

INTRODUCTORY PERSPECTIVES ON MARINE TOURISM IN SOUTH AFRICAN LAW

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SUMMARY

Marine tourism is a new subject of legal enquiry in South Africa. After defining "marine tourism", this paper explores the range of legal aspects of marine tourism by relying on the BLT model. The paper also analyses the extent to which generic tourism legislation in the national and provincial spheres of government affects marine tourism. The paper then examines the application of instances of municipal legislation to marine-tourism activities before concluding that there is unquestionably room for a comparative survey leading to the drafting of model legislation doing justice to the importance of marine tourism in the South African economy as well as the ecological sensitivity of the coastal zone.

1 INTRODUCTION

There are a number of reasons why the legal aspects of marine tourism ought to be the subject of study separately from other forms of tourism. One reason is that marine tourism takes place in a legal environment to a great extent different from the legal environment in force on land. A further reason is that, in contrast to land-based tourism, marine tourism takes place in a physical environment for which humans are not anatomically equipped. As a result, the range of marine-tourism activities is much more dependent on technological advances than in the case of land-based tourism.¹ Another consequence is that the safe use of the equipment involved requires a high level of regulation.

Across the globe, the sea has been attracting tourists for centuries.² South Africa is no exception.³ Indeed, for international tourists from outside Africa, the top ten South African attractions include: Cape Town and the Cape Peninsula (number one); the Garden Route (number three); the Durban beachfront (number six); Robben Island (number seven); and the Wild Coast

¹ See Orams *Marine Tourism. Development, Impacts and Management* (1999) 14-20.

² See Orams 11-20.

³ Saunders and Barben "The History of Tourism" in George (ed) *Managing Tourism in South Africa* (2007) 22.

(number ten).⁴ As far as they are concerned, the majority of South Africans who can afford to go on holidays spend them on the coast of KwaZulu-Natal, the Eastern Cape, the Southern Cape or the Western Cape.⁵ Yet, despite the social, cultural and economic significance of marine tourism, the legal aspects of this phenomenon have not received attention from South African writers until now.⁶

This lack of interest is hardly surprising in the light of the fact that the legal aspects of tourism as a whole, with its generic, travel, hospitality and attraction components, have only been the focus of research in this country for about a decade.⁷ A further reason is that the study of the legal aspects of marine tourism, more specifically, presents a number of challenges. The first of those challenges involves defining the concept "marine tourism" in such a way that it is neither over-inclusive or under-inclusive, with the risk of failing to account for the whole range of activities involved. The second challenge resides in identifying the wide range of legal relationships involved. The third and final challenge consists in venturing into different fields of South African law which are not always obvious bedfellows. Within the limited confines of this contribution, introductory insights on marine tourism are offered from the perspective of tourism law and municipal legislation.

2 DEFINITION OF "MARINE TOURISM"

Tourism is an "enormously complex" phenomenon,⁸ which has three basic elements: travel, accommodation and attractions. Indeed, the 1996 Tourism White Paper defines "tourism" as "all travel for whatever purpose, that results in one or more nights being spent away from home".⁹ The White Paper also defines a "tourist" as "a person who travels away from home, staying away for at least one night".¹⁰

⁴ <http://www.southafrica.net/sat/content/en/za/top-10-detail?oid=6883&sn=Detail&pid=1&Attractions-in-South-Africa> (accessed 2011-03-09).

⁵ Visser "The Geography of Tourism" in George (ed) *Managing Tourism in South Africa* (2007) 49-51.

⁶ There is a growing body of South African literature with regard to other aspects. See, eg, Oberholzer, Saayman, Saayman and Slabbert "The Socio-economic Impact of Africa's Oldest Marine Park" in Albers and Myles (eds) *Proceedings of CMT2009, the 6th International Congress on Coastal and Marine Tourism* (2009) 181-196; Van der Merwe, Slabbert and Saayman "Travel Motivations of Tourists to Selected Marine Destinations" in Albers and Myles (eds) *Proceedings of CMT2009, the 6th International Congress on Coastal and Marine Tourism* (2009) 167-180; and Van Zyl "Coastal and Marine Tourism: A Conservation Perspective" in van Niekerk (ed) *Proceedings and Papers at the National Maritime Conference 1991* (1991) R-1-R-6.

⁷ See for instance Vrancken "The National Legal Framework of Tourism: Past, Present and Future" 2000 11 *SLR* 85-98; Vrancken "The Provincial Tourism Legislation" 2000 3 *TSAR* 506-531; Vrancken "Introductory Perspectives on Travel Agency in South African Law" 2001 64 *THRHR* 64-82; Vrancken *Tourism and the Law in South Africa* (2002); and Vrancken and Chetty "International Child Sex Tourism: A South African Perspective" 2009 53 *Journal of African Law* 111-141.

⁸ Miller and Ditton "Travel, Tourism and Marine Affairs" 1986 14 *Coastal Zone Management Journal* 1.

⁹ Department of Environmental Affairs and Tourism *White Paper: The Development and Promotion of Tourism in South Africa* (1996) vi.

¹⁰ *Ibid.*

In order to distinguish marine tourism from other forms of tourism is a difficult task. This is not to say that all forms of marine tourism are difficult to identify. Indeed, an individual who travels by ship on the open sea (the travel element) over several days (the accommodation element) in order to engage in scuba diving on a mid-oceanic seamount (the attraction element) is undoubtedly a marine tourist. By contrast, an individual who travels across an ocean by air in order, during several days, to shop for electronic equipment in a coastal city is undeniably not a marine tourist. In those two examples, the position is clear because all three tourism elements are either of a marine nature (in the first example) or not (in the second example). The problem is that there are an almost infinite number of situations in between those two opposite ends where only one or two of the elements are of a marine nature. This would be the case, for instance, where our scuba diver spends his nights on a nearby island or where our shopper succumbs to the temptation of spending an afternoon on one of the city's beaches. One would readily agree that the former does not cease to be a marine tourist merely because the accommodation element is land-based. By contrast, one would also agree that the latter becomes a marine tourist merely as a result of the marine nature of the attraction element. This points to the fact that the predominant element of marine tourism is the attraction element.

To complicate matters further, the marine nature of the attraction element is not always evident. One would readily agree that shark-cage diving a few miles from the shore is a marine attraction. However, difficulties arise at the shore. For instance, do sea-kayaking tourists cease to be marine tourists once they enter a tidal river? They would not if one understands the marine nature of the attraction to flow from its association with the marine environment seen broadly as including any saline body of water connected permanently or episodically to the open sea.¹¹ On that basis, by contrast, "marine tourism does not include exclusively freshwater-based activities like white-water rafting[,] stream hiking",¹² yachting on dam waters or recreational fishing in a lake. However, one should be careful not to exclude from marine tourism activities taking place on land, such as beachcombing or whale watching from the top of a cliff. To do so would overlook the fact that "[h]umans are land-based creatures and, as a result, many of our activities that are focused on the marine environment do, in fact, occur on land".¹³ It is therefore necessary to identify a criterion that would make it possible to distinguish between land-based activities that do not qualify as marine attractions, and those that do. A possible tool is the "focus" of the activity, understood as the main purpose of that activity, which has to be related to the marine environment. On that basis, "shore-based fishing, land-based whale watching, reef walking or watching a professional surfing competition" are all marine attractions.¹⁴ So are also exploring inter-tidal rock

¹¹ Land-locked bodies of saline water, such as the Dead Sea, are therefore excluded, while temporarily closed estuaries are included.

