
**THE WHITE PAPER FOR SUSTAINABLE
COASTAL DEVELOPMENT AND
THE FUTURE OF THE SEA-SHORE ACT**

1 Introduction

In his 2006 budget speech, the Minister of Environmental Affairs and Tourism, Marthinus van Schalkwyk, indicated that he would present a new Integrated Coastal Management Bill to Parliament before the end of the year. This new Integrated Coastal Management Bill, the Minister explained, would promote a system of co-ordinated and integrated coastal management (see Van Schalkwyk *Speech During National Assembly Debate on Budget Vote 27: Environmental Affairs and Tourism* 6 June 2006).

The decision to draft this new Integrated Coastal Management Bill may be traced back to the *White Paper for Sustainable Coastal Development in South Africa* (2003). One of the recommendations made in this White Paper is that a new coastal law should be enacted, *inter alia*, to replace the Sea-shore Act 21 of 1935 (hereinafter “the Act”). This recommendation is based, *inter alia*, on criticisms that have been leveled against the Act by academic and other commentators in recent years.

The purpose of this note is to set out these criticisms in more detail and to examine the reforms proposed in the White Paper. Before doing so, however, it will be helpful to briefly set out the relevant provisions of the Act itself.

2 The Sea-shore Act

As its long title indicates, the main purpose of the Sea-shore Act is to regulate the ownership and use of the sea and the sea-shore.

The “sea” is defined in section 1 of the Act as “the water and the bed of the sea below the low water mark and within the territorial waters of the Republic including the water and bed of any tidal river and of any tidal lagoon”, and the “sea-shore” as “the water and land between the low-water mark and the high-water mark”.

The low-water mark is defined, also in section 1, as the “lowest line to which the water of the sea recedes during periods of ordinary spring tides”; and the high-water mark as “the highest line reached by the water of the sea during ordinary storms occurring during the stormiest period of the year, excluding exception or abnormal floods”.

Section 2 of the Act vests the ownership of these areas in the President. The right of ownership vested in the President, however, is not the same as

the private law concept of ownership. This is because the President owns the sea and the sea-shore, not for his own benefit, but for the “general use and enjoyment of the whole community” (see *South African Shore Angling Association v Minister of Environmental Affairs* 2002 5 SA 511 (SECLD) 519).

An important consequence of the custodial nature of the President’s ownership is that it may not be exercised in a manner that would prejudice the public’s interest in these areas. The President’s ownership is therefore subject to certain restrictions aimed at protecting the public’s use and enjoyment of the sea and the sea-shore.

Amongst the most important of these restrictions are: (a) that the President may not alienate, let or transfer these areas to another person, except as provided for by the Act or by any other law (s 2(3)); and (b) that the President may not prevent members of the public from exercising their common law rights – which have been expressly preserved by the Sea-shore Act (s 13(c)) – in these areas, unless authorized to do so by the Act or any other law (see *Consolidated Diamond Mines of SWA (Ltd) v Administrator, SWA* 1958 4 SA 572 (A)).

Apart from imposing these two restrictions on the President’s ownership, the Sea-shore Act also protects the public’s interest in the sea and the sea-shore by imposing conditions on the Minister of Environmental Affairs and Tourism statutory powers to alienate or let these areas.

For example, section 3 provides that while the Minister may let a portion of these areas for certain specified activities, he or she may only do so if such letting is “in the interests of the general public or will not seriously affect the general public’s enjoyment of the sea-shore and the sea”.

Similarly, section 4 provides that while the Minister may alienate or let a portion of these areas to a local authority, the rights acquired by the local authority may not be transferred to any person “other than a local authority or the government of the Republic, unless the prior approval thereto, by resolution, of the provincial legislature concerned is obtained”.

Lastly, section 6 of the Act provides that while the Minister may alienate or let a portion of these areas in circumstances other than those envisaged by the Act or any other law, he or she may only do so after having obtained the approval, by resolution, of the National Assembly.

