries (the 1893 survey). It was the terms of this re-survey that resulted in litigation between the parties.

The crisp issue in dispute in the action was the determination of the exact location of the northern boundary of Lot 21.

The plaintiff's claim was that the property in dispute extended towards the bay up to the limits of the Government Reserve 150 feet in length, measured from high-water mark. The northern boundary of the lot was therefore on the plaintiff's contention, a line drawn 150 feet above the high-water mark. Defendant claimed that the northern boundary was the line as measured between two beacons (that were stated to be from 994 to over 1000 feet above the high-water mark).

The court was faced with four issues. They were:

1. Whether the 1851 or the 1854 grant was valid;

2. what the correct construction of the valid grant was;

3. whether the disputed land was originally granted as, or subsequently became, *ager limitatus*; and

4. whether the existing beacons planted after the 1893 survey had since that date been so recognised that they should be accepted as correctly defining the northern boundary of the land.

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[22] 1933 NLR 68.

Feetham JP delivered the judgment. He said the following, having summarised the four issues that faced the court:

> "If, as the result of the answers given to these four questions, the decision should be in favour of the plaintiff's main contention that the northern boundary of the Lot is a line drawn 150 feet south of the high-water mark, then, in order to determine the actual position of the boundary line, it will become necessary to deal with the further question of the exact location of the high-water mark."[23]

After a lengthy technical foray into the facts relating to the different surveys undertaken, Feetham JP came to the conclusion that on the facts proved, the attack on the validity of the cancellation of the 1851 grant and the subsequent argument by the defendant on the validity of the 1854 grant failed, and that the 1854 grant was only valid grant of Lot 21.

As regards the second question (and the construction to be put on the grant regarding the location of the northern boundary) Feetham JP held that on the face of it, the words of the grant "(b)ounded northward by the Bay" are clear and mean that the northern boundary of the Lot is the high water-mark of the Bay of Natal. He confirms that the words introducing the diagram are the same as those used in the grants considered in *Horne's* case (*supra*) and *Estate de Villiers* (*supra*). Accordingly, the rule as to the relationship between the text and diagram stated and followed in those cases applies. He went on to say however, that in the case before him, the plaintiffs (who relied upon the validity of the 1854 grant), did not lay claim to the entire area to which a literal interpretation of the words "bounded northward by the Bay" would entitle them. They alleged in their replication that the words were not to be literally interpreted, but were to be given a special meaning in this case. This relates to the secondary meaning of the expression. The plaintiffs contended in support of their argument, that expressions like "bounded by the Bay" and "bounded by the Indian Ocean" were expressions in common use at that time "to denote that the boundary of the land thus expressed should begin at the inland boundary of the so-called Admiralty Reserve."

In support of their contention that these expressions and similar expressions were in 1854 expressions in common use in documents of title for the purpose of conveying a different meaning (that is, meaning "bounded by a reserve 150 feet in width extending to high-water mark") the plaintiffs produced evidence of the existence in Natal of the long established State practice of retaining an Admiralty Reserve. Feetham JP concludes that:

> "It appears ..... that by 1857 the practice of retaining a 150 foot reserve on the sea coast above high-water mark was so well established that the surveyor general could refer to such a reserve as "the ordinary reserve", and speak of the width of 150 ft as "the usual width". [24]

I would submit that (in Kwazulu-Natal at least) a further interpretation has been added to the rule established in *Horne's* case that in cases of conflict, the text of the grant hold sway. Proof of a secondary or special meaning that has existed through common usage will trump the clear wording of a grant in these circumstances.

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[23] Page 184.
[24] Page 228.

Feetham JP concludes then, that the plaintiff's contention that the northern boundary of Lot 21 was a line drawn 150 feet to the south of the high-water mark of the Bay, was correct. The conclusions that Feetham JP reaches on the question of the grant and its interpretation "necessarily imply rejection of the *ager limitatus* contention, advanced for the defendant and referred to in the third of the four questions stated at the outset of this judgment, so that as far as that contention purports to be based on the terms of the grant and is not bound up with a claim for rectification."[25]

On the third question, as to the meaning of the term *ager limitatus*, Feetham JP had the following to say. He examined the principles laid down in *van Niekerk's* case,[26] where the question for decision was whether a property described as bounded by a river was to be presumed to extend to the middle of the riverbed. He quotes Solomon JA, who gave the judgment in that case as saying the following:

> "Originally '*agri limitati*' in Roman law meant lands belonging to the State by right of conquest and granted or sold in plots. The term was extended, however, to include any piece of land granted by measure and actually demarcated on the ground, and it is in that sense that it is used in Roman Dutch law. But lands which are bounded by natural objects such as rivers, were called not '*agri limitati*' but '*agri arcifinii*'.[27]

After stating that the distinction was chiefly important in respect of an addition to land caused by alluvion, which attaches to *agri arcifinii* but not *agri limitati* and after quoting a passage on the subject from Voet, Judge Solomon went on as follows:

> "Here the distinction is clearly brought out between agros limitatos, that is lands actually defined on the ground, and those having a natural boundary, such as a river. In the former case it is easy to understand that the owners would be strictly limited to the land so bounded, whether by embankments or posts or beacons, and that in no circumstances could those limits be exceeded; whereas in the case of *agri arcifinii* there is no such rigid exclusion. In the former case therefore, there was no room for the application of the presumption that land bounded by a river extended *ad medium filum aquae*...[28]

In Feetham JP's view the extract that is quoted above made it clear that while in its stricter and original sense the term *ager limitatus* only applies to land which is actually demarcated on the ground, it may also perhaps apply to any land granted by measurement. He concludes that where the measurement was the dominant feature of the grant, the grantee should be kept strictly to the extent mentioned. This would by implication exclude a grantee from claiming an increase in land caused by alluvion or accretion.

In respect of the position of the high-water mark, Feetham JP poses an interesting question. Historically, land on the Bluff was reclaimed by means of dykes and a succession of small banks in order to protect gardens in the area from the effects of an encroaching tide. The judge therefore poses the question as to where the high-water

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[25] Page 231.
[26] 1917 AD 359.
[27] Page 231.
[28] Pages 231 – 232.

mark would now be if the land had been left in its original state and no land reclamation work had taken place. Feetham JP quotes the rule laid down in *Pharo's* case regarding the extent of the high-water mark and then tries to relate it to the facts of *Karim's* case by adding a peculiar interpretation to the rule. He states as follows:

> "For the purpose of fixing high-water mark in the area now in question it is necessary, therefore, (1) to ascertain what is the greatest rise of the sea in the Bay above the level of low water at ordinary spring tides ('the datum level') under the conditions stated in the above definition, i.e. in ordinary seasonal storms, and (2) to fix the line which would be reached in this area by a tide rising to such heights if the original levels of the ground had remained unaltered."[29]

Feetham JP's view was that he had to rely on data as to the rise of tide furnished by observation records over the past years and make due allowance for alterations in the original levels resulting from the erection of banks and other artificial works. He seemed to have no particular feeling for the dynamism of the coastal zone, and was attempting to peg it at a point which it would be physically impossible for the high-water mark to reach at the date that he was considering these issues and writing his judgement. Having embarked on this perilous course, Feetham JP soon abandoned it. He concluded as follows:

> "As it does not appear to me that we have sufficient evidence before us to enable us to fix definitely the line of high-water mark and the inner boundary of the 150 feet reserve, the matter must, failing agreement between the parties, be made the subject of a reference under sections 21 and 22 of the Arbitration Act." [30]

It would appear that if one carefully interprets this portion of the judgement, there is some authority for the proposition that if one can on the facts reasonably establish a high-water mark that was significantly further inland than it presently is, then one may possibly (in Kwazulu-Natal at least) be able to found a claim for accession.

A brief foray into the principles of accession

Obtaining ownership by *accessio* can take a number of forms, depending on the nature of the materials (moveable or immoveable) and the circumstances in which they were joined. The principles which are relevant in the context of riparian land are those relating to *alluvio*, which in Roman law meant the gradual natural accretion of sediment deposited by a river against a riparian property.

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[29] Page 248.
[30] Page 250.

Any claim in our law to accession or alluvion is also qualified by another rule that originated in Roman law. Accession in Roman law was only possible if land was *ager non limitatus* (that is, bounded by a natural boundary). The distinction between an *ager limitatus* and an *ager non limitatus* was this. In the case of an *ager limitatus* its boundary was fixed by a surveyor drawing an artificial straight line between beacons. In such a case, no further area could be added by alluvio or otherwise. In the case of an *ager non limitatus*, the boundary was a natural feature and the area of the property was accordingly not fixed. *Accessio* could occur on such a property.