¹² Orams 10, who also points out that such an exclusion is not without problems since it excludes "those marine mammals which are the focus of tourism but which move between [the marine and freshwater environments]. For example, the West Indian manatee frequently moves from the sea up tidal estuaries and into freshwater areas".

¹³ Orams 9.

¹⁴ Orams 11.

pools and visiting a large marine aquarium¹⁵ as well as driving along a scenic coastal route and admiring a sunset on the patio of a holiday cottage overlooking the sea.

Finally, the fact that human beings are land-based creatures means that, for most of us, the sea is not our home. For that reason, in a real sense, most individuals who venture at sea for more than one day are tourists, irrespective of their purpose. In other words, a definition of "marine tourism" that includes all attractions based on the marine environment would result in the inclusion of activities such as commercial fishing, marine scientific research and navy manoeuvres. Such a concept would undoubtedly be too wide and therefore requires some form of restriction. The most obvious way to do so is to exclude activities which are work-related so as to emphasize the recreational element of marine tourism,¹⁶ while not ignoring other purposes such as health or religion.

In the light of the above, marine tourism may be defined as the human activities involved in the non-work-related attractions which have as their host or focus the marine environment, the latter being understood as including all bodies of saline water connected permanently or episodically to the open sea.

3 EXTENT OF THE LEGAL ASPECTS OF MARINE TOURISM

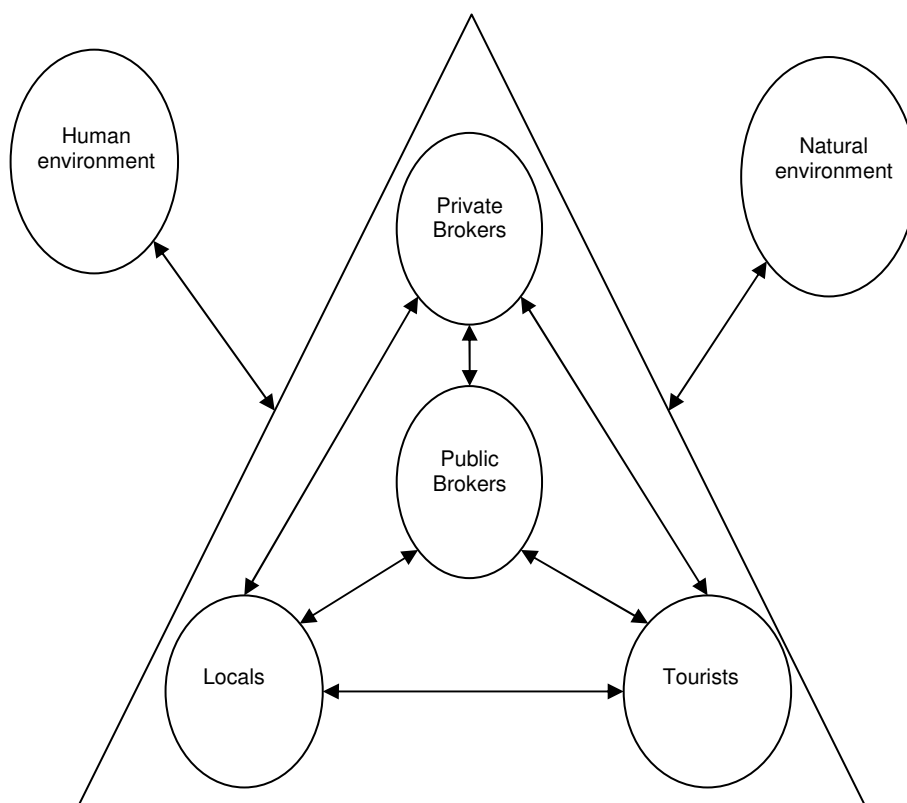
3.1 BLT model

The difficulties involved in defining marine tourism are matched by those encountered when identifying the wide-range of legal relationships involved. A useful tool to tackle those obstacles is the BLT model, a sociology tool which, on the one hand, identifies tourism brokers, locals and tourists as the main actors in tourism and, on the other hand, facilitates the identification of their relationships.¹⁷ In that model, the tourists are the individuals who consume the tourism services and the locals are the individuals who live at the place where the tourism services are consumed. As far as they are concerned, the brokers either supply the tourism services (private brokers) or regulate the supply of those services in the public interest (public brokers). To the extent that law is understood as the normative system which can be adjudicated upon by the judicial organs of the state, the model's distinction between public brokers and private brokers needs to be emphasized in view of the central role played by the former when marine tourism is approached from a legal perspective. This can be done by adapting the model as follows:

¹⁵ Orams 9.

¹⁶ See Orams 10 who stresses that "[i]t is important to acknowledge that there are difficulties in applying [this distinction] absolutely; for example, there is, for many commercial fishers, a significant recreational component to their work".

¹⁷ Miller and Auyong "Coastal Zone Tourism. A Potent Force Affecting Environment and Society" 1991 15 *Marine Policy* 76-77.



3 2 Public brokers

One of the factors affecting the extent to which South African public brokers have jurisdiction to regulate marine tourism services is the place of performance of those services. On the South African land territory, jurisdiction vests in the local municipality (if any),¹⁸ the district municipality or metropolitan municipality¹⁹ and the province where the service is performed as well as in the national sphere of government. The position is essentially the same in the South African internal waters, that is, all the waters landward of the baselines²⁰ including *inter alia* the seashore, estuaries and harbours.²¹ This is because those waters are part of the national territory as well as the territory of the coastal local municipality (if any), district municipality or

¹⁸ Parts of the coast (south of Saldanha Bay, north of the Matzikama Municipality as well as between the Cape Agulhas Municipality and the Swellendam Municipality) are district management areas. There is also no local municipality where there is a metropolitan municipality (s 155(3)(a) of the Constitution).

¹⁹ The three coastal metropolitan municipalities are: the City of Cape Town Metropolitan Municipality, the eThekweni Metropolitan Municipality and the Nelson Mandela Metropolitan Municipality.

²⁰ S 3(1)(a) of the Maritime Zones Act 15 of 1994. See further Vrancken "The South African Baseline" 2002 27 *South African Yearbook of International Law* 158-170.

²¹ See further below.

metropolitan municipality and province, the land territory of which they are adjacent to.²² The same applies to the South African territorial waters, which extend up to 12 nautical miles²³ from the baselines.²⁴ The position is different beyond the territorial waters. The main reason is that marine tourism taking place beyond 12 nautical miles from the South African baselines does not take place within the South African territory. Whether South African public brokers have jurisdiction depends on either the matter concerned (in the contiguous zone/maritime cultural zone²⁵ and the EEZ²⁶) or the existence of a sufficient connection with South Africa.²⁷

When they exercise their powers within their geographical areas of jurisdiction, the South African public brokers must comply with the demands of the Constitution. Two of those demands are that they observe and adhere to the principles of co-operative government and that they conduct their activities within the relevant constitutional parameters.²⁸ Such demands are made necessary by the very complex distribution of powers between the national, provincial and local spheres of government. For instance, local government has jurisdiction over beaches²⁹ with the province concerned monitoring, providing support and regulating the exercise of that power³⁰ while national government also has the authority to regulate in specific circumstances such as when national regulation is necessary to establish minimum standards required for the rendering of services.³¹ In such a case, should a conflict arise between national and provincial legislation, the former prevails.³² In contrast, local government also has jurisdiction over jetties and piers³³ with the province concerned monitoring, providing support and regulating the exercise of that power,³⁴ but there is no limitation to the right of national government to regulate the exercise of that power.³⁵ In this case, provincial legislation prevails over national legislation³⁶ except in specific circumstances.³⁷ Much less complicated examples are the conservation of marine resources as well as the regulation of international and national

²² Vrancken "The Marine Component of the South African Territory" 2010 127 *SALJ* 207-223.