3 Criticisms of the Sea-shore Act

As was pointed out above, a number of criticisms have been levelled against the Sea-shore Act by academic and other commentators in recent years. While most of these commentators support the provisions vesting ownership of the sea and sea-shore in the President for the use and benefit of the public, they are critical of many of the other provisions of the Act. Amongst the criticisms that have been levelled against the Act are the following:

Firstly, the beach and sand dunes which are located above the high-water mark are excluded from the definition of the sea-shore. The ownership of these areas is accordingly not vested in the President and they are not subject to the provisions of the Act. Land tenure arrangements may therefore differ dramatically above and below the high-water mark (see Department of Environmental Affairs and Tourism *Coastal Policy Green Paper: Towards Sustainable Coastal Development in South Africa* (1998) 179). In this respect it is interesting to note that there are countries in which the beach or sand dunes are defined as public property. For example, in Spain, Article 3 of the Coastal Act (*Ley de Costas*) of 1988 provides that "coastal public property" includes, *inter alia*, both the sea-shore (article 3(1)(a)) and the beach (article 3(1)(b)).

Secondly, the limitations which the Act places on the state's power to alienate, let or otherwise deal with the sea or sea-shore are not particularly effective. During the apartheid era, for example, regulations providing for the use of beaches and bathing in the sea by different race groups were made in terms of the Act itself as well as the Reservation of Separate Amenities Act 49 of 1953. Despite the fact that these regulations clearly violated the public interest in the sea and the sea-shore they were consistently upheld by the courts in cases such as *S v Naicker*, *S v Attawari* (1963 4 SA 610 (N)); *Richards v Port Elizabeth Municipality* (1990 4 SA 770 (SE)); *Waks v Jacobs* (1990 1 SA 913 (T)); and *Jacobs v Waks* (1992 1 SA 521 (A)). (See Glazewski "Towards a Coastal Zone Management Act for South Africa" 1997 *SAJELP* 1 13.)

Thirdly, the Act makes no provision for physical access by the public to the sea or the sea-shore. As the law currently stands, there is no obligation on the owners of land above the high-water mark to grant members of the public access over their land to get to the sea-shore. Members of the public have to rely accordingly either on the relatively undeveloped common law right of immemorial user (*vetustas*), or on a public servitude stipulated in the original deed of grant or a subsequent title deed, to assert a right of access. Given that most land which is adjacent to the sea-shore is owned both by the state or by private persons, access to the sea-shore has been, and remains, restricted (see Glazewski "The Admiralty Reserve – A Historical Anachronism or a Bonus for Conservation in the Coastal Zone?" 1986 *Acta Juridica* 193 197-198).

Fourthly, the Act does not provide a legal framework in terms of which a programme of integrated coastal management may be pursued. For example, the Act's use of the high-water mark as the landward boundary for its application is inappropriate from an integrated coastal management perspective (see Glazewski *Environmental Law in South Africa* 2ed (2005) 314). Cican-Smith and Knecht thus argue that as a general rule, management of the coastal zone should be legally delimited so as to extend inland far enough to include all lands whose use can affect coastal waters (see Cican-Smith and Knecht *Integrated and Coastal Management Concepts and Practices* (1998) 39). In addition, the Act makes no provision for other key aspects of integrated coastal management: it makes no

provision for the respective roles of the public, the state and other users, or for a system of co-operative and participatory management (see Glazewski 319).

Fifthly, the Act does not make sufficient provision for co-operation amongst the different agencies of government who are responsible for administering it. In terms of the Constitution of the Republic of South Africa, 1996 coastal management falls into several different functional areas of concurrent national and provincial competencies (Schedule 4 competencies), for example: “environment”, “nature conservation”, “pollution control”, “regional planning and development”, “tourism”, “municipal public works” and “pontoons, ferries, jetties, piers and harbours”. Both the national and provincial governments may therefore enact and administer laws affecting the coastal zone. In accordance with the system of co-operative government, however, national laws affecting the coastal zone should ideally be administered by the provincial governments (see Currie and De Waal *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2001) 120). Most of the key administrative provisions of the Act, including those regulating the letting of the sea and the sea-shore, were therefore assigned to the coastal provinces (see R27 in GG 16346 of 1995-04-07). No mechanisms have, however, been included in the Sea-shore Act to promote co-operation between national and provincial coastal agencies or between provincial coastal agencies which are responsible for administering the Act. For example, the Act does not clearly identify the agencies which are responsible for coastal management, nor does it create any mechanisms in terms of which such agencies could co-ordinate their activities (see *Coastal Policy Green Paper: Towards Sustainable Coastal Development in South Africa* 72 and 182).