In Roman law all navigable rivers belonged to the state and were inalienable. By implication all non-navigable rivers were alienable. South Africa has very few navigable rivers and therefore the Roman law rule does not dovetail easily with the environmental reality. As a result the distinction between *agros limitati* and *agros non limitati* has been further shaped in South African law, and tidal rivers in this country are regarded as navigable rivers. Non-tidal rivers are treated with reference to the principles applicable to non-navigable rivers. This requires a brief examination of the cases in our law that lay down principles for land ownership on tidal rivers.

6. *Durban City Council and Others v Minister of Agriculture & Another* [31]

In this matter, a dispute had developed between the landowner and the State over the boundaries of riverside plots that flanked the Umgeni River. The owners contended that all the plots were *agri non limitati* and that each plot extended as a result to the river, and what is more, to the center of its bed (based on the principle established by Innes CJ in *van Niekerk's* case.[32] The state contended that all of the plots were *agri limitati* and bounded on the riverside not by the river itself, but by artificial limits. In the alternative, the state contended that if any plot was an *ager non limitatus* which ran to the river, that property extended no further than the inner bank, ending there. In either case, it concluded, no plot encroached onto the riverbed. The State viewed the Umgeni River as tidal where it flowed past the plots and consequently its bed there as part of "the sea" (for the purpose of the Sea-Shore Act, "the sea" includes "the bed of any tidal river"). The State is proclaimed owner of the "the sea" in section 2 of that Act, except for any portion thereof which was lawfully alienated before the date of commencement of the Act.

The court held that the extent of the two plots in question depended on the interpretation of the deeds that established them and their boundaries; in cases of conflict the description in the text of the grant, when clear and unambiguous, must prevail over the diagram attached to the grant.[33]

The court held further that there was a presumption that an *ager non limitatus* which was bounded by an unnavigable river was presumed to extend to the center of its bed and such presumption was rebuttal.

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[31] 1982 (2) SA 361 (D).

[32] *Van Niekerk & Union Government v Cata* 1917 AD 359 There, Innes CJ held that property bounded by a river was always understood (in the absence of express contrary provision) to extend *ad medium filum fluminis*.

[33] The Court quotes *Horne's* case, *Estate de Villiers & Lovemore's* case as authority for this proposition.

Didcott J did not have to decide on whether the Umgeni River was tidal, because the state abandoned its contention in that regard.[34]

Interestingly, Didcott J referred to an issue that he did not have to decide on the facts of the case. It relates to the effect, on an *ager non limitatus*, of a deviation in the course of the river by which it was bounded. The crisp question is whether that boundary shifted with the river and ran wherever that did from time to time, or whether the boundary was immobile, always remaining where it had been drawn in the beginning, where the river had flowed on the day the boundary was fixed. In support for the contention that the former position is the correct one, Didcott J quotes Grotius with approval.[35] Grotius' contention was that:

> "In land defined by a river, its natural boundary, if the river changes its course gradually it changes also the boundary of the territory; and whatever the river adds to one side belongs to him to whose land it is added."[36]

Didcott J points out that the corollary, the subtraction of land on the other side, has implications that may be disturbing. If the principle is applied to subtraction it stands to reason that the following consequence might occur. If the channel moves far enough to cross the plot located there and settles down beyond it (taking a position on or outside the opposite boundary) then the plot itself vanishes altogether, the land of which it once consisted being swallowed whole by the adjoining property. As Didcott J puts it:

> "Perhaps that is the law. I do not know. The question was not argued. It did not need to be. The order I was asked to and did make traced the disputed boundaries along the middle of the Umgeni River's present bank, not the one lying somewhat to the north which the evidence suggested was occupied in 1846."

<u>Other existing legal controls in the coastal zone and the way forward</u>

Statutory obligations are imposed on landowners of properties in the coastal zone when they wish to undertake specified activities on those properties that have been deemed to have an impact or a potential impact on that environment. These laws have the effect of ensuring that potential human activity must be authorised by the public authority with jurisdiction under those laws, before the activity can be carried out.

The most important of these obligations is contained in two sets of Regulations promulgated under the Environment Conservation Act, 73 of 1989. The first are the Regulations promulgated under section 21 of the Environment Conservation Act which provide for environmental impact assessments in regard to certain scheduled activities ("the EIA Regulations").[37] One of these scheduled activities relates to the reclamation of land below the high water mark. The scheduled activity is more fully described as the

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[34] Page 376E.
[35] Page 376G.
[36] De Jure Belli Ac Pacis 2.3.16.2
[37] On 5 September 1997 in GG 18261.

"construction or upgrading of ..... all structures below the high-water mark of the sea".[38]

The EIA Regulations impose a range of obligations on persons who wish to undertake scheduled activities. In the first instance, regard should be had to the definition section of the regulations. The "relevant authority" which is tasked with deciding on whether or not to permit a scheduled activity differs from province to province.

In order to undertake a scheduled activity, an applicant must retain an independent consultant who is required to comply with the obligations imposed by regulation 3 of the EIA regulations. These include the following:

> An applicant must ensure that the consultant, while complying with the EIA Regulations, has the ability to manage the public participation process contemplated in the EIA Regulations and also that the consultant has expertise in the area of environmental concern being dealt with in the specific application.
>
> An applicant must ensure that the consultant provides to the relevant authority access to, and opportunity for review of, all procedures, underlying data, reports and interviews with interested parties, whether or not that information is reflected in reports required by the EIA Regulations or not.

Of particular importance in regard to the independent consultant's obligations, is the requirement that a proper public participation process be followed, in ensuring that all interested and effected parties who have or may have an interest in the scheduled activity, are given the opportunity to be heard properly in regard to the undertaking of the scheduled activity.

Once the scoping report has been finalised, it must be submitted to the relevant authority, which is required to decide whether the scoping report adequately addresses all issues of environmental importance, whereupon that authority can apply its mind and make a decision as to whether or not to allow the scheduled activity to proceed. In the event that the authority is of the opinion that it requires further information, it can require the applicant to embark on the next phase of the environmental impact assessment, which will culminate in the production of an environmental impact report.

Other Regulations that will have an impact on particular properties in the coastal zone were promulgated under the Environment Conservation Act on 27 November 1998. They are titled "Identification of activities which may have a detrimental effect on the environment; Outeniqua sensitive coastal area extension" ("the Outeniqua Regulations").[39] The Outeniqua Regulations affect properties along the Garden Route, in locations like Sedgefield and the Knysna lagoon. Properties that fall to be governed by these regulations are listed in a Schedule to thr Outeniqua Regulations.

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[38] Schedule 1(e) to the EIA Regulations.

[39] These Regulations were promulgated in GG 19493.

The promulgation notice to the Outeniqua Regulations specifically provides that the Notice under which they are promulgated shall not apply to any activity referred to in schedule 1 to the EIA regulations. On the face of it, this means that the EIA regulations (insofar as they provide a procedure for specified activities anywhere in the Republic) and the Outeniqua Regulations will both apply to certain properties in the coastal zone.

The public authority with jurisdiction in respect of the Outeniqua Regulations is the National Parks Board (the Parks Board).[40] On my reading of the Lake Areas Development Act, 39 of 1975 and the Regulations made under that Act on 13 December 1985,[41] it cannot be said that the Parks Board is the sole public authority with jurisdiction over the Knysna Lagoon, with the result that separate applications to it and CNC may have to be made when an activity that falls within the parameters of the Schedules to both Regulations is envisaged.

The procedure for compliance with the Outeniqua Regulations involves submitting the application to the local authority.[42] This is a peremptory requirement. In addition the applicant is required to prepare an environmental impact report, which must accompany the application. The required content of the environmental impact report is stipulated in regulation 5. The environmental impact report must also be submitted to the parks Board. The Parks Board is then obliged to consider the application. Its powers, once the application has been considered, are set out in Regulation 6. The Outeniqua Regulations also prescribe a procedure for issuing a record of decision and an appeal procedure.

In some areas of the South African coastal zone, it can therefore be said that environmental concerns are accorded appropriate statutory recognition. However, the fact that different authorities with different roles, powers and duties may have to be approached for permission regarding an activity that may fall under both sets of regulations discussed highlights the fragmentary and piecemeal approach that characterises protection of the coastal zone in this country.

A short comparative analysis: the way forward

The idea of revisiting first principles in domestic law that have become diluted by judicial interpretation (like reduced public access to the sea and sea-shore) is not a new one. Other countries can provide guidance in this regard. Spain is one of the best of these examples.