²³ A nautical mile is equivalent to 1 852 metres.

²⁴ S 4(1) of the Maritime Zones Act 15 of 1994. See further below.

²⁵ Which extend up to 24 nautical miles from the baselines (s 5(1) and 6(1) of the Maritime Zones Act 15 of 1994, respectively). See further below.

²⁶ The exclusive economic zone extends up to 200 nautical miles from the baselines (s 7(1) of the Maritime Zones Act 15 of 1994). See further below.

²⁷ See further below.

²⁸ S 40(2) of the Constitution. See further the Intergovernmental Relations Framework Act 13 of 2005, which provides the structures and institutions to promote and facilitate intergovernmental relations as well as mechanisms and procedures to facilitate the settlement of intergovernmental disputes.

²⁹ S 156(1)(a) and (2) read with Part B of Schedule 5 of the Constitution.

³⁰ S 155(6)(a) and (7) read with section 156(1) of the Constitution.

³¹ S 155(7) read with section 44(2)(d) of the Constitution.

³² S 147(2) of the Constitution.

³³ S 156(1)(a) and (2) read with Part B of Schedule 4 of the Constitution.

³⁴ S 155(6)(a) and (7) read with section 156(1) of the Constitution.

³⁵ S 155(7) read with section 44(1)(a)(ii) of the Constitution.

³⁶ S 146(5) of the Constitution.

³⁷ S 146(2)-(3) of the Constitution.

shipping, which fall exclusively within the jurisdiction of the national government.³⁸

Marine-tourism public brokers must ensure that their actions contribute to integrated coastal management in accordance with the National Environmental Management: Integrated Coastal Management Act, 2008 (NEMICMA).³⁹ The latter defines the coastal zone as “the area comprising coastal public property, the coastal protection zone, coastal access land and coastal protected areas, the seashore, coastal waters and the exclusive economic zone [including] any aspect of the environment on, in, under and above” those areas.⁴⁰ In turn, the coastal public property includes the internal waters; the territorial waters; most estuaries; land submerged by, and most islands within those waters; most sections of the seashore; any admiralty reserve owned by the state; any state-owned land declared to be coastal public property; as well as any natural resources on or in any of the abovementioned areas or the EEZ or the continental shelf.⁴¹ Those definitions are wide enough to cover all marine activities except those taking place beyond the outer limits of the South African EEZ and continental shelf.

Marine-tourism public brokers must also protect the heritage resources either located in the marine environment or affected by marine tourism despite being located on land. In this regard, for instance, the National Heritage Resources Act⁴² includes the South African heritage resources which are considered part of the national estate and fall within the sphere of operations of heritage resources authorities,

“any vessel ..., or any part thereof, which was wrecked in South Africa, whether on land, in the internal waters, the territorial waters or in the maritime culture zone of [South Africa] ..., and any cargo, debris or artefacts found or associated therewith, which are older than 60 years or which”

the South African Heritage Resources Agency considers to be worthy of conservation.⁴³ Those wrecks are managed by the Agency if they have “qualities so exceptional that they are of special national significance”.⁴⁴ Other wrecks are the responsibility of the relevant provincial heritage resources authority unless they are in the territorial waters or the maritime cultural zone of South Africa, in which case they are also the responsibility of the Agency.⁴⁵

³⁸ Part A of Schedule 4 of the Constitution.

³⁹ Act 24 of 2008.

⁴⁰ S 1(1) NEMICMA.

⁴¹ S 7 NEMICMA.

⁴² Act 25 of 1999 (hereinafter referred to as “NHRA”).

⁴³ S 2 NHRA.

⁴⁴ S 8(2) NHRA read with s 7(1)(a) NHRA.

⁴⁵ S 35(1) NHRA. This leaves under the responsibility of the provincial authorities the wrecks located within the internal waters.

3 3 Private brokers and locals

The suppliers of marine-tourism services are mainly private legal persons, often in the form of a business entity.⁴⁶ Sometimes they are public bodies such as in the case, for instance, of services offered at the Tsitsikamma National Park.⁴⁷

Over and above entering into legal relationships with other private brokers,⁴⁸ the suppliers of marine-tourism services enter into legal relationships with locals. Those relationships are often of an employment nature for the purpose of delivering marine-tourism services such as scuba-diving training, for example.⁴⁹ The relationship may also be established for the purpose of hiring a piece of equipment such as a boat, or providing support services such as boat maintenance. Those relationships are normally welcomed by locals to the extent that they contribute to the local economy, which might otherwise struggle to support the local population.

The actions of private brokers may also have a negative impact on locals, with the associated legal implications. An example is the discharge of blackwater⁵⁰ by a cruise ship, which may result in harm to the health of local users of a nearby beach. Other instances are conflicts between the spatial and infrastructure requirements of private brokers and those of locals. The likelihood of such conflicts is high because the coastal area where the bulk of marine-tourism activities take place is relatively narrow and particularly fragile as far as its ecology is concerned. The NEMICMA is a crucial legal tool to reconcile the various interests involved in order to try and ensure sustainable development of marine tourism. It provides that the ownership of the coastal public property “vests in the citizens of the Republic and [it] must be held in trust by the state on behalf of the citizens of the Republic”.⁵¹ This means that coastal public property “is inalienable and cannot be sold, attached or acquired by prescription and rights over it cannot be acquired by prescription”.⁵² It also means that the state must “ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community”.⁵³ The state must further “take whatever reasonable legislative and other measures it considers necessary to

⁴⁶ See Le Roux “Business Entities” in Vrancken (ed) *Tourism and the Law in South Africa* (2002) 109-143.

⁴⁷ The Park includes a marine-protected area. See par 2(19) of the Schedule to the Declaration of areas as marine-protected areas made under GN R1429 of 2000 published in GG 21948 of 2000-12-29.

⁴⁸ This is the case, for instance, of a tour operator who puts together a marine-tourism package (see further Vrancken 2001 64 *THRHR* 64-82). As explained earlier, any number of the components of the package might be of a maritime nature (see par 2 above).

⁴⁹ See Vercuil and Fourie “Labour Law” in Vrancken (ed) *Tourism and the Law in South Africa* (2002) 145-176.

⁵⁰ “Blackwater is waste of human origin from water closets and urinals and is distinct from yellow water (urine) and grey water or sullage, which is commonly understood to refer to domestic wastewater from showers, laundry use and cooking, but does not include sewage” (Coghlan “Blackwater” in Lück (ed) *The Encyclopedia of Tourism and Recreation in Marine Environments* (2008) 65).

⁵¹ S 11(1) NEMICMA.

⁵² S 11(2) NEMICMA.

