ON THE BEACH: OWNERSHIP AND ACCESS TO THE SEA AND THE SEA-SHORE IN SOUTH AFRICA

Warren Freedman
Faculty of Law
University of KwaZulu-Natal
South Africa

1. Introduction

The legal status of the coast in South Africa is currently provided for in the Sea-shore Act.[1] This Act, *inter alia*, vests ownership of the "sea" and the "sea-shore" in the President for the benefit and use of the public.[2] As the *White Paper for Sustainable Coastal Development*[3] has pointed out, however, this Act is deficient in a number of respects, particularly when viewed from an integrated coastal management perspective.[4] The *White Paper* has therefore suggested that it should either be amended or replaced with a new coastal law.[5] This suggestion has been accepted by the government and a draft Integrated Coastal Management Bill has recently been prepared.[6] The provisions of the Sea-shore Act governing the legal status of the coast in South Africa; the criticisms which have been leveled against these provisions; and the changes proposed in the draft Integrated Coastal Management Bill are the focus of this paper.

It is divided into five parts. In part one, the different regions that make up the South African coast as well as the most significant environmental demands confronting each of these regions is briefly described. In part two, the South African government's long term vision for the coast, as well as the manner in which it hopes to achieve this vision is summarised. In addition, the government's official position on the legal status of the coast and its plans to reform the Sea-shore Act are discussed. In part three, the relevant provisions of the Sea-shore Act itself, the administration of this Act and the criticisms that have been leveled against it are considered. In part four, those sections of the draft Integrated Coastal Management Bill that are intended to give effect to the government's official position on the legal status of the coast and its plans to reform the Sea-shore Act are set out and evaluated and, finally, in part five, some brief concluding remarks are made.

---

[1] 21 of 1935.
[2] S 2(1).
[3] Department of Environment and Tourism (DEAT) *The White Paper for Sustainable Coastal Development in South Africa* (2000) at para 3.3.2.
[4] A report produced by the Group of Experts on the Scientific Aspects of Marine Environmental Protections (GESAMP) for the Food and Agricultural Organisation (FAO) defines integrated coastal management 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." The goal of integrated coastal management, the GESAMP Report goes on to explain, is "to improve the quality of life of human communities who depend on coastal resources while maintaining the biological diversity and productivity of coastal ecosystems." See GESAMP *The Contribution of Science to Integrated Coastal Management* GESAMP Reports and Studies No.61 (1996) at para 2.1.
[5] See DEAT *The White Paper* (n 2) at para 9.3.1.
[6] See JI Glazewski *Environmental Law in South Africa* 2ed (2005) at 319.

2. The South African Coast

The South African coast is long and diverse. It stretches over 3000 kms from the border with Mozambique in the east to the border with Namibia in the west. It is surrounded by three major marine waters, namely the Indian, Southern and Atlantic oceans and is strongly influenced by the warm Agulhas current which flows south along the eastern seaboard and the cold Benguela current which upwells sporadically along the western seaboard. The contrasting temperatures of these two currents have given rise to at least three distinct coastal regions: (a) the subtropical east coast; (b) the warm temperate south coast; and (c) the cold temperate west coast.[7]

(a) The east coast stretches from the border with Mozambique to the city of Port Elizabeth. It has a subtropical climate with good summer rainfall (800 to 1300 mm). Its coastal waters are warm and support a wide variety of species. They are, however poor in nutrients and biological productivity is low. The coastline is characterized by long sandy beaches interspersed with rocky outcrops and backed by well-vegetated dunes. Bays, headlands and rocky shores also occur in the southern part of this region. Two-thirds of South Africa's estuaries are located on the east coast as well as several large coastal lakes. The subtropical climate has encouraged human settlement and the region is densely populated. The coastal economy is dominated by port activities, light and heavy industry, commercial and subsistence agriculture, dune-mining and tourism. [8]

(b) The south coast stretches from Port Elizabeth to the city of Cape Town. It is a transitional region between the cool dry west coast and the warm moist east coast and displays characteristics of both regions. It has a warm temperate climate with average summer rainfall in the south-east and winter rainfall in the south-west (400 to 1000 mm). Its coastal waters are warm, due to the influence of the Agulhas current, but the upwelling of cold water occurs at times. The coastal waters consequently support a wide diversity of species and are also moderately productive. The coastline consists of sandy beaches, rocky shores and deep river gorges. There are also several large and many small bays in this region. The southern coast is not as densly populated as the east coast and the coastal economy is dominated by tourism and holiday related developments. Offshore deposits of oil and gas are also mined in this region. [9]