Spain enacted a statute in 1988 called the Shores Act.[43] In the preamble to the Shores Act, reference is made to the innovative nature of the new law. It specifically records that " the innovation ..... consists in the restoration to their full purity of principles deeply

[40] Schedule 3 to the Outeniqua Regulations.
[41] In GG 10036 dated 13 December 1985.
[42] Regulation 3.
[43] Act 22 of 1988.

rooted in our historical law which had been weakened in the course of their application."[44]

Regarding ownership rights the Shores Act contains, in addition to a definition of the sea-shore that recognises the ecological uniqueness and fragility of this part of the coastal zone, "a return to our original traditions contained in Roman law and medieval law"[45] in reaffirming that the sea and its shore are public property. This approach synthesises with Spain's constitutional dispensation and the provisions of article 339.1 of the Spanish Civil Code.

Particularly novel and interesting is the section of the Shores Act devoted to the protection of coastal property. That section sets forth a series of limitations upon riparian ownership rights, which serve as a minimum regulation, and are capable of being supplemented by regional government legislation. The most striking of these is contained in Chapter 2 of the Act (entitled "Easements"), which provides for a protection easement over a zone of 100 metres from the landward limit of the sea-shore. In addition and wherever necessary to secure the effectiveness of the easement and based on the particular features of a stretch of coastline, the width of this zone can be enlarged. This can be undertaken by central government after consultation with the regional government and town council having jurisdiction, up to a maximum of another 100 metres. Certain activities are prohibited in the protection easement zone. These activities include erecting buildings for residential purposes and activities involving the destruction of deposits of sand, stones and gravel.

Conclusion

A plethora of conflicts and potential conflicts arise in regard to human activities in and our use of the coastal zone. This is clear from the analysis of the relevant case law. Many of these disputes are caused by the constantly changing nature of the physical interface between land and sea. The coastal zone is also particularly susceptible to moving boundaries caused by accretion or decretion. These occurrences are caused by natural events (like seasonal changes) and artificial ones (like hardening of the environment upstream of land adjacent to tidal rivers or lagoons).

All of this begs the question whether present coastal zone legal principles (part common law, part codified) regulate these dynamic events properly and fairly, or whether the applicable law needs to be reviewed in the light of our increased recognition of the dynamic nature of the coastal zone. Not only the nature of the sea-shore but also new problems that face it to an increasing extent (like decretion) must be properly addressed.

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[44] Introductory memorandum page 2.

[45] Explanatory memorandum, *ibid.*

The primary reason for a dedicated coastal zone legal management regime is that "these areas have characteristics which necessitate a different approach from that applied inland and that they are particularly valuable and vulnerable to degradation".[46]

In analysing the need for a new coastal zone management statute for South Africa, Glazewski has the following to say about defining boundaries in terms of a new Act:[47]

> "Acknowledging that the coastal zone is a dynamic ecological interface between land and sea and that the high-water mark is an inappropriate line to sever the legal-administrative aspects of the two areas, the question remains what should the landward and seaward boundaries of the area be? An examination of the treatment of this question by other coastal states reveals no particular way but a variety of approaches".

After reviewing comparative approaches Glazewski suggests a combined approach. This approach mergers "a purely arbitrary administrative line"[48] with important ecological criteria. The ecological approach recommends extending the landward boundary into the hinterland to include areas which influence or are influenced by the sea or coastline from an ecological perspective. Acknowledging ecological criteria would take partial cognisance of the ecological approach.

The policy embodied in the Draft White Paper recognises the concerns raised in this paper and proposes among other things, that a new statute must preserve the philosophy of the public status and State custodianship of the sea and sea-shore. Importantly, the policy also makes the crucial point that a new Act must make provision "to ensure public access to the sea and sea-shore, while respecting private property rights".[49] The suggestion made in the White Paper is that consideration could be given to extending the principles of public ownership or State custodianship to appropriate areas above the high-water mark. The White Paper does not define precisely what criteria are to be employed to establish appropriateness.

My conclusion is that specific and controversial issues relating to moving boundaries in the coastal zone, like accretion and decretion, must be examined as part of the process of reviewing existing laws, policies and principles that inform coastal zone management. This examination should also be undertaken in the light of the genesis of a new democratic and constitutional dispensation in South Africa.

The Draft White Paper has referred to difficulties that have arisen in the past regarding the definition of the coast[50] and it also recognises the need for a legislative approach that synthesises with South Africa's Constitution. In addition, it highlights the need to designate national and provincial lead agencies for coastal management, the development of co-ordinating mechanisms to facilitate intergovernmental collaboration and the

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[46] *Legal and Institutional Aspects of Integrated Coastal Area Management in National Legislation* FAO (1994) authors Sonja Boelaert – Suominen and Cormac Cullinan.

[47] *Towards a Coastal Zone Management Act for South Africa"* Jan Glazewski South African Journal of Environmental Law and Policy at page 1.

[48] Glazewski *op cit* page 19.

[49] Page 89 of the policy.

[50] Page 132.

involvement of non-governmental actors as ways of addressing the present inadequate approach to administering coastal management.

It is hoped that the issues raised in the policy contained in the Draft White Paper will be formulated into a coherent legislative policy that addresses present difficulties, as analysed in this essay. The uniqueness (and often, the still pristine nature) of our coastline deserves proper protection. One way to ensure this is by viewing traditional approaches afresh and trying to synthesise the need for clear delineation of the coast's boundaries with private owners' rights and the rights of the public to reasonable coastal access. All of this must be achieved against the backdrop of recognising the ecological criteria that distinguish the coastal zone from other environments, and make it as special and unique as it is.

FISHING FOR ACCESS RIGHTS
A REVIEW OF LEGISLATION AND RECENT JUDGEMENTS RELATING TO THE ALLOCATION OF FISHING RIGHTS IN SOUTH AFRICA

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1. Introduction

As we approach the end of the century it is worth looking back and reflecting on the manner in which people's relationship with the sea and its resources have changed. Vessels have fished increasingly far from shore, using technology which has been constantly upgraded and techniques which have improved catch returns. This has resulted in the exploitation of certain species, some to the point where fishing of those species is no longer commercially sustainable (eg. North Atlantic salmon, and Orange Roughy between Australia and New Zealand) and the targeting of new species, such as has recently occurred with the Patagonian Toothfish. As a consequence there have been efforts, both internationally and by specific states, to regulate the pressures being placed on these resources.

The efforts to regulate fishing include the restriction on the catching of certain species either by way of complete bans or through the regulation of the times that species may be caught, the method of capture and the mass that may be caught generally or by a specific person. The efforts have also led to the creation of various fishing zones. One of the most significant zones is the exclusive economic zone, extending seaward 200 nautical miles from the coastline, in which area the coastal state has the exclusive right to exploit the marine resources.

Catch limits

Within the area of its jurisdiction, South Africa has sought to control the catching of the different species which are targeted for commercial exploitation. In the case of each of the most heavily targeted species, a "total allowable catch" (TAC) has been determined. The TAC is the maximum mass of that species that may be caught in a particular season by all commercial fishers.

Within the TAC individual fishers have been allowed, in the past, to catch on a "catch as catch can" basis. In such an event, although there is a limit on the total combined mass which may be caught, there is no restriction on the how much of that total combined mass may be caught by an individual fisher. Once the combined mass has been caught no further catching by individuals may take place. Such a regime was applied in South Africa in the 1960's to West Coast Rock Lobster. It continues to be applied to horse mackerel where an annual precautionary upper limit is in operation. This regime can be criticised as it may result in 'a race for the resource', an associated increase in individual effort and harvesting at its highest early in the season. In order to avoid the problems associated with such an 'open' system and to regulate the harvests of individual fishers, in South Africa quotas within the TAC are allocated to the individual fishers.

Individual quotas

Individual quotas may be expressed as a specific mass, as was the case until recently in New Zealand. This method of allocation has been criticised for not making allowance for seasonal fluctuations in the resource which may result in unsustainable levels of exploitation. To overcome these problems, in New Zealand this regime was replaced by a system, similar to that which prevails in South Africa for quota controlled species, where the individual quotas are expressed as a percentage of the TAC. However, in New Zealand, in order to effect the conversion to percentage quotas it was necessary for the State to acquire the rights of the individual fixed-mass quota holders by purchasing them back and then reallocating them as quotas expressed as a percentage of the TAC. Whether or not compensation would be payable for a reduction of a percentage quota (ie by reducing the pro rata portion of the TAC which an individual holds) depends on the nature of the rights accompanying the grant of the quota, a matter which is more fully dealt with below.

2. Historical framework

The specific legislation regulating the allocation of access rights in South Africa has changed over time. In addition, in the past ten years there have been various attempts to revise the basis upon which fishing rights have been granted.