⁵³ S 12 NEMICMA.

conserve and protect coastal public property for the benefit of present and future generations".⁵⁴ This must be done in terms of a national coastal management programme, provincial coastal management programmes and municipal coastal management programmes,⁵⁵ a national estuarine management protocol and estuarine management plans⁵⁶ as well as coastal planning schemes.⁵⁷

3 4 Private brokers and tourists

Private brokers enter mainly into legal relationships with tourists in order to provide their services to those tourists. As pointed out earlier,⁵⁸ private brokers may be in a number of different contractual positions towards the tourists. Firstly, private brokers may act as *suppliers* of the marine-tourism services to the tourists. In such cases, the contractual relationship would often take the form of a contract of letting and hiring of property (a kayak for instance) or a contract of letting and hiring of work (a diving lesson for instance). Secondly, private brokers may act as *dispensers* of the marine-tourism services to the tourists. In such cases, the dispenser is in a principal-agent relationship with the supplier of the service. An example would be where a tourist purchases diving lessons to be given by a broker in the Seychelles through a travel agent in Bloemfontein. Provided all the requirements are met, a legal relationship is established between the supplier and the tourist. A legal relationship is also created between the dispenser and the tourist. Thirdly, private brokers may act as *securers* of the marine-tourism services for the tourists. In such cases, the securer is in a principal-agent relationship with the tourist. In the same example, a legal relationship is established between the supplier and the tourist as well as between the securer and the supplier. Fourthly, private brokers may act as *tour operators*. In those cases, the latter acquire marine-tourism services from suppliers and sell them, usually as a package, to the tourists. The nature of the legal relationship between tour operator and tourist depends in each case on the term of the individual contract. Fifthly, private brokers may act as *assistants*. In such cases, the broker is in a mandate relationship with the tourist, where the mandator is the tourist and the mandatary the broker. An example would be where a travel agent obtains a fishing permit on behalf of a tourist. Finally, private brokers may act as *consultants*. In those cases, the broker is relied upon by the tourist to provide advice on marine tourism. In the example above, the travel agent would be acting as consultant when she advises the tourist as to when to travel in order to enjoy the best weather conditions.

The above is well illustrated by *Masters v Thalia Thain t/a Inhaca Safaris*.⁵⁹ In that case, the appellant entered into an agreement with the respondent in terms of which the respondent undertook to transport the appellant and his family to Inhaca Island and provide them with hotel

⁵⁴ *Ibid.*

⁵⁵ See s 44-55 NEMICMA.

⁵⁶ See s 33-34 NEMICMA.

⁵⁷ See s 56-57 NEMICMA.

⁵⁸ See Vrancken 2001 64 *THRHR* 70-76.

⁵⁹ 1999 4 All SA 618 (W), 2000 1 SA 467 (W).

accommodation there for ten days.⁶⁰ The only reason why the appellant contracted with the respondent was to enable him and his daughter to do scuba diving around the Island.⁶¹ However, the price paid by the appellant did not include the amount that he would have to pay on the Island for the use of a boat to take him and his daughter out to sea, which was quoted by the respondent as approximately R140,00 per dive.⁶² Once on Inhaca, the appellant was unable to find a broker who would take him and his daughter out to sea and immediately demanded that the respondent fly him and his family back to South Africa and fully repay him the price he had paid, namely R15 245,00.⁶³ The court did not identify in which of the abovementioned capacities the respondent was acting. It is unlikely that the respondent acted as the supplier of the travel and accommodation services. It is more likely that it acted either as a dispenser, a securer or a tour operator. It is clear, in contrast, that the respondent did not act, with regard to the marine tourism service, either as a supplier, a dispenser, a securer or a tour operator, but rather that it acted as a consultant.

As indicated above, some locals at a tourism destination do enter into legal relationships with private brokers. In those cases, although those locals do often enter in contact with tourists, there are no contractual relations between the former and the latter. Indeed, should a contractual relation be established where the local provides a service to a tourist, the former must, in terms of the model, be considered as a private broker.

The application of the consumer-protection legislation⁶⁴ to marine-tourism services deserves specific and detailed attention which will hopefully be given in the near future.

3.5 Tourists and locals

While easily overlooked, the interaction between marine tourists and locals is complex. Indeed, although the latter live by the sea, their degree of involvement with the marine environment may vary considerably. At the one end, the lives of most if not all inhabitants of a small fishing village would be directly and substantially affected by the sea. At the other end, very little of the daily lives of many inhabitants of big coastal cities such as Mumbai, New York, Rio and Tokyo involves the nearby marine environment. In a sense, the relationship between those individuals and the sea is the same as that between marine tourists and the sea, but for the proximity of the former's home to the marine environment, which results in their not having to spend a night away from home⁶⁵ in order to enjoy marine attractions.⁶⁶

⁶⁰ 619i.

⁶¹ 620f.

⁶² 620g.

⁶³ *Ibid.*

⁶⁴ See the Consumer Protection Act 68 of 2008.

⁶⁵ The accommodation element required for there to be tourism.

⁶⁶ Technically one must then speak of "marine excursionists". Obviously, the locals of a coastal town may travel along the coast and become marine tourists in another town if they spend at least a night away from home.

Locals who are not directly involved with the marine environment may nevertheless be negatively affected by the actions of marine tourists. This is the case, for instance, where coastal land is owned by marine tourists either in the form of a vacant plot or a dwelling (often of an extremely high value). The NEMICMA acknowledges the problems resulting from “the high percentage of vacant plots and the low occupancy levels of residential dwellings”.⁶⁷ It also requires that municipal coastal management programmes include priorities and strategies to address those problems and “to equitably designate zones ... for the purposes of mixed-cost housing and taking into account the needs of previously disadvantaged individuals”.⁶⁸

As far as they are concerned, locals who are directly involved with the marine environment, either for recreational or work-related purposes, may also be negatively affected by the actions of marine tourists. This is the case, for instance, when the latter commit criminal offences such as public indecency or engaging in prohibited sexual behaviour.⁶⁹ Obviously, the reverse is also true since marine tourists may be the victims of offences committed by locals, such as theft and assault. It would be a mistake, however, to believe that marine-tourism safety is limited to the interaction or among tourists and locals. Indeed, safety requires also adequate knowledge and control of the marine environment itself. It remains to be ascertained to which extent South African law places duties in this regard on the local bodies involved.⁷⁰

4 TOURISM LAW

4 1 National sphere of government

The Tourism Act⁷¹ does not contain any reference to marine tourism. The Act established the South African Tourism Board⁷² with, in terms of section 2, the object “to promote tourism by encouraging persons to undertake travels to and in the Republic”. The Act does not define the term “Republic”. Therefore the Interpretation Act⁷³ applies.⁷⁴ The latter defines the term “Republic” as meaning “the territorial limits of the Republic of South Africa referred to in section 1 of the [1993] Constitution”.⁷⁵ This provision defined the national territory as comprising of the nine provincial territories which, in turn, consist of magisterial districts including coastal districts the seaward limits of which are at the shore.⁷⁶ It could thus be argued that, for the purposes of the Tourism Act, the term “Republic” must be understood

⁶⁷ S 49(2)(c)(iii) NEMICMA.

⁶⁸ S 49(2)(c)(iv) NEMICMA.

⁶⁹ See for instance Vrancken and Chetty 2009 53 *Journal of African Law* 111-141.

⁷⁰ As far as Australia is concerned, see Wilks *Beach Safety and the Law: Australian Evidence* (2008).

⁷¹ Act 72 of 1993.

⁷² S 2.

⁷³ Act 33 of 1957.

⁷⁴ S 1.

⁷⁵ S 2.