(c) The west coast stretches from Cape Town to the border with Nambia. It has a cold temperate climate with low winter rainfall (100 to 700 mm). Its coastal waters are cold but highly productive. The periodic upwelling of cold, nutrient-rich water supports substantial stocks of fish, lobsters, seals and seabirds. The coastline is characterized by sandy beaches in the south and rocky shores in the north. The regions low rainfall means that there are very few perennial rivers in this region. The arid climate has discouraged

[7] See AEF Heydorn, JI Glazewski and BC Glavovic "The Coastal Zone" in RF Fuggle and MA Rabbie (eds) *Environmental Management in South Africa* (1999) at 669.
[8] See Department of Environmental Affairs and Tourism (DEAT) *Our Coast Our Future: Costal Policy Green Paper: Towards Sustainable Coastal Development in South Africa* (1998) at 96 – 113 and BC Glavovic *Our Coast, Our Future: A New Approach to Coastal Management in South Africa* (2000) at 36.
[9] See DEAT *The Green Paper* (n 8) at 85 – 95 and Glavovic *Our Coast Our Future* (n 8) at 34.

> human settlement and large parts of this region are uninhabited. In addition, public access to the coast is frequently limited by poor road infrastructure and security restrictions enforced by diamond mining operations. The west coast is the centre of South Africa's commercial fishing industry. Marine diamonds are also mined in this region.[10]

Given the natural bounty that characterizes each of these regions it is not surprising that the South African coast has been exploited by human beings since at least the early stone-age.[11] Many of the worlds' oldest shell middens, for example, are to be found along the south and west coasts.[12] These shell middens, some of which date back 120 000 years, were created by humans who roamed the coast harvesting intertidal resources and feeding on stranded whales and seals.[13]

Technological improvements over the past 50 to 60 years have, however, dramatically extended human being's ability to exploit coastal resources. The South African coast today is, consequently, the focus of almost the entire range of human activities, including building, farming, fishing, forestry, manufacturing, mining and tourism. These activities have, unfortunately, placed enormous pressure on the environmental integrity of the coastal zone.

The primary threat to the ecological integrity of the coastal zone over the past 50 to 60 years has come from the rapid expansion of coastal cities and towns.[14] The National State of the Environment Report points out in this respect that up until the 1970s, the Gauteng area was the fastest growing region in South Africa. Since the 1980s, however, this trend has changed and growth is now fastest in the major coastal cities and towns. At least 30 percent of the South African population it is currently estimated now lives within 60kms of the coast.[15]

The rapid expansion of cities and towns in the coastal zone has occurred as a result of a number of factors, amongst which are the following:

(a) the lifting of legal restrictions on the movement of black South Africans following the abolition of the apartheid system;[16]

(b) the mass migration of individuals from inland areas to the coast in pursuit of a more attractive lifestyle;[17]

---

[10] See DEAT *The Green Paper* (n 8) at 80 – 84 and Glavovic *Our Coast Our Future* (n 8) at 34..

[11] See M Branch "Strandlopers and Shell Middens 2A" in Department of Environmental Affairs and Tourism (DEAT) *People and the Coast* (2000) accessed on 24 April 2006 at http://sacoast.wcape.gov.za.

[12] Shell middens are the accumulations of shells that were discarded by prehistoric people. They may contain stone tools, shards of pottery, fish hooks made of bone and stone sinkers. See Branch *Strandlopers and Shell Middens* (n 11).

[13] Ibid.

[14] Among the more environmentally damaging activities the growth in coastal cities and towns has given rise to are the following: (a) the construction of commercial and residential buildings next to estuaries and along the coastline, which has resulted in the deterioration of many estuaries, the destruction of natural coastal systems and the loss of scenic coastal settings; (b) the emission of industrial effluent, sewage and storm water run-off into the sea, which has resulted in the contamination of marine organism and coastal waters; and (c) the operation of ports and harbours, which has resulted in the destruction of marine habitats and organisms. See Department of Environmental Affairs and Tourism (DEAT) *The National State of the Environment Report – Marine and Coastal Systems and Resources* (1999) at paras 4.3.1, 4.3.2 and 4.3.4.

[15] See DEAT *National State of the Environment Report* (n13) at para 4.2.1.

[16] See JI Glazewski "Towards a Coastal Zone Management Act for South Africa" (1997) 4 *SAJELP* 1 at 2.

[17] See Glazewski *Environmental Law in South Africa* (n 6) at 295.