The first comprehensive legislation to manage marine living resources was the Sea Fisheries Act of 1940 which was repealed by the Sea Fisheries Act No 58 of 1973. These acts provided for the minister responsible for fishery management, to allocate access rights, including quotas.

Following on widespread dissatisfaction about the way in which quotas were being granted by the responsible minister, various commissions of enquiry were established, the most significant being the Du Plessis commission in 1971, the Treurnicht commission in 1980 and the Diemont commission in 1986. The Diemont Commission of Inquiry into the Allocation of Quotas for the Exploration of Living Marine Resources resulted in the promulgation of the Sea Fishery Act, No 12 of 1988 ("the Sea Fishery Act").

The Sea Fishery Act repealed the Sea Fisheries Act No 58 of 1973, as amended, and the Fishing Industry Development Act No 86 of 1978, in so far as it had not been repealed by a previous act. As a measure to 'depoliticize' the granting of access rights, the Sea Fishery Act provided for the establishment of an independent statutory board, the Quota Board, to inter alia allocate access rights to quota controlled species.

In 1993 guidelines were adopted which set out certain objectives to be pursued by the Quota Board in the allocation of quotas. These were the sustained growth of the industry, stability in the industry, access to the industry for a broader spectrum of the population, the creation of formal job opportunities and the promotion and development of communities which are mainly dependent on the fishing industry' (my emphasis).

In 1994, and pursuant to the Constitutional transition in South Africa, the Minister of Environment Affairs and Tourism, being the Minister responsible for fishery management, established a multiple stakeholder task team, called the Fisheries Policy Development Committee (FPDC), to advise him on the restructuring of the South African fishing industry. In its report to the Minister the FPDC recognised the need for access to marine living resource to be fair and equitable.

Subsequently, in 1998 a white paper on marine living resources was published by the Minister. In the White Paper it is recorded that access to South African fisheries resources in the past has not been fair and equitable resulting in numerous problems which, in certain circumstances, threaten the sustainability of the resource. As a result the need is identified to achieve the following objectives (p15):

> "* **a fairer system of allocation of access to rights to harvest South African's living marine resources;**
> * **a system which ensures greater access to the resource by those who have been denied access previously;**
> * **a reduction in the current levels of pressure on the resources, which in some cases threaten the very sustainability of a resource"**

The White Paper was followed, shortly thereafter, by a bill which was submitted to Parliament. After certain revisions Parliament adopted the Marine Living Resources Act, No 18 of 1998 ("the Marine Living Resources Act") which was promulgated on 27 May 1998 but was implemented with effect from 1 September 1998. The Marine Living Resources Act repeals the Sea Fishery Act, with the exception of certain specific sections. It has as its object 'to provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources: and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa'(my emphasis).

These legislative and ministerial initiatives have been accompanied by attempts in the last five years to allocate quotas to new participants in the fishery. These attempts have led to a spate of litigation by existing participants who have turned to the courts to protect their interests. With the exception of the last, all of these cases have related to allocations made by the Quota Board in terms of the Sea Fishery Act.

3. The Sea Fishery Act

There are various provisions of the Sea Fishery Act which regulate the allocation of fishing rights. The Sea Fishery Act generally makes provision for the granting of rights of exploitation. These are granted by either the Minister (in terms of section 25 of the Act and regulation 6(4) of the regulations made in terms of section 45 of the Act and which are contained in Government Gazette No 18357 of 1 November 1997) or, in respect of new entrants to quota controlled species, by a Quota Board established in terms of section 15 of the Act. The Act further makes provision for the Quota Board to grant quotas to individuals holding rights of exploitation for a particular quota controlled species.

3.1 Rights of exploitation

A "right of exploitation" is defined in the definitions section of the Sea Fishery Act as:

> **"a right to utilize living marine resources or aquatic plant for commercial purposes on the authority of a permit".**

Although "commercial purposes" are not defined in the Sea Fishery Act this right would not appear to relate to utilization for personal consumption or possibly for recreational purposes. However, the distinction between recreational and commercial purposes may become blurred particularly when dealing with charter fishing. The commercial value of recreational fishing has

been well illustrated by the Ministerial investigation in the Victoria, Australia into the desirability of allowing inshore trawling to continue in the bays and inlets of that state due to its possible negative impacts on recreational fishing.

Implicit in the definition of a right of exploitation is the fact that the right is exercised pursuant to the granting of a permit authorising the utilization. In terms of section 25(3)(a), a right is held for a specific period and, in terms of section 25(3)(b), it may only be alienated with the approval of the relevant authority. In terms of section 25(3)(c) a right of exploitation may be suspended or terminated by the Minister pursuant to the conviction of the holder of an offence in terms of the Act.

It may be possible, in terms of the Sea Fishery Act, to obtain a right of exploitation in one of two ways. Firstly, section 25(1) of the Act, by the use of the word "shall", compels the Minister, pursuant to an application, to grant a right of exploitation to a person who, at the date of commencement of the Act, "had access to the sea or any branch of the fishing industry or had such access in the industry of collecting aquatic plants or shells". However, the section provides further that "such grant shall be made on the basis of such person's historical performance in the said industry". This suggests that the extent of the grant may, within a particular branch of the fishing industry, differ from one "exploiter" (as defined in the Sea Fishery Act) to another.

Secondly, in terms of section 25(2) of the Sea Fishery Act, new entrants to a branch of the fishing industry, whether it be regulated by quotas or not, are required to apply for a right of exploitation. It then lies within the discretion of either the Quota Board, in respect of quota controlled species, or the Minister to grant or refuse such an application.

Guidelines

The Sea Fishery Act provides for "guidelines" to be formulated for the granting of access rights, whether in the form or rights of exploitation or

quotas. It is submitted that the wording of the Act in regard to the guidelines is poor. The only mention of these guidelines is contained in section 18(1) where it is recorded that the functions of the Quota Board are to:

> **"(a) recommend to the Minister for his approval guide-lines for the determination of quotas and the granting of rights of exploitation;**
>
> **(b) allocate quotas on application to persons in the different branches of the fishing industry, subject to [foreign fishing rights and the determination of the total allowable catch], on the conditions determined by the board and in accordance with the approved guide-lines;**
>
> **(c) grant rights of exploitation in terms of section 25 and in accordance with the approved guide-lines."**

No further indication is given in the Sea Fishery Act of the format of the guide-lines or the procedure to be followed for their adoption.

However, the nature of a right of exploitation and of the related guidelines received the recent attention of the High Court in a series of cases relating to the allocation of abalone quotas for the 1996/7 season.

Overberg Commercial Divers Association and Others v The Minister of Environmental Affairs and Tourism and Others

In the matter of Overberg Commercial Divers Association and Others v The Minister of Environmental Affairs and Tourism and Others (CPD Case No 16659/96) the Applicants sought an order interdicting certain new entrants, to whom the Quota Board had granted rights of exploitation to utilise 79.5 tons of abalone for commercial purposes, from exercising the rights of exploitation pending a review of the grants. The First Applicant's members, who were the further applicants to the application, were all persons who, at the commencement of the Sea Fishery Act, had access to the sea in that branch of the industry. When the Sea Fishery Act came into force in 1990 they applied for and were granted rights of exploitation in terms of section

25(1).

The Applicants contended that the Quota Board could only grant rights of exploitation to new entrants once guidelines for the granting of such rights had been approved in terms of section 18(1) of the Sea Fishery Act. The court considered the provisions of section 18(1) and found that the legislation did not confer on the Quota Board an unfettered discretion to grant rights of exploitation and that "its power to grant such rights could only be exercised in accordance with guidelines which it had recommended to the Minister and which he had approved"[p4].

In that matter the Quota Board conceded that no guidelines had been approved. In the circumstances, the court found that the decision of the Quota Board to grant rights of exploitation to new entrants was, on the face of it, invalid.

The parties in the Overberg Commercial Divers Association & Others-case subsequently settled the review aspect of that litigation on the basis that the decision of the Quota Board was set aside by agreement and the agreement was made an order of court.

Gillion v Minister of Environmental Affairs and Tourism and Others

In the matter of Gillion v Minister of Environmental Affairs and Tourism and 18 Others (CPD Case No 5186/97) the Applicant sought a mandamus compelling the Chief Director of Sea Fisheries to issue to him a permit to catch his pro rata share of 79.5 tons of abalone for the 1996/7 season (being the same 79.5 tons which was the subject matter of the Overberg Commercial Divers Association-case). It was the Applicants' contention that they were, as a matter of right, entitled to such a pro rata share. Certain of the Respondents contended, in turn, that by virtue of the provisions of section 25(2)(b) of the Sea Fishery Act the Quota Board could consider fresh applications for rights of exploitation by "new entrants".