⁷⁶ See Vrancken “The Border or Is It? The Territory of the Republic of South Africa” 1999 *De Rebus* 28-29.

narrowly as referring only to the land territory of South Africa. The result would be that the object of the Board does not include encouraging individuals to undertake travel to and in the internal and territorial waters of South Africa. However, it has been argued elsewhere that section 233 of the Constitution requires a broad approach which sees the abovementioned waters as part of the South African territory.⁷⁷ Moreover, the fact that the Tourism Act applies not only on land but also in the internal and territorial waters, is confirmed by sections 3(2) and 4(2) of the Maritime Zones Act.⁷⁸ For those reasons and in view of the fact that there does not appear to be any basis for distinguishing in the present case between the land component and the marine component of the national territory, it is submitted that, although the Tourism Act refers explicitly to the land territory only, section 2 must be interpreted in such a way that the object of the Board extends also to encouraging individuals to undertake travel to and in the adjacent waters up to the outer limit of the territorial waters.⁷⁹ This is in the case where the legislator declines to remove any uncertainty in this regard by means of an amendment to section 2 consisting in the insertion of the words “as well as its internal and territorial waters” after the word “Republic”. The same would apply with regard to the definition of the terms “tourism industry”⁸⁰ and “tourist guide”.⁸¹

The Tourism Act empowers the Minister of Tourism to establish a grading and classification scheme in respect of accommodation establishments.⁸² The latter term refers, for purposes of the Act, to “place[s] in or upon which the business of providing accommodation with or without meals is conducted for gain”.⁸³ This definition does not contain any reference to the location of the establishments and is therefore wide enough to include accommodation establishments located in the marine environment. Finally, the Tourism Act⁸⁴ as well as the Regulations Pertaining to Tourist Guides, 1994,⁸⁵ and the Regulations in Respect of Tourist Guides, 2001,⁸⁶ govern the registration of tourist guides, without referring to the environment within which they operate. That tourist guides may operate in the marine environment is confirmed by the Regulations for the Management of Boat Based Whale

⁷⁷ See Vrancken 2010 127 *SALJ* 207-223.

⁷⁸ Act 15 of 1994.

⁷⁹ That is 12 nautical miles or a little more than 22 kilometres from the baselines. See s 4(1) of the Maritime Zones Act.

⁸⁰ In terms of s 1, the term “‘tourism industry’ means the organized industry which is concerned with the promotion and handling of tours to and in the Republic, and the provision of services and facilities to and the provision for the needs of persons who undertake such tours, in the preparation for such tours, while they are under way and during their stay at their destinations”.

⁸¹ In terms of s 1, the term “‘tourist guide’ means any person who for reward, whether monetary or otherwise, accompanies any person who travels within or visits any place within the Republic and who furnishes such person with information or comments with regard to any matter”. See further s 13(h), 13(i), 27 and 28A of the Act.

⁸² S 18.

⁸³ S 1.

⁸⁴ S 20-211.

⁸⁵ Made in terms of s 26 of the Tourism Act and published by GN R641 of 1994 in *GG* 15607 of 1994-04-08.

⁸⁶ Made in terms of s 26 of the Tourism Act and published by GN R744 of 2001 in *GG* 22563 of 2001-08-17.

Watching and Protection of Turtles, 2008.⁸⁷ Indeed, the latter require for the issuing of a whale-and dolphin-watching permit that the applicant demonstrates that he or she has “employed or will employ one or more tourist guides”.⁸⁸

4 2 Provincial sphere of government

All four coastal provinces have their own tourism legislation: the Eastern Cape Parks and Tourism Agency Act (the ECA),⁸⁹ the KwaZulu-Natal Tourism Authority Act (the KZNA),⁹⁰ the Northern Cape Tourism Entity Act (the NCA)⁹¹ and the Western Cape Tourism Act (the WCA).⁹² As in the case of the (national) Tourism Act, the four abovementioned provincial Acts do not confirm explicitly that they apply in the marine environment. On the one hand, section 1 of the WCA defines the term “province” as “the Province of the Western Cape”. As far as they are concerned, section 1 of the ECA defines the term “province” as “the Province of the Eastern Cape established by section 103 of the Constitution”, section 1 of the KZNA defines the term “province” as “the KwaZulu-Natal Province contemplated in section 103(1)(d) of the Constitution”, and section 1 of the NCA defines the term “province” as “the Northern Cape Province referred to in section 103(1)(g) of the Constitution, or any part thereof”. Section 103 of the Constitution does not define the provinces as including the adjacent internal and territorial waters. It could therefore be argued that the territories of the coastal provinces do not include the internal and territorial waters adjacent to the coast of those provinces, except for a few bodies of internal waters, such as the Knysna Lagoon.⁹³ It must also be taken into account that there is no rule of international law dictating how jurisdiction over internal waters and the territorial sea must be allocated within the constitutional dispensation of a coastal state. It is therefore not possible to rely on section 233 of the Constitution to interpret section 103 as not excluding the internal waters and territorial sea from the territories of the coastal provinces. Nevertheless, it seems that the better approach is the one which sees the internal waters and territorial sea adjacent to the coast of the coastal provinces as being part of the territories of those provinces.⁹⁴ As indicated in an earlier contribution,⁹⁵ there is no evidence that either the drafters of the 1993 Constitution or the Constitutional Assembly intended to alter the legal status of the internal waters and territorial sea, which were part of the province before 1994. Moreover, it was argued in the said contribution that section 103(2) of the Constitution ought to be interpreted as not excluding the

⁸⁷ Made in terms of s 77(1)(b), (2)(g), (2)(x)(v) and (2)(y) of the Marine Living Resources Act 18 of 1998 and published by GN R725 of 2008 in GG 31212 of 2008-07-04.

⁸⁸ Regulation 5(2)(e). See also regulation 6(1)(b).

⁸⁹ Act 2 of 2010.

⁹⁰ Act 11 of 1996.

⁹¹ Act 5 of 2008.

⁹² Act 1 of 2004.

⁹³ See GG 28189 of 2005-10-31 58.

⁹⁴ Chaskalson and Klaaren “Provincial Government” in Chaskalson, Woolman, Roux, Klaaren and Stein (eds) *Constitutional Law of South Africa* (1998) par 4.1(b)(i); Dugard *International Law* (2004) 360; and Rautenbach and Malherbe *Constitutional Law* (2009) 262.

⁹⁵ See Vrancken 2010 127 *SALJ* 207-223.

existence of components of the national and provincial territories other than the land component which they define. A further consideration is that integrated coastal management in terms of the NEMICMA would not be fostered by a geographical division of competences in the middle of the coastal zone. It must be kept in mind, however, that marine resources, national parks as well as “the regulation of international and national shipping and matters related thereto” are functional areas expressly excluded from the competence of the provinces by the Constitution.⁹⁶

There are no provisions in the NCA and the WCA which do indirectly point out to the fact that marine tourism is included in their ambit. In contrast, the ECA compels the Eastern Cape Parks and Tourism Agency⁹⁷ to “develop and maintain a register of all tourist amenities and persons conducting or operating a tourist service in the Province”.⁹⁸ For these purposes, “an amenity is a tourist amenity if that amenity is a hotel, lodge, guesthouse, bed and breakfast establishment, conference centre or restaurant”.⁹⁹ Those terms are not defined in the ECA which, however, makes provision¹⁰⁰ for the continued registration of the amenities already registered under the predecessor of the ECA, the Eastern Cape Tourism Act, 2003 (ECTA).¹⁰¹ The latter defined the term “hotel” as meaning “premises, wherein or whereon the business of supplying lodging and meals for a reward is or is intended to be conducted”.¹⁰² There is no apparent reason why this definition should be read restrictively to include only land-based “hotels”.¹⁰³ The ECTA did not define the terms “lodge”, “guesthouse” and “bed and breakfast establishment”. Rather it defined the more general term “other accommodation establishment” as meaning “any premises offering sleeping accommodation to the public for a fee, whether with or without meals and includ[ing] a boat or house boat”,¹⁰⁴ thereby contemplating explicitly the existence of marine accommodation.