(b) the increased use of port facilities as a result of South Africa's reintegration into the world economy and the growth in the export of manufactured goods;[18] and
(c) the development of coastal resorts and other facilities in response to increased demand for coastal amenities from local and foreign tourists.[19]

Apart from the expansion of coastal cities and towns, the National State of the Environment Report has also identified fishing and mining as activities which have made a significant contribution to the environmental degradation of the coastal zone. Insofar as fishing is concerned, the report explains, that South Africa has a well-developed and wide-spread commercial and recreational fishing industry. Improvements in fishing methods over the past 50 years have, however, the report explains further, resulted in greater numbers and varieties of fish being caught and this has lead to a serious decline in many fish stocks, with some having collapsed completely.[20]

Insofar as mining is concerned, the reports points out that the discovery of marine diamonds off the west coast and of heavy metals such as titanium and zirconium in the sand-dunes of the east coast has lead to the development of an economically important and expanding coastal mining industry. Coastal mining, however, the report goes on to point out, has some detrimental consequences such as the disruption of the sea-bed, the alteration of sea-bed habitats and the destruction of sand-dunes. In addition, recovery from coastal mining takes a long time and it is unclear whether full recovery is in fact possible.[21]

Lastly, it is also important to note that the large scale exploitation of the coast has largely been to the benefit of white South Africans. This is because South Africa's racial policies, which were only abolished in 1994, excluded black South Africans from most coastal areas and denied them the opportunity to use and benefit from coastal resources.[22]

Although the dispossession of black South Africans began during the colonial period, it gained particular momentum following the commencement of the Land Acts of 1913 and 1936.[23] These Acts not only divided the country into geographically separate black and white zones, but also provided that black South Africans could only acquire property rights in those areas reserved for them. The zones set aside for black South Africans, which became known as "homelands" during the apartheid era, only constituted 13 percent of the total surface area of South Africa, even though black South Africans constituted 80 percent of the population.[24]

Of the ten homelands created during the apartheid era, three were located along the coast, namely KwaZulu, the Transkei and the Ciskei. The coastal areas incorporated into these homelands were, however, relatively insignificant. For example, the Transkei coastline, which

[18] Ibid.
[19] Ibid.
[20] Ibid at para 4.2.4.
[21] Ibid at para 4.2.3.
[22] See Glavovic *Our Coast, Our Future* (n 11) at 63.
[23] The Black Land Act 27 of 1913 and the South African Development Trust and Land Act18 of 1936.
[24] For a more detailed discussion of apartheid land laws see TW Bennett "African Land – A History of Dispossession" in R Zimmerman and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) at 65.

was the longest of the three, only extended for 270 kms. In addition, the apartheid system ensured that economic development and social service were severely limited in these areas. They were consequently economically depressed, environmentally degraded and overpopulated.[25]

The South African coast is accordingly characterized by sharply divided geographical and racial patterns of development and underdevelopment.[26]

3. Coastal Zone Management in South Africa

Despite its unusual geographic position (encompassing both marine and terrestrial environments); its unique ecosystems; and its peculiar problems, the coastal zone in South Africa has only recently been identified by the government as a distinct system which requires its own dedicated management programme.

In the past, coastal management efforts were carried out by a range of different agencies on an ad-hoc and sector-by-sector basis. The activities of these different agencies were also frequently uncoordinated and little thought was given to the coast as a distinct system with its own special demands. In addition, coastal management efforts were usually pre-occupied with the preservation of the natural environment and intrinsic ecological values.[27]

In 2000, however, a new approach to coastal management was adopted when the *White Paper for Sustainable Coastal Development* was approved by the government.

Given South Africa's legacy of racial discrimination, this policy argues that the coast must contribute to the reconstruction and development of South Africa. At the same time, it recognizes that the coast can only help address the legacy of racial discrimination 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.[28]

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, coordinated coastal management recognizes that the coast can only be developed in a sustainable manner if it is managed as a distinct, complex and interrelated system.[29]

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.[30] These goals and objectives, the *White Paper* explains, provide a more detailed

---

[25] See M Hauck and M Sowman "Coastal and Fisheries Co-Management in South Africa: Is here and enabling legal environment?" 12 *SAJELP* (2005) 1 at 4 – 9.
[26] See B Glavovic *Blood is Thicker than Water: The Evolution of Coastal Management in South Africa* at 1
[27] See B Glavovic "Coastal Sustainability – An Elusive Pursuit? Reflections on South Africa's Coastal Policy Experience" 34 *Coastal Management* (2006) 111 at 118-119.
[28] See DEAT *The White Paper* (n 3) at paras 2.2 and 2.2.2.
[29] Ibid at para 2.2.3.
[30] Ibid at para 7.2.

direction for achieving the vision of sustainable coastal development through integrated coastal management.[31]