It appears to have been common cause between the parties that, in the light of the decision of the court in the Overberg Commercial Divers Association-case, the Applicant could obtain a mandamus if no guidelines existed. Although the Quota Board initially indicated in correspondence to the Applicant that there were no guidelines and made a similar concession in the Overberg Commercial Divers Association case, in its replying affidavit it was recorded that on 16 June 1992 the then Minister of Environmental Affairs, Mr Louis Pienaar, had approved guidelines as contemplated in section 18(1)(a) of the Sea Fishery Act, that stated the following:

> **"'n ontginningsreg in enige vertakking van die bedryf word vir 'n bepaalde tydperk en op spesifieke voorwaardes toegeken aan 'n persoon wat by hernuwing of wat nuut tot die bedryf toetree en wat op die voorgeskrewe wyse daarom aansoek doen en aan wie 'n kwota daarvoor toegeken is".**

In argument the Applicant contended that this guideline was too vague to be construed as being "guidelines" as contemplated in section 18 of the Sea Fishery Act, particularly as it offerred no criteria or factors to be considered when granting rights of exploitation. In his judgement Louw AJ considered the relationship between a right of exploitation and a quota and found that "in order to be entitled to dive and catch abalone, a person needs to have both a quota allocated to him and a right of exploitation" [p7]. In the circumstances the court found that it was necessary to read the sets of guidelines relating to rights of exploitation together with the set of guidelines relating to quotas, and to reconcile them. It found that if the guidelines are read to supplement each other the guidelines relating to rights of exploitation are not too vague. In dismissing the application the court found that, even if the 1992 guideline relating to rights of exploitation was invalid, there was nothing to preclude the Minister from determining new guidelines prior to making the allocation.

The stance adopted by the court in providing that it was still open for the Minister to determine new guidelines and, on that basis, indicating that it was

not prepared to effect the allocation itself, differs from the far more robust approach adopted by Foxcroft J in two separate judgements which are dealt with more fully below. In both these matters, the first being Gillion and 3 Others v The Minister of Environmental Affairs and 23 Others (CPD Case Nos. 12875/97 and 13113/97) and the second, Tuna Marine (Pty) Ltd v The Chairman of the Quota Board and 23 Others (CPD Case No 6854/97), the court, albeit for slightly different, although not completely unrelated, reasons was prepared to effect an allocation.

It is further worth noting that in terms of recent practice, rights of exploitation are granted for a period of ten years. Although section 18(3)(a) provides for rights of exploitation to be granted for a specified period, the Act gives no indication of how the period is to be determined.

3.2 Total Allowable Catch

The Sea Fishery Act provides, in section 19, that the Minister shall:

> **"from time to time, after consultation with the advisory committee, determine, on the conditions that he may deem fit, the maximum mass of fish of a particular species which is available for allocation of quotas by the board".**

Where a branch of the fishery has not developed to the extent where a total allowable catch is determinable, as with horse mackerel in South Africa, mass is allocated by the Minister as "experimental" catching rights. A similar regime has been adopted with Patagonian Toothfish.

In the Gillion case it was recorded (at p3) that it was common cause that the full TAC must be allocated in each season. That being the case, it is necessary to determine the portion of the total mass available for exploitation which should be made available for quota purposes.

The "total allowable catch" is not defined in the Sea Fishery Act. However, it is apparent that the mass available for allocation as quotas must be determined by the Minister after consultation with the Sea Fishery Advisory Committee which is established in terms of section 7 of the Act. The practice of the advisory committee, which has generally been endorsed by the Minister, has been to recommend that the mass available for quotas in terms of section 19 is the nett mass remaining after provision has been made for recreational fishing, poaching, foreign fishing and any experimental catching, such has occurred with hake caught by the long-line method.

The thrust of the recordal in the Gillion-case would appear to be to compel the Minister to make the full TAC immediately available to the Quota Board. It is not open to him to hold a part of it back to be dealt with at a later stage.

3.3 Individual quotas

Allocation of quotas in the different branches of the industry is effected by the either the Minister in regard to foreign states wishing to fish in the exclusive economic zone [s18(3)] or, by the Quota Board, established by the Minister in terms of s16 of the Act, in accordance with approved guidelines [s18(1)(b)].

Guidelines

As with rights of exploitation, the Quota Board may recommend to the Minister for his approval guidelines for determining quotas. On 10 March 1993 the erstwhile Minister of Home Affairs and of Environment Affairs approved a set of guidelines in terms of section 18(1)(a) of the Sea Fishery Act ("the 1993 guidelines"). The 1993 guidelines contain a number of clauses which are numbered A, B, C, C, E, F and G. As these guidelines form the subject of most of the recent judgements it is worth noting their contents:

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- Clause A sets out certain basic qualification requirements for quota holders and provides as follows:

> **"A1. An allocation shall be made to a juristic or natural person only, who is**
>
> **(a) a South African citizen which includes a registered South African company, a partnership, trust, closed corporation or a co-operative in which South African citizens have at least a 50% interest;**
>
> **(b) in possession of a productive asset such as a boat or processing plant or a meaningful interest therein, or is able to prove that he is capable of acquiring it within a reasonable period of time but within a period of two years.**
>
> **A2. A fishery community trust instituted in accordance with the requirements of the Department and/or which meets such requirements, is exempted from the provisions of A.1(b).**

- Clause B sets out the factors to be taken into account in determining the quantum of individual allocations;

- Clause C deals with the situation where there is an increase in the TAC and provides that:

> **"Should the total mass of fish available for allocation be increased, the Board may in its discretion and subject to specific conditions -**
>
> **(a) increase the allocation to existing quota holders with due regard to existing Quota Board undertakings; and/or**
>
> **(b) accommodate new entrants as provided for in paragraph E."**

- Clause D deals with the factors relevant to the re-allocation of quotas to existing quota holders and reads as follows:

> **"D1. Quota allocations are made in accordance with the quota holder's established share in the relative sector.**
>
> **D2. No person who was in possession of a quota during the previous year will be subjected to the suspension,**

withdrawal or reduction of his quota, unless -

(a) there is a reduction in the total mass of fish available for allocation, in which case reductions will be made pro rata, but with due regard to existing Quota Board undertakings to quota holders in the fishing industry and the economic viability of the small quota holder;

(b) the Board is convinced that the quota holder, without justification, failed to utilize his entire quota during the previous season to meet any of the requirements laid down by the Board;

(c) the Board acts in accordance with section 20 of [the Sea Fishery] Act;

(d) in the Board's opinion any of the factors mentioned in paragraph B.2 justifies a reduction in his quota;

(e) a redistribution as mentioned in paragraph G occurs.

D3. When the Quota Board intends to act in accordance with paragraphs D2(b) and D2(d), the quota holder will be afforded an opportunity of stating his case before such suspension or reduction of his quota is effected."

- Clause E deals with the allocation of quotas to new entrants in industry sectors which are already subject to quota control.

- Clause F sets out the considerations which may apply when the Quota Board allocates quotas in an industry sector which has not previously been subjected to quota control.

- Clause G, which deals with redistribution of quotas, provides as follows:

> **"Should the Board be of the opinion that a redistribution of quotas is desirable in a sector of the industry, the Board may effect a redistribution of quotas after conducting an investigation which includes consultations with the relative industry sector".**

4. The objectives for which quotas are allocated.

The 1993 guidelines set out certain objectives to be pursued by the Quota Board in the allocation of quotas being 'the sustained growth of the industry, stability in the industry, access to the industry for a broader spectrum of the population, the creation of formal job opportunities and the promotion and development of communities which are mainly dependent on the fishing industry'.

Trawler and Line Fishermen's Union v The Minister of Environmental Affairs and Four Others

The objectives of the guidelines came under the consideration of the court in the matter of Trawler and Line Fishermen's Union v The Minister of Environmental Affairs and Four Other (CPD Case No 14344/94). On 28 September 1995 Josman AJ issued a judgement in which he considered the allocation of quotas to fishermen's trusts. The Applicant, a registered trade union representing fishermen engaged in trawling and line fishing, brought an application against the Minister and four others, including the Quota Board, in which it sought an order declaring that the allocation by the Quota Board of 951 tons of hake to The Cape Town Harbour Fishermen's Trust was unlawful either because the trust did not fall within the meaning of "persons" as referred to in section 18(1)(b) of the Act or because the Quota Board did not have the power to make the allocation in question to the Trust and in doing so it was acting ultra vires [p2].