As far as the public is concerned, “a person is conducting or operating a tourist service if that person is a tour operator, courier, travel agent, vehicle rental operator, activity operator or a tourism or biodiversity management training provider”.¹⁰⁵ Once again, those terms are not defined in the ECA, which makes provision¹⁰⁶ for the continued registration of the service providers already registered under the ECTA. The latter defined the term “tour operator” as meaning “any person who carries on the business of

⁹⁶ See Schedule 4 and Schedule 5 of the Constitution.

⁹⁷ Established in terms of s 10 ECA.

⁹⁸ S 42(1) ECA.

⁹⁹ S 42(2) ECA.

¹⁰⁰ S 75 ECA.

¹⁰¹ Act 8 of 2003.

¹⁰² S 1 ECTA.

¹⁰³ See also the definition of the terms “conference centres” (“establishments in the business of providing facilities for the hosting of conferences, congresses, conventions, symposia, seminars and exhibitions, not forming part of a hotel or other accommodation establishment”) and “restaurant” (“premises which are structurally adapted and used for the purpose of supplying meals as prescribed, for a fee, to the public for consumption on the premises”) (s 1 ECTA).

¹⁰⁴ S 1 ECTA.

¹⁰⁵ S 42(2) ECA.

¹⁰⁶ S 75 ECA.

providing tours of any description with their own or other operators' approved vehicles, aircrafts and other facilities".¹⁰⁷ This wording is somewhat problematical from a marine-tourism perspective. The word "vehicle" must obviously not be given a very general meaning because the provision distinguishes between "vehicles" and "aircraft", which are vehicles in a wide sense. How narrowly must the term "vehicle" be understood is unclear. If it refers only to motor vehicles, marine-tourism tour operators would only be included in the definition of the term "tour operator" for the purposes of the ECA if what those operators use at sea falls within the meaning of "other facility", a term which is not readily understood to include means of conveyance. This difficulty is absent in the case of a "courier", which is "a person or business providing carriage for passengers",¹⁰⁸ without any restriction as to whether such conveyance occurs on land, in the air or at sea.¹⁰⁹

As far as it is concerned, the KZNA includes among the powers of the KwaZulu-Natal Tourism Authority¹¹⁰ the power "to register, accredit, classify, grade and certify tourism operators and establishments in the Province".¹¹¹ The term "tourism operators" means "any natural or juristic person within the tourism industry in the Province", the term "tourism establishment" means "any establishment, including a facility or service, within the tourism industry in the Province", and the term "tourism industry" means "the industry within the Province which focuses on and aims to attract domestic or international tourists to the Province, and includes the provision of public and private services and facilities".¹¹² The wording of those definitions does not exclude marine-tourism operators and establishments. The fact that the latter do indeed fall within the ambit of the KZNA is confirmed by the KwaZulu-Natal Tourism (Registration of Tourism Establishments and Tourism Operators) Regulations, 2004 (KZNR).¹¹³ On the one hand, the latter does list among the private brokers which must be registered: boat / fishing charters; aquariums; cruise operators; dive operators; whale-watching operators; dolphin-watching operators; and ferries.¹¹⁴ On the other hand, a mechanism is provided for the voluntary registration of private brokers such as harbours, lighthouses, wharves, biosphere reserves, nature reserves / wilderness areas, waterfronts and sea-sport clubs.¹¹⁵

¹⁰⁷ S 1 ECTA.

¹⁰⁸ *Ibid.*

¹⁰⁹ See also the definition of the term "training provider": "any person, organisation or institution providing training, guidance or education within the tourism industry in the Province" (s 1 ECTA). The ECTA did not define the terms "travel agent", "vehicle rental operator" and "activity operator".

¹¹⁰ Established in terms of s 2(1) KZNA.

¹¹¹ S 3(g)(iv) KZNA.

¹¹² S 1 KZNA.

¹¹³ Made in terms of s 32(f) and (i) KZNA and published by PN 458 of 2004 in PG 6263 of 2004-05-13.

¹¹⁴ Regulation 3(1) read with appendix 1 KZNR. In order to be registered, the private broker must "(a) be a member of at least one Community Tourism Organisation if it is necessary to the marketing of its service; (b) have a business or trading licence; and (c) have public liability insurance" (regulation 3(2) KZNR).

¹¹⁵ Regulation 4 read with appendix 2 KZNR. The sports are angling / fishing, board-sailing, body-boarding, diving, jet-skiing, lifesaving, sailing, scuba-diving, ski-boating, snorkelling, surf ski, surfing, swimming and yachting. In order to be registered, the private broker must

5 MUNICIPAL LEGISLATION

Municipalities do not normally have tourism-specific by-laws. However, there are other pieces of legislation which have an impact on marine tourism. A distinction can be made in this regard between legislation that does apply exclusively to the sea-shore and the sea, on the one hand, and legislation that does not apply specifically to those areas, on the other hand.

An example of the second category is the Nelson Mandela Bay Metropolitan Municipality Public Amenities By-Law, 2010 (NMBL).¹¹⁶ The aim of the latter is to control “access to and use of all public amenities owned by or under the control of the municipality”.¹¹⁷ Public amenities include beaches, estuaries, public resorts, recreation sites and rivers.¹¹⁸ However, the definition of the term “public amenity” does not refer explicitly to the sea. Nevertheless, chapter II of the NMBL is entitled: “Specific provisions relating to rivers, dams, estuaries and sea”.¹¹⁹ But, the extent to which the NMBL does indeed apply at sea is unclear. On the one hand, the prohibitions relating to angling clearly apply only with regard to rivers.¹²⁰ Section 16, which deals with the registration of boats,¹²¹ only forbids the operation of unregistered boats “on a river, dam or estuary”.¹²² Similarly, the duty to moor a boat not in use is explicitly aimed at protecting other users of “a river, dam or estuary”.¹²³ Moreover, the provisions relating to the operation of boats are clearly confined once again to rivers, dams and estuaries.¹²⁴ On the other hand, the NMBL forbids the skipper¹²⁵ of a boat to leave a “river mouth without the occupants of the boat wearing suitable life jackets”.¹²⁶ As far as they are concerned, the provisions relating to jet-propelled craft do not contain any express indication or suggestion that they

“(a) be a member of at least one Community Tourism Organisation if it is necessary to the marketing of its service; (b) have a business or trading licence; and (c) have public liability insurance” (regulation 4 read with regulation 3(2) KZNR).

¹¹⁶ Made in terms of s 156 of the Constitution and published by Local Authority Notice 39 of 2010 in the Eastern Cape PG 2322 of 2010-03-24.

¹¹⁷ S 2 NMBL.

¹¹⁸ S 1 NMBL.

¹¹⁹ Chapter I contains the general provisions relating to public amenities and chapter III contains miscellaneous provisions.

¹²⁰ S 23 NMBL.

¹²¹ The term “boat” is defined as “a vessel, craft, punt, canoe or inflatable boat that moves or is propelled by means of bars, poles, paddles, oars, sails or mechanical power and that is being used to carry persons on water” (s 1 NMBL).

¹²² S 16(1) NMBL. The NMBL does not define the term “estuary”. By contrast, the term “river” is defined as “that portion of a river within the area of jurisdiction of the municipality, defined as a ‘tidal lagoon’ and ‘tidal river’ in terms of the Sea-Shore Act (Act 21 of 1935)” that is: “any lagoon in which a rise and fall of the water-level takes place as a result of the action of the tides” and “that part of any river in which a rise and fall of the water-level takes place as a result of the action of the tides” (s 1 of the Act).