As will be discussed below, most of these criticisms have been accepted by the government and are addressed in the White Paper.

4 The White Paper

The White Paper, which was published in 2000, marks a fundamental change in the government’s approach to managing the coast.

It begins by arguing that in light of South Africa’s history and given the coast’s abundant natural resources, it must contribute to the reconstruction and development of the country. At the same time, however, the White Paper recognizes that the coast can only help address the legacy of South Africa’s past if its diversity, health and productivity are maintained. The White Paper consequently identifies “sustainable coastal development” as the long-term vision for coastal management efforts in South Africa (par 2.2.2).

The most effective way of achieving sustainable coastal development, the White Paper then argues, is through the introduction of a system of integrated coastal management. This is because, the White Paper argues further, it is generally accepted by the international community that the coast

can only be developed in a sustainable manner if it is managed as a distinct, complex and interrelated system (par 2.2.3).

Integrated coastal management, the White Paper explains, has been defined as “a continuous and dynamic process that unites government and the community, science and management, sectoral and public interests in preparing and implementing an integrated plan for the protection and development of coastal ecosystems and resources” (par 3.2).

Having accepted that integrated coastal management is the most appropriate mechanism for achieving sustainable coastal development, the White Paper goes on to identify 21 goals and 62 objectives (par 7.2). These goals and objectives, the White Paper explains, provide detailed directions for achieving the vision of sustainable coastal development through integrated coastal management (par 7.1).

These goals and objectives are then organised into five themes. The second of these themes – which provides that the coast must be retained as a “national asset” – is particularly relevant insofar as the Sea-shore Act is concerned. This is because it sets out the government’s official position in respect of physical access to, and ownership of, the coast. The government’s official position in respect of access to the coast is set out in Goal B.1, and the government’s goals and objectives in respect of the ownership of the coast are set out in Goal B.4 (par 7.2).

Insofar as physical access to the coast is concerned, the White Paper provides in Goal B.1 that the state must ensure that the public have a right of physical access to the sea, and to and along the sea-shore on a managed basis. In order to achieve this goal, the White Paper goes on to identify two objectives, which provide that: (a) the state must provide opportunities for public access at appropriate coastal locations (Objective B1.1); and (b) public access must be managed in a manner that minimizes adverse impacts and resolves incompatible uses (Objective B.2).

Insofar as ownership of the coast is concerned, the White Paper provides in Goal B.4 that the state must fulfil its duties as legal custodian of all coastal assets on behalf of the people of South Africa. In order to achieve this goal, the White Paper goes on to identify five objectives, which provide that: (a) the state must retain ownership and ensure effective management of coastal waters and the sea-shore (Objective B4.1); (b) the state must retain ownership of and ensure effective management of public land along the sea-shore (Objective B4.2); (c) the state must retain, manage, reinstate and extend the so-called “admiralty reserves” (Objective B4.3); (d) coastal resources under the control of parastatal organisations must be managed in the public interest and that coastal land may not be alienated for private purposes (Objective B4.4); and (e) the state must adopt mechanisms to transform those rights that are in conflict with the policies set out in the White Paper (Objective B4.5)

After having identified these goals and objects, the White Paper goes on to examine the extent to which they are addressed by the Act. In this respect, the White Paper points out that while the Act does protect the public

interest in the sea and the sea-shore, it does not make provision for the effective management of the coastal zone, land above the high-water mark or the admiralty reserves. In addition, the White Paper points out further, the Act does not make provision for physical access to the coast from above the high-water mark. Finally, the White Paper observes, the Act is outdated and does not conform to the current constitutional, administrative and environmental framework. The White Paper therefore recommends that the Act should be amended, or replaced by a new coastal law (par 9.3.1).

This new coastal law, the White Paper recommends further, should, *inter alia*, (a) preserve the public character and the state's custody of the sea and sea-shore; (b) make provision for public access to these areas while respecting private property; (c) consider extending the boundaries of these areas to include appropriate land above the high-water mark; (d) clarify the responsibilities attached to the ownership of admiralty reserve land and establish principles and procedures for the management of such land; (e) clearly delineate the roles and responsibilities of the national, provincial and local spheres of government; and (f) make provision for the institutions needed to implement and fund the coastal zone management and policies set out in the White Paper (par 9.3.2).