The judge considered the purpose of the allocation to the Trust in question. In a judgement which, with respect, appears at times confused in its logic although perhaps correct in its outcome, Josman AJ notes, at p22, that a discretionary trust, which vested control in the trustees rather than the intended beneficiaries, would generally be an undesirable vehicle for conferring benefits on a community of fishermen and concluded that, in the light of cases dealing with the legal nature of a trust, there was nothing in the Sea Fishery

Act to suggest that the legislature intended to include a trust as a "person" to whom a quota could be allocated. Without it being expressly stated, they clear result of such a finding is that the provisions of the guidelines, insofar as the deal with trusts, are ultra vires.

Having reached the conclusion set out above, the judge then proceeds to consider the alternative argument of whether "the Board acted...without reference either to the purposes of the act or the Board's own powers in establishing the guidelines". The judge considered Clause A(1) of the guidelines which provides for an allocation to be made to a juristic or natural person only and Clause A(1)(b) which provides for investment or the potential of investment in a vessel or productive asset. He finds that this guideline is "consistent with the notion that the person to whom the quota right is allocated will exploit the quota right himself". He then concludes that the exclusion of the community trust from the requirement of investing in a vessel or processing plant:

> **"has laid the basis for the quota allocation to be disposed of by the trustees for a sum of money to be shared amongst the recipients who are, or supposed to be members of impoverished fishing communities. Instead of being given the right to fish they are being given handouts. In my opinion the Quota Board exceeded the powers conferred upon it by the Act in so doing"**(at p23).

Although the apparent objective of the judge of ensuring that the recipients of quotas should derive a direct benefit from the allocation and should be directly involved in the catching or processing of the quota, through their interest in a productive asset, is laudable, it may be that the finding on the alternative argument is not sustainable in law. Certainly, in the case of registered companies, particularly public companies, the situation often arises where the beneficiaries are not involved in the exploitation of the quota itself. There is nothing in the Sea Fishery Act itself to suggest that this should not be the case. However, the need to ensure that the benefits of the resource should accrue to those directly dependent on it for a livelihood has informed the recent legislative reforms set out above and which are dealt with more

fully below.

West Coast Fishermen's Co-operative v The Government of the Republic of South Africa and four others

The finding in the Trawler and Line Fishermen's Union case that an allocation for welfare purposes to a person not directly involved in the exploitation of the resource is ultra vires is at odds with the decision of the Brand J in the matter of West Coast Fishermen's Co-operative v The Government of the Republic of South Africa and four others (CPD Case No 8156/97 reported as 1998 (2) SA 224 (CPD)).

In the West Coast Fishermen's Co-operative matter the Applicant was "not an ordinary commercial entity. It was established in 1990 with the object of acquiring a fishing quota so as to be in a position to provide pension and medical benefits for all pelagic fishermen and their families on the West Coast of the Western Cape". In 1993, after previous failed attempts, the Applicant successfully applied for an anchovy quota which allocation was then renewed annually thereafter. At the beginning of 1997, as a result of dramatic decline in catch returns, the Minister determined that the total allowable catch for anchovy in the ensuing season would be nil. As a result the Applicant did not receive an anchovy quota. In order to limit the resultant hardship the Applicant, who had also applied for a pilchard quota, was granted a pilchard quota of 1000 tons by the Quota Board. The Quota Board, after hearing appeals in terms of section 22 of the Act, had subsequently reduced the allocation to Applicant to 415.5 tons. The court granted the Applicant an order reviewing and setting aside the decision of the Quota Board to reduce the allocation of 415.5 tons on the basis that such decision was ultra vires.

In coming to his decision Brand J considered the nature of any grant made by the Quota Board prior to the finalisation of the appeal procedure, set out in section 22 of the Sea Fishery Act, and concluded that, having made an initial allocation, the Quota Board was not at liberty to reduce it without advising the

beneficiary that it was considering doing so and calling them to a hearing. (It should be noted that in a judgement delivered shortly thereafter in the matter of Coast Trading Co (Pty) Ltd and 7 Others v the Chairman of the Quota Board and 36 Others (CPD Case No 9671/97) Blignaut AJ has occasion to consider the judgement in the West Coast Fishermen's Co-operative case and, in regard to this conclusion, at p.18, points out that 'this decision raises a number of practical difficulties in regard to the manner in which these provisions should be applied in practice').

Although the court in the West Coast Fishermen's Co-operative case did not consider whether or not the Quota Board had exceeded its powers, in the initial allocation, by providing "handouts", in the form of pension and medical aid benefits, the effect of this judgement is to sanction an objective which the court in the Trawler and Line Fishermen's Union case found to be unlawful.

5. The legal nature of a quota

In the light of the various efforts to effect some form of redistribution in the industry it is important to consider the nature of the rights that a quota affords the holder. This is particularly relevant in relation to the question of whether an individual whose quota (or pro rata share of the TAC) stands to be reduced is entitled to be afforded the protection granted by section 25 of the Constitution. In particular, it is relevant to the issue of whether such person would be entitled to compensation pursuant to a reduction.

In New Zealand individuals whose quotas are reduced in circumstances justifying such reduction are entitled to compensation (see in this regard Davies, N 'Fisheries Management - a New Zealand Perspective' 1992 (12) SA Journal of Marine Science 1069). In Australia, industry participants speak of a 'quasi-property' right.

In the Overberg Commercial Divers Association case Farlam J considered the nature of the right afforded to the Applicants as a result of them having

previously been allocated a right of exploitation in terms of section 25 of the 1988 Act. It was contended on behalf of certain of the new entrants who were respondents to the application that at best the Applicants had a spes that the mass that had been granted to the new entrants would, in the event of the grant being set aside by the court, be granted to them. The court did not rule on whether or not the Applicants were the holders of a spes or stronger rights, but found that a spes was capable of protection. Certainly, where guidelines for the granting of a right of exploitation or quotas exist the holders of existing 'rights' would have a legitimate expection that their rights would not be limited from one season to the next other than in accordance with the provisions of the guidelines.

In terms of section 24 of the Sea Fishery Act a quota, or a part of a quota, is transferable in accordance with guidelines 'adopted by the Minister after consultation with the Competition Board and announced in a manner that he may deem fit' (s24(1)). The Minister has approved guidelines for the transfer of quotas (a copy of which has been made available to the writer by the department but from which it is not clear when they were adopted).

The approved guidelines for transfer provide inter alia that:

> **"1.4 A quota can be transferred only after it has been held for a minimum period of three years: Provided that in the event of (a) the winding up of a partnership or juristic person or the sequestration of an individual's estate before the expiry of such period or an individual quota holder leaving the industry before the expity of such period, the quota shall revert to the State, without compensation for reallocation, or (b) the death of an individual quota holder, the quota may be transferred to the legal heir if he or she is the surviving spouse or related to the deceased within at least the second degree of consanguinity and is willing and able to exploit the quota.**
>
> **1.5 For the purposes of these guidelines any change in the constitution of a partnership or the change in the controlling interest in a juristic person shall constitute circumstances requiring an application for the transfer of a quota.**
>
> **1.7 The rules governing competition in the Republic could, in their own right, have a bearing on the reallocation of quotas."**

If the approach of the court in the Gillion-case is to be extended to the guidelines for transfer then these guidelines should be read as supplementary to the guidelines relating to rights of exploitation and allocation of quotas. In that event, the guidelines for transfer would appear to provide additional circumstances in which a quota may be withdrawn or reduced.

Section 24(4) provides that the Quota Board may (my emphasis) approve an application for the transfer of a quota, or a part of it, if the proposed transfer complies with the guidelines. From the aforegoing it is apparent that the rights are not freely transferable. Transfer is subject to the provisions of the guidelines and the discretion of the Quota Board. They also do not fall within the estate of the holder. The guidelines on allocation of quotas make provision for the reduction or redistribution of quotas. Section 20 of the Sea Fishery Act also provides for the suspension, cancellation and reduction of quotas.

In the light of all of the aforegoing it is apparent that quota holders in South Africa do not have an absolute right which accrues to them in perpetuity. The rights can therefore be reduced without compensation being payable. However, it is further apparent that persons holding quotas in terms of the Sea Fishery Act have a legitimate expectation that their grants will be renewed annually, a fact recognised by the court in a series of judgements dealing with the reduction of existing quotas.

6. The reduction of existing quotas.

Most recent judgements have dealt with the reduction of rights of existing participants. In certain instances where the Applicants have succeeded in reviewing the decision to reduce their rights the court has been prepared to effect what it regards to be the correct allocation. In others it has not, preferring instead to refer the matter back to Quota Board for reconsideration.