¹²³ S 17(2) NMBL.

¹²⁴ See s 16(5), (6), (10)(c)-(d), (11), (13) and (14) NMBL.

¹²⁵ The term “skipper” is defined as, “in relation to a vessel, the person having lawful command or charge of or, for the time being, is in charge of the vessel, as the case may be” (s 1 NMBL).

¹²⁶ S 19(16) NMBL.

do not also apply at sea.¹²⁷ The same applies with regard to the provisions relating to environment conservation¹²⁸ and water-skiing.¹²⁹ Finally, the title of section 24, which deals with general conduct, includes the words “rivers, dams, estuaries and sea”.

As far as it is concerned, legislation that does apply exclusively to the sea-shore and the sea is in the form of either original legislation or subordinate legislation. A weakness of the latter is that its scope may not exceed the scope of the original legislation in terms of which it is made. This is illustrated by the Durban Sea-Shore Regulations (DSSR),¹³⁰ made in terms of the Sea-Shore Act, 1935 (SSA).¹³¹ The problem resides in that the SSA defines the sea-shore as “the water and the land between the low-water mark and the high-water mark”, that is “the highest line reached by the water of the sea during ordinary storms occurring during the most stormy period of the year, excluding exceptional or abnormal floods”.¹³² In other words, Parliament has not given any authority to other bodies to apply the SSA and make regulations in the zone within an area such as the Durban beachfront, which the sea does not reach during ordinary storms occurring during the stormiest period of the year, a zone where, for that very reason, many of the facilities and attractions are located.¹³³ Section 10(3)(b) of the SSA makes provision for a regulation to be made applicable also “to any State-owned land adjoining or situated near the sea-shore”, in which case, “for the purposes of the application of any such regulation, any State-owned land to which such regulation has been so declared to be applicable, shall be deemed to be a portion of the sea-shore”. However, the DSSR does not contain any provision to that effect. In fact, the preamble to the DSSR makes it clear that it was made in terms of section 10(1), which grants the power to make regulations only “in regard to any portion of the sea-shore and the sea”.

¹²⁷ See s 20 NMBL. The only provision the area of application of which is limited is s 20(3), which provides that “[n]o person may operate a personal watercraft or any other jet-propelled craft in the [sic] river mouth other than for the express purpose of gaining access to and from the sea”.

¹²⁸ S 21 NMBL.

¹²⁹ S 22 NMBL. The term “water skiing” is defined as “the act of a person on dual skies, slalom ski, aqua board, tube or any other device other than a person in another boat, being towed by a boat through, over or on the water” (s 1 NMBL).

¹³⁰ Made in terms of s 10(1) of the Sea-Shore Act, 1935, upon authority granted by the Administrator of Natal (GN 41 of 1989 published in GG 11666 of 1989-01-20), and available <http://www.durban.gov.za/durban/government/bylaws/seashore-regulations>. For a geographical perspective, see Preston-Whyte “Contested and Regulated Seaside Space at Durban” in Miller, Auyong and Hadley (eds) *Proceedings of the 1999 International Symposium on Coastal and Marine Tourism* (2002) 229-236.

¹³¹ Act 21 of 1935.

¹³² S 1.

¹³³ Regulation 2 DSSR confirms that the DSSR “apply to the sea-shore and the sea situated within or adjoining the area of jurisdiction of the Council”, the latter being defined in regulation 1(1) as meaning “the City Council of the City of Durban”. The term “sea” means “the water and the bed of the sea below the low-water mark and within the territorial waters of the Republic, including the water and the bed of any tidal river and of any tidal lagoon” (s 1 of the Sea-Shore Act, 1935 (Act 21 of 1935)).

The DSSR provides for the designation of “any area on or part of the seashore and the sea exclusively for a particular recreational activity”.¹³⁴ One such activity is bathing,¹³⁵ which is only allowed in a bathing zone¹³⁶ and only when permission to do so has been given by the relevant notice or sign.¹³⁷ Surf-riding¹³⁸ is also limited to designated areas and not further than the line of the shark nets or, where there are no such nets or the line is not visible, 400 m from the low-water mark.¹³⁹ As far as it is concerned, board-sailing¹⁴⁰ is only allowed in a limited area in the surf as well as in the whole area between the seaward side of the surf and the line of the shark nets or, where there are no such nets or the line is not visible, 400 m from the low-water mark.¹⁴¹ The DSSR forbids fishing “in or from any area at any time during which bathing, board-sailing or surf-riding is permitted”.¹⁴² Fishing on piers, groynes and stormwater outfalls is only allowed at specific places and times.¹⁴³ Fishermen must give precedence to other users of the sea and sea-shore. More specifically, they may not use their “fishing equipment, including any rod, net, trap or other device in such manner as to cause danger or annoyance to any other person or in such a way as to cause an obstruction to or to interfere with the comfort of any other person”.¹⁴⁴ The DSSR also provides for the grant of the exclusive use of a portion of the seashore and the sea “to any organisation, body or person or class of persons and invitees thereof for the purpose of any event or contest”.¹⁴⁵

The DSSR does not only allocate separate areas for different recreational activities. It also regulates in great details the interaction between the various users of the beachfront whenever they come into contact with one another.¹⁴⁶ Interestingly, the DSSR only forbids the playing of a game or indulging in a pastime which is likely to cause nuisance, annoyance, injury or discomfort to bathers, spectators or any other persons, either when a notice

¹³⁴ Regulation 3(1) DSSR. In such an area, no person may engage in another recreational activity (regulation 3(3) DSSR). The DSSR does not define the term “recreational activity”.

¹³⁵ The DSSR defines the term “bathing” merely by indicating that it “excludes paddling” (regulation 1(1) DSSR). The *Oxford Concise Dictionary* defines the verb “to paddle” as meaning to “walk barefoot or dabble the feet or hands in shallow water”.

¹³⁶ Regulation 4 DSSR.

¹³⁷ Regulation 5(a) DSSR. See further regulation 16 DSSR.

¹³⁸ The term “surf-riding” means “the recreational activity involving the use of a surf-craft” which, in turn, is defined as a device used for riding the surf which is designed for use by not more than two persons and which is propelled either by the movement of the surf or the actions of the surf-rider, without mechanical aid, or a combination of both, and includes a belly-board, a body-board and a paddleski but excludes a device: (a) of an inflatable character, or (b) wholly constructed of a soft, pliable material, which does not exceed two metres in length” (regulation 1(1) DSSR).

¹³⁹ Regulation 7(a) and (c) DSSR.

¹⁴⁰ “Board-sailing” means to use a “sail-board”, that is “a rudderless device which is fitted with a sail and is propelled on the surface of the sea by the action of the wind and is designed to carry one person” (regulation 1(1) DSSR).

¹⁴¹ Regulation 8 DSSR.

¹⁴² Regulation 9(1) DSSR.

¹⁴³ Regulation 9(2) DSSR. For other provisions regarding piers and groynes, see regulation 13 DSSR.

¹⁴⁴ Regulation 9(3) DSSR. See also regulation 9(4) DSSR.

¹⁴⁵ Regulation 15(1) DSSR. See further regulation 15(2)-(3) DSSR.