5 Comment

With one exception, it is difficult to find fault with the White Paper. This is because the White Paper has not only identified the most important criticisms leveled against the Sea-shore Act, but has also made several constructive and practical recommendations aimed at addressing these criticisms. The exception relates to the blanket recommendation that the public character and state custody of the sea and the sea-shore should be retained. This recommendation may be criticised on the grounds that it does not address the arguments made by environmental and community activists over the past few years in favour of recognising the so-called "community-based property rights" of indigenous and local coastal communities (see for example Lynch and Harwell *Whose Natural Resources? Whose Common Good* (2002) 1).

Community-based property rights (CBPRs), these activists explain, are derived from the relationships that have existed for a long period of time between an indigenous or local community and the land and natural resources upon which the community's existence depends. They encompass a complex and often overlapping bundle of rights and may relate to common property such as grazing areas or wildlife as well as individual property such as homesteads or gardens. They may also vary in time and place so as to include seasonally available resources, for example fruit and fish. CBPRs, these activists explain further, usually specify the circumstances in, and extent to, which members of the community may inhabit, harvest, hunt, gather and inherit the land and other natural resources the community considers to be its own property (see Lynch and Harwell 3-4).

A distinguishing characteristic of CBPRs, environmental and community activists argue, is that they derive their authority from the community in which they operate and not from the state in which they are located. The existence of these rights does not depend, therefore, on formal legal recognition by the state. The formal recognition of CBPRs as private property rights is, however, desirable. This is because in most democratic societies, the state may only interfere with private property rights if it is in the public interest to do so and if the interference strikes a balance between the interests of the public and those of the rights holder. The formal recognition of CBPRs as private property rights would, therefore, these activists argue further, go a long way towards ensuring the interests of the community are taken into account whenever the state seeks to regulate the land and natural resources the community regards as its own (see Lynch and Harwell 4).

Apart from ensuring that the interests of the community are taken into account whenever the state regulates its land and natural resources, the formal recognition of CBPRs as private property rights may also promote the protection of the environment. This is because it would (a) encourage the community to conserve and protect its land and natural resources; and (b) ensure that the community has the authority to enforce its management rules. In addition, the formal recognition of CBPRs may also prevent outsiders from migrating into and exploiting the community's (often environmentally sensitive) land and natural resources (see Lynch and Harwell 7-8).

6 Federalism

Finally, and on a slightly different point, it is interesting to note that should Parliament decide to repeal the Sea-shore Act and enact a new coastal law it will find that its power to do so is limited by at least two of the Constitution's federal features.

The first of these arises from the fact that in terms of section 239 of the Constitution those parts of the Act which were assigned to the coastal provinces in 1995 became provincial laws on the date the Constitution took effect. This means that those parts of the Act that have become provincial laws may only be amended or repealed by the relevant Provincial Legislature and not by Parliament. This is because in *Ex parte Western Cape Provincial Government: DVB Behuising (Pty) Ltd v North West Provincial Government* (2001 1 SA 500 (CC) par 21), the Constitutional Court held that in terms of section 43(b) read with section 104(1)(b)(iv) of the Constitution, a provincial legislature has the exclusive competence to repeal its own laws. This should not, however, present Parliament with too many difficulties. This is because even though Parliament cannot repeal those parts of the Act which have become provincial laws, Parliament can override them, provided it fulfils the requirements set out in section 146 of the Constitution.

The second of these arises from the fact that "beaches and amusement facilities" are listed as a functional area of exclusive provincial competence

in Part B of Schedule 5 of the Constitution. This means that Parliament may not enact a statute whose main substance falls into the functional area of “beaches and amusement facilities”, unless it complies with the overriding provisions set out in section 44(2) of the Constitution. The provinces’ exclusive competence to enact laws falling into the functional area of “beaches and amusement facilities” should also not present Parliament with too many difficulties. This is because in *Ex parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (2000 1 SA 732 (CC) par 53), the Constitutional Court defined the functional areas of exclusive provincial competence very narrowly when it explained that they apply primarily to those matters which may appropriately be regulated within the boundaries of a province.

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