Marine Products Ltd and Anor v The Chairman of the Quota Board and 9 Others, St Helena Bay Fishing Industries Ltd and Oceana Fishing Group Ltd v The Chairman of the Quota Board

In the matter of Marine Products Ltd and Anor v The Chairman of the Quota Board and 9 Others (CPD Case No 8773/97) the Applicants, who were existing participants, sought an order setting aside the allocation by the Quota Board of pilchard quotas for the 1997 season to new entrants and further directing that the allocation be effected on the same basis of allocation applied in respect of the previous season (ie pro rata to the participants of the previous season). They sought this order on the basis that the allocation to new entrants had only been made possible by the Quota Board reducing their quotas and that this reduction had been effected in violation of the guidelines.

The allocation by the Quota Board of pilchard quotas for the 1997 season was also the subject matter of the dispute in St Helena Bay Fishing Industries Ltd and Oceana Fishing Group Ltd v The Chairman of the Quota Board (CPD Case No 14867/97). However, it differed from the Marine Products-case in that the Applicants, in addition to seeking an order setting aside the allocation for the 1997 season, sought an order directing that the allocation be effected on the basis applicable prior to 1992.

In November 1992 the Quota Board had announced that it would not allocate pilchards for the forthcoming season on the same basis as the previous season. As a result the quotas of existing participants stood to be reduced. This led to Oceana instituting a review application. The application was settled as a result of a compromise agreement concluded between the then members of the pelagic industry (the 1992 agreement). In terms of the agreement certain of the existing participants in the pilchard sector accepted a reduction in their quotas in exchange for the allocation to them of anchovy quotas. The agreement was sanctioned by the Quota Board which thereafter dealt with the existing participants in the pilchard and anchovy sectors on the basis of the agreement.

Despite the applicants in the St Helena Bay Fishing Industries-case being instrumental in achieving the 1992 agreement, and exchanging part of their then pilchard quota for anchovy quota, as a result of the subsequent demise of the anchovy resource, the agreement no longer suited them. Therefore they were now seeking to have the agreement set aside. In order to avoid the consequences of the agreement, they contended that it was a nullity as the relevant legislation did not make provision for such a 'swap' arrangement.

The Marine Products-case and the St Helena Bay Fishing Industries-case were heard together on the same day, as the facts in the one matter were similar to those in the other. In effect the Applicants to the latter case were opposed to the relief being sought by the Applicants in the former. They required a more far reaching order, to whit an order that the allocations for 1997 be effected pro rata on the basis of the 1992 allocations as opposed to the 1996 allocations.

The Court dismissed the argument that the 'swap' arrangement should be set aside. In doing so, Foxcroft J applied the maxim "nemo ex suo delicto melioriem suam condicionem facere potest". However, it is worth noting that an industry-wide agreement such as the pilchard/anchovy swap could have been lawfully implemented by the parties and the Quota Board utilising the provisions of section 24 of the Sea Fishery Act which relates to the transfer of quotas.

It was further contended by the Applicant's in the St Helena Bay Fishing Industries-case that the reduction in the Applicants' pilchard quotas had been effected in a procedurally incorrect manner and that the Quota Board had failed to observe the requirements of natural justice when it gave effect to the earlier compromise. On the basis of the delay-rule set out in the Wolgroeier's case and the considerable prejudice that would be occasioned to the new entrants over the intervening period, this was dismissed.

The Court accepted the concession by the Quota Board that it's decision should be set aside and thereafter granted the Applicants in the Marine Products-case the relief they sought whilst dismissing the relief sought in the St Helena Bay Fishing Industries-case to the extent that it was inconsistent therewith.

Coast Trading Co (Pty) Ltd and 7 Others v The Chairman of the Quota Board and 36 Others

In the matter of Coast Trading Co (Pty) Ltd and 7 Others v the Chairman of the Quota Board and 36 Others (CPD Case No 9671/97) the Applicants sought an order reviewing and setting aside decisions of the Quota Board relating to the allocation of West Coast Rock Lobster quotas for the 1996/97 season. The Quota Board made a provisional allocation of 1475 tons on 7 November 1996. This represented a reduction of 63 tons on the previous years TAC of 1520 tons. The allocation was effected, in terms of a Schedule, to four different categories being to new entrants, new entrants of the previous year who received an increase, existing participants who received an increase and to existing participants on a pro rata basis who received a decrease. A further 200 tons was subsequently referred by the Minister to the Quota Board for allocation. The Quota Board decided to allocate 63 tons of this further mass to the existing participants who had received a pro rata decrease and the balance of 137 tons to all participants, including the new entrants.

The court, in the person of Blignaut AJ, found that it was not necessary to set aside an entire allocation for the season as the various allocations to individual applicants could be regarded as separate decisions each capable of being separately reviewed [p16]. The court found further that an investigation which includes proper consultations with the relative industry sector was a prerequisite for the making of reduced or revised allocations [p17] and that a 10 minute address to the Quota Board at public meetings did not constitute proper consultation and cannot serve to validate a subsequent reduction and

reallocation in terms of Guideline G [p17]. In addition it was necessary for the Quota Board to inform existing participants beforehand of the possible application of Guideline G.

Tuna Marine (Pty) Ltd v The Chairman of the Quota Board and 23 others

In Tuna Marine (Pty) Ltd v The Chairman of the Quota Board and 23 others (6854/97) the court was asked to review and set aside allocations of abalone quotas for the 1996/7 season which were effected on the basis of 95% to the existing quota holders, 50% of the balance to new entrants and the other 50% of the balance to the new entrants of the previous year. In an ex tempore judgement on 18 June 1997 Foxcroft J found that this basis of allocation was at odds with the guidelines in that, in terms of the guidelines, a person can only have his quota reduced pursuant to a "wholesale" redistribution. The court then considered the provisions of the guidelines relating to redistribution and concluded, at p.6, that "it is something which should be done in a proper manner after proper notice to all possible interested parties".

The court found that an inquiry that the Quota Board intended to hold within a few days of the finalisation of the court case would not constitute sufficient inquiry for the purposes of a redistribution as intended in the guidelines.

Gillion and 3 Others v The Minister of Environmental Affairs and 23 Others, Atlantic Fishing Enterprises (Edms) Bpk v The Minister of Environmental Affairs and Tourism

In Gillion and 3 Others v The Minister of Environmental Affairs and 23 Others (CPD Case No 12875/97) the Applicants sought an order interdicting the Quota Board from applying certain amendments to the existing guidelines pending an order reviewing and setting aside the amendments. The issues in that application impacted on another application, Atlantic Fishing Enterprises (Edms) Bpk v The Minister of Environmental Affairs and Tourism & Others

(CPD Case No 13113/97). As a result the two applications were heard together.

On 14 August 1997 the Minister had approved new guidelines for the allocation of quotas. The most significant of the guidelines for purposes of the judgement was the amendment of Guideline G by the deletion of the words "after conducting an investigation which includes consultations with the relative industry sector" so that the guideline, in its revised form, reads as follows:

> **"The Board may effect a redistribution of quotas if it is of the opinion that such a redistribution is desirable in a sector of the industry".**

On 11 July 1997, the Overberg Commercial Abelone Divers Association, of which the Applicant was the president, had written to the Minister requesting an opportunity to make representations regarding the proposed amendment of the existing guidelines. A month later the Association received a letter from the Quota Board recording that, in the light of the proposed abolition of the Quota Board, lengthy consultations about the proposed guidelines was undesirable and that, in any event, the proposed guidelines would not impact on any person's interest.

In an acerbic judgement Foxcroft J noted that, in the Tuna Marine matter, the guidelines had presented the Quota Board with a problem as a result of which the Quota Board had not followed them. Subsequent to that judgement, through the amendment of the guidelines, the Quota Board was endeavouring to achieve a situation where it was not necessary for it to consult with members of the industry in order to effect a wholesale redistribution. The court found that 'the applicants were obviously interested parties, they had rights in terms of the guidelines as they stood. They had the right not to have their quota reduced, certainly until they had been given an opportunity to be heard in the matter and their rights were ridden over roughshod' (at p9). When the Quota Board had decided to amend the guidelines it was then obliged to entertain representations from any person who wished to be heard which it

had not done.

From these cases it is apparent that the efforts of the Quota Board to effect some form of transformation were being constantly frustrated by the Quota Board's failure to do so within the framework of its own guidelines. In this regard it is worth considering the further comments of Foxcroft J in the Tuna Marine matter where, having reviewed and set aside the decision of the Quota Board relating to the allocation of abalone for the 1996/7 season, he refused to refer the matter back to Quota Board for a decision and, instead, substituted it with a decision of Court. One of the reasons for doing so was that the Applicant had already suffered unjustifiable prejudice from the fact that "Applicant and other people cannot fish but have to spend their time arguing in law courts and before the Quota Board, not just in this case, but in many other cases in the last years. This is not the way to bring about a fair distribution in the fishing industry. If the law is to be changed then it has to be done in Parliament and not in this way"[at 7].