¹⁴⁶ See for instance regulation 10 DSSR (clothing), regulation 12 DSSR (animals) and regulation 14 DSSR (vehicles).

or sign is displayed to that effect or upon a warning to refrain from doing so by the relevant municipal officer,¹⁴⁷ an official lifeguard¹⁴⁸ or an authorised employee.¹⁴⁹ In other words, the DSSR does not appear to offer users of the sea-shore any proactive tool to engage with individuals who play games or indulge in pastimes which are likely to cause nuisance, annoyance, injury or discomfort, if the municipality fails to cause the necessary notice or sign to be displayed, and either there is no individual present who is competent to give the necessary warning or, although present, such an individual fails to issue a warning. The DSSR, however, creates such a wide range of offences that, once such a nuisance, annoyance, injury or discomfort is actually caused, the actions of the individuals concerned are likely to constitute an offence.¹⁵⁰

The abovementioned difficulties with regard to the scope of application of municipal-beach legislation are overcome if that legislation is disentangled from the Sea-Shore Act and adopts a sufficiently comprehensive approach to its application. A good example is the Hibiscus Municipality Beach and Launch Site Bylaws, 2009 (HMBB).¹⁵¹ The latter “apply to the sea-shore[,] Admiralty Reserve and the coastal area and foreshore situated within or adjoining the jurisdiction of the Council” of the Hibiscus Coast Municipality.¹⁵² As a result, the HMBB applies not only to the sea-shore,¹⁵³ but also further inland in the admiralty reserve¹⁵⁴ and the littoral active zone¹⁵⁵ as well as any other areas, including public roads,¹⁵⁶ lying between the high-water mark

¹⁴⁷ The Manager of Bathing Amenities, that is the municipal officer representing “the Director of Parks, Recreation and Beaches appointed by the Council or his Deputy and any person acting in either capacity”, “in the exercise of control under th[e] regulations of [the] sea-shore and the sea and any other area to which th[e] regulations apply or acting in the capacity of such officer or his deputy or any employee of the Council authorised by the Director to act on behalf of such officer” (regulation 1 DSSR).

¹⁴⁸ That is “a lifeguard in the employ of the Council and also ... any member of a voluntary lifesaving association or club whilst performing the duties and functions of a lifeguard on the Council’s beaches at the request and under the direction of the Manager of Bathing Amenities” (regulation 1 DSSR).

¹⁴⁹ Regulation 11 DSSR.

¹⁵⁰ See for instance regulation 19(ff) DSSR.

¹⁵¹ Made in terms of s 156 and 162 of the Constitution read in conjunction with s 11 of the Local Government Municipal Systems Act, 2000 (Act 32 of 2000), and published by Notice 69 of 2010 in the KwaZulu-Natal PG 486 of 2010-07-22.

¹⁵² Part 1 bylaw 3 HMBB.

¹⁵³ The HMBB defines the term “sea-shore” as meaning “the area between the low-water mark and the high-water mark” subject to any determination or adjustment of a coastal boundary in terms of s 26 NEMICMA (bylaw 1 HMBB read with s 1(1) NEMICMA).

¹⁵⁴ That is “any strip of land adjoining the inland side of the high-water mark which, when [the HMBB] took effect, was state land reserved or designated on an official plan, deed or other document evidencing title or land-use rights as ‘admiralty reserve’, ‘government reserve’, ‘beach reserve’, ‘coastal reserve’ or other similar reserve” (bylaw 1 HMBB).

¹⁵⁵ That is “any land forming part of, or adjacent to, the seashore that is (a) unstable and dynamic as a result of natural processes; and (b) characterised by dunes, beaches, sand bars and other landforms composed of unconsolidated sand, pebbles or other such material which is either unvegetated or only partially vegetated” (bylaw 1 HMBB read with s 1(1) NEMICMA).

¹⁵⁶ As defined in the Road Traffic Act, 1996 (Act 93 of 1996).

and the nearest private or municipal land up to one hundred metres inland.¹⁵⁷

Like the DSSR, the HMBB provides for the designation of “any area on or part of the seashore and the sea exclusively for a particular recreational activity”.¹⁵⁸ In contrast with the DSSR, the HMBB does, however, indicate what the term “recreational activity” means, that is, any beach-related activity pursued on a beach and regulated by the HMBB.¹⁵⁹ The latter does in fact forbid any person from engaging in “any recreational activity other than an activity for which specific provision is made in or in terms of” the HMBB.¹⁶⁰ This provision is problematical because, as indicated above, a recreational activity must be understood for the purposes of the HMBB to be an activity regulated by the HMBB. Such an activity cannot therefore be an activity for which provision is not made in or in terms of the HMBB. A more appropriate wording would be: “any activity other than a recreational activity”.

Many provisions of the HMBB are similar, if not identical, to provisions of the DSSR.¹⁶¹ There are, however, provisions in the HMBB which have no equivalent in the DSSR. Those provisions fall into two main categories: environmental conservation and launch sites. The HMBB does indeed contain provisions forbidding pollution as well as provisions aimed at protecting the form of any dune or river mouth as well as the fauna and flora of the area.¹⁶² As far as launch sites are concerned, the HMBB stresses¹⁶³ that its provisions are subject to the provisions of the Regulations in Terms of the National Environmental Management Act, 1998: Control of Vehicles in the Coastal Zone, 2001.¹⁶⁴ The latter contains a general prohibition of the use of any vehicle in the coastal zone, with a number of exceptions.¹⁶⁵ One of those exceptions involves the use of any vehicle within a boat-launching site,¹⁶⁶ provided that a licence has been obtained to that effect.¹⁶⁷ The HMBB adds a number of requirements, including the completion and signing of the Launch Register and the payment of the prescribed launch fee.¹⁶⁸

6 CONCLUSION

Marine tourism is a new subject of legal enquiry in South Africa. Defined as the human activities involved in the non-work-related attractions which have as their host or focus the marine environment, the latter being understood as

¹⁵⁷ Bylaw 1 HMBB.

¹⁵⁸ Regulation 3(1) DSSR. In such an area, no person may engage in another recreational activity (regulation 3(3) DSSR). The DSSR does not define the term “recreational activity”.

¹⁵⁹ Bylaw 1 HMBB.

¹⁶⁰ Part 1 bylaw 4.4 HMBB.

¹⁶¹ Compare for instance the lists of offences in regulations 19 DSSR and part 2 bylaw 14 HMBB.

¹⁶² Part 3 bylaw 1 HMBB.

¹⁶³ In part 4 bylaw 1 HMBB.

¹⁶⁴ Made in terms of s 44 NEMA and published by GN 1399 of 2001 in GG 22960 of 21 December 2001.

¹⁶⁵ Regulation 3.

¹⁶⁶ Regulation 3(a) read with regulation 4(b).

¹⁶⁷ Regulation 7(1)-(2).

¹⁶⁸ Part 4 bylaw 3 HMBB.

including all bodies of saline water connected permanently or episodically to the open sea, marine tourism involves tourism brokers, locals and tourists in a complex range of relationships which require systematic and in-depth study. Neither national legislation nor the legislation of the four coastal provinces does explicitly include marine tourism within their scope of application. But there are provisions in the national Act and in two of the provincial Acts which lead to the conclusion that marine tourism does indeed fall within their scope. Day-to-day marine-tourism activities are, however, mainly governed by municipal legislation. The latter shows an unsurprising heterogeneity as well as a number of weaknesses. There is unquestionably room for a comparative survey leading to the drafting of model legislation doing justice to the importance of marine tourism in the South African economy as well as the ecological sensitivity of the coastal zone.