In the light of those comments it is worth considering briefly the changed regime that has now been introduced by the Marine Living Resources Act.

7. The Marine Living Resources Act

The Marine Living Resources Act abolishes the Quota Board and, in what could be seen as a step back to the situation that prevailed prior to the promulgation of the Sea Fishery Act, provides for allocations to be effected by the Minister who shall determine the rights to be granted to any person in terms of section 18(1). Section 18(1) provides that:

> **"No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such activity or to operate such establishment has been granted to such person by the Minister."**

The Act separately recognises "recreational" fishing as a category affording certain limited rights (s20).

The purpose for which rights are granted.

The Marine Living Resources Act introduces various "objectives and principles" which are applicable to any organ of state exercising any power in terms of that Act. Included amongst them are the "need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry" (s2(j)).

The Act provides further in section 18(5) that:

> **"In granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section 2, have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society" (my emphasis).**

It is apparent from the aforegoing that the Minister is obliged to utilise quotas to achieve certain socio-political goals. However, it may well be that the considerations of the court Trawler and Line Fishermen's case will continue to apply.

Total Allowable Catch

As with the Sea Fishery Act, the Marine Living Resources Act sets out mechanisms for managing catch sizes. Whereas the Sea Fishery Act talks of "the maximum mass of fish of a particular species which is available for allocation of quotas" the Marine Living Resources Act provides for allocation based on a "total allowable catch" and a "total applied effort". The former is defined as:

> **"the maximum quantity of fish of individual species or groups of species made available annually, or during such other period of time as**

> **may be prescribed, for combined recreational, subsistence, commercial and foreign fishing."**

The latter as:

> **"the maximum number of fishing vessels, the type, size and engine power thereof or the fishing method applied thereby for which fishing vessel licences or permits may be issued for individual species or groups of species, or the maximum number of persons on board a fishing vessel for which fishing licences or permits may be issued to fish individual species or groups of species".**

In terms of section 14 of the Marine Living Resources Act the Minister shall inter alia determine the total allowable catch and the total applied effort and shall determine the portions of these to be allocated in any year to subsistence, recreational, local commercial and foreign fishing.

The nature of the rights

All rights granted by the Minister in terms of section 18(1) of the Marine Living Resources Act are valid for a period which the Minister shall determine but which shall not exceed 15 years after which the rights automatically revert to the state (s18(5)). The Act contemplates that the rights will be leased by the State to the holders (s22). Commercial rights may be transferrable with the consent of the Minister (s21(2)).

Fisheries Transformation Council

The Marine Living Resources Act, in section 29, establishes a new institution, the Fisheries Transformation Council which has as its objective "to facilitate the achievement of fair and equitable access to the rights referred to in section 18". The Minister may allocate rights to the Council which shall then proceed to lease them, according to criteria determined by the Minister, to "persons from historically disadvantaged sectors of society and to small and medium sized enterprises" (s31(2)).

Implementation

The Marine Living Resources Act was promulgated in GG No 18930 of 27 May 1998 and was implemented with effect from 1 September 1998 (GG 19148 of 21 August 1998). Acting within the framework of the Act the Minister then established the various institutions referred to in the Act, including the Fisheries Transformation Council, and thereafter proceeded to consider applications for the granting of access rights to certain sectors of the fishery for the 1999 season. However, this soon gave rise to further litigation.

Langklip See Produkte (Pty) Ltd and 59 others v The Honourable Minister of Environmental Affairs and Tourism and 161 others.

The promulgation of the Marine Living Resources Act should have heralded the end of the period of uncertainty that prevailed under the Sea Fishery Act. However, on 23 April 1999 in the Cape Provincial Division in Case No 986/99 Davis J delivered a judgement in the matter of Langklip See Produkte (Pty) Ltd and 59 others v the Honourable Minister of Environmental Affairs and Tourism and 161 others. In that matter the Applicant sought an order reviewing and setting aside proceedings of the Minister relating to the allocation of West Coast rock lobster for the 1998/9 season, declaring that in terms of section 85 of the Marine Living Resources Act the Minister was compelled to exercise the powers and follow the procedures of the Quota Board and granting certain related relief.

The Mininster had reduced the allocation of West Coast rock lobster to existing quota holders by 25%. This mass was allocated to 40 new entrants approved by the Minister and 567 tons was allocated to 166 applicants by the Fisheries Transformation Council in terms of the provisions of section 31 of the Marine Living Resources Act.

After considering various rules of interpretation the Court, in the Langklip See Produkte case, found that the clear purpose of section 85 of the Marine Living Resources Act was to compel the Minister to apply the Sea Fishery Act for a period of six months after the commencement of the Marine Living Resources Act, and, in making the allocations of West Coast rock lobster for the 1998/9 season, to exercise the powers and follow the procedures of the Quota Board, including the provisions of the guidelines.

However, unlike the court in the Tuna Marine case, and despite counsel for the Minister conceding that it may do so, the court was not prepared to dispose of the applications for quotas in the manner that the Minister would have done had he exercised the powers assumed from the Quota Board. In refusing to replace the decision of the Minister acting qua Quota Board with its own decision, the court referred specifically to Guideline D3 which provides for the reduction of quotas. In its order the court directed that the available mass be allocated "in accordance with the provisions of guideline D2 to all persons who were allocated and in possession of a lobster quota for 1997/8 fishing season ("existing entrants").

8. Conclusion

In guideline D2 provision is made for a reduction of quota pursuant to "a redistribution as contemplated in Guideline G". It is not clear from the Langklip See Produkte case whether the judge was contemplating the Minister possibly utilising these powers. However, the effect of the judge refusing to impose a decision resulted in the participants in the various quota controlled sectors of the South African fishery concluding sector-wide agreements, similar to that dealt with by the Court in the St Helena Bay Fisheries case. The result has been the introduction of new entrants by agreement, albeit reluctantly given.

This clearly begs the question of whether or not the process of restructuring would have been expedited had the court refused to substitute its decision for

that of the Quota Board in the matters of Tuna Marine and Killion and Others.

There were a wide range of other grounds of review raised in the Langklip See Produkte case which dealt with the various powers of the Minister and the Fisheries Transformation Council acting in terms of the Marine Living Resources Act. In the light of the Court's interpretation of section 85 of the Marine Living Resources Act it was not necessary to deal with these. However, they do afford one an insight into some of the possible legal challenges that may be made in the future as the Minister seeks to implement that Act and fishes around for ways in which to achieve the socio-political objectives of redistribution that have been so clearly identified.

Cape Town
6 June 1999.

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Excellent - original. Always research in a new, challenging law.

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Legislation

1. The Sea Fishery Act, No 12 of 1988
2. A Marine Fisheries Policy for South Africa White Paper 5 May 1997
3. Marine Living Resources Act, No 18 of 1998
4. Guidelines for the allocation of rights of exploitation, quotas and the transfer of quotas

Cases

5. Overberg Commercial Divers Association and Others v The Minister of Environmental Affairs and Tourism and Others (CPD Case No 16659/96)
6. Gillion v Minister of Environmental Affairs and Tourism and 18 Others (CPD Case No 5186/97)
7. Gillion and 3 Others v The Minister of Environmental Affairs and 23 Others (CPD Case Nos. 12875/97)
8. Atlantic Fishing Enterprises (Edms) Bpk v The Minister of Environmental Affairs and Tourism & Others (CPD Case No 13113/97)
9. Tuna Marine (Pty) Ltd v The Chairman of the Quota Board and 23 Others (CPD Case No 6854/97)
10. Trawler and Line Fishermen's Union v The Minister of Environmental Affairs and Four Other (CPD Case No 14344/94).
11. West Coast Fishermen's Co-operative v The Government of the Republic of South Africa and four others (CPD Case No 8156/97 reported as 1998 (2) SA 224 (CPD))
12. Coast Trading Co (Pty) Ltd and 7 Others v the Chairman of the Quota Board and 36 Others (CPD Case No 9671/97)
13. Marine Products Ltd and Anor v The Chairman of the Quota Board and 9 Others (CPD Case No 8773/97).
14. St Helena Bay Fishing Industries Ltd and Oceana Fishing Group Ltd v The Chairman of the Quota Board (CPD Case No 14867/97).
15. Langklip See Produkte (Pty) Ltd and 59 others v the Honourable Minister of Environmental Affairs and Tourism and 161 others (CPD Case No 986/99)
16. Davies, N 'Fisheries Management - a New Zealand Perspective' 1992 (12) A Journal of Marine Science 1069