These goals and objectives are then organized into five themes.[32] The second of these themes, which provides that the coast must be retained as "our national asset", sets out the government's official position insofar as the ownership of and access to the coast is concerned.[33] The government's official position in respect of the ownership of the coast is set out in Goal B.4 which is headed "state responsibility",[34] while the government's official position in respect of access to the coast is set out in Goal B.1 which is headed "physical access".[35]

Insofar as the legal status of the coast is concerned, the *White Paper* provides in Goal B.4 that the state must fulfill 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 provide that the state must retain ownership and ensure effective management of coastal waters and the sea-shore.[36] In addition, it also provides that the state must retain ownership of and ensure effective management of public land along the sea-shore[37] and also retain, manage, reinstate and extend the so-called "admiralty reserves".[38]

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 provide that the state must provide opportunities for public access at appropriate coastal locations.[39] Public access must also be managed in a manner that minimizes adverse impacts and resolves incompatible uses.[40]

After having identified these goals and objects, the *White Paper* goes on to explain that some of them are currently addressed by the Sea-shore Act. This Act, the *White Paper* explains further, vests ownership of the sea and the sea-shore in the President on behalf of all South Africans. It also prohibits the alienation of these areas and regulates the grounds upon which they may be let.[41]

---

[31] Ibid at para 7.1.
[32] The five themes are as follows: Theme A (Governance and Capacity Building); Theme B (Our National Asset); Theme C (Coastal Planning and Development); Theme D (Natural Resource Management); and Theme E Pollution (Control and Waste Management).
[33] Ibid at para 7.2 – Theme B: Our National Asset.
[34] Ibid at para 7.2 – Goal B.4: State Responsibility.
[35] Ibid at para 7.2 – Goal B.1: Physical Access.
[36] Ibid at para 7.2, "Objective B4.1".
[37] Ibid at para 7.2, "Objective B4.2".
[38] Ibid at para 7.2, "Objective B4.3". Admiralty reserves are strips of land adjoining the landward side of the high-water mark which were reserved for the government in their original deeds of grant. For a more detail discussion see JI Glazewski "The Admiralty Reserve – a historical anachronism or a bonus for conservation in the coastal zone?" 1986 *Acta Juridica* 193.
[39] Ibid at para 7.2, "Objective B1.1".
[40] Ibid at para 7.2, "Objective B.1.2".
[41] Ibid at para 7.2, "Goal B.4: Towards Implementation".

Unfortunately, it does not make any provision for the effective management of the coastal zone, land above the high water mark or the admiralty reserves.[42] Nor does it make any provision for physical access to the coastal zone. In addition, it does not conform to the current constitutional and administrative framework.[43] The *White Paper* therefore suggests that the Act should be amended, or replaced by a new coastal law.[44]

This new coastal law, the *White Paper* suggests 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 the ownership of admiralty reserve land and establish principles and procedures for the management of such land; and (e) clearly delineate the roles and responsibilities of the national, provincial and local spheres of government.[45]

In light of these suggestion, the government has recently prepared a draft Integrated Coastal Management Bill. This draft Bill not only provides for the repeal of the Sea-shore Act, but makes some significant changes to the legal rules and principles governing the ownership and boundaries of, as well as the right of access to, the coastal zone. Before turning to consider this draft Bill, however, it will be helpful to examine those provisions of the Sea-shore Act which regulate the ownership and public use of the sea and the sea-shore; to highlight the place of the Act in the new constitutional and administrative order; and to set out some of its shortcomings in more detail.

3. The Sea-shore Act

3.1 Introduction

In South African law the sea and sea-shore were initially classified as things which were owned by the people who were therefore entitled to use and benefit from them. Today, these areas are classified as things that are owned by the state. The public's right to use and benefit from them has, however, been retained.

3.2 Things which belonged to no one

The public's right to use and benefit from the sea and the sea-shore may be traced back to Roman law which classified these areas as "common things" (*res omnium communes*). Common things were defined in Roman law as those things which by natural law were common to all people and therefore incapable of being owned. Since common things were incapable of being owned, every person was entitled to use and enjoy these things as he or she pleased.[46]

---

[42] Ibid.
[43] Ibid at para 7.2, "Goal B.1 Towards Implementation".
[44] Ibid at para 9.3.1.
[45] Ibid at para 9.3.2.
[46] See PJ Badenhorst, JM Pienaar and H Mostert Silberberg and Schoeman's *The Law of Property* 4ed (2003) at 33 and CG van der Merwe "Things" in *LAWSA First Reissue* Vol 27 (2002) at para 213.

3.3 Things which belonged to the people

During the feudal period, however, this classification was modified and in Roman Dutch, and therefore South African common law, the sea and sea-shore were classified as "public things" (*res publicae*). Public things were defined in Roman-Dutch law as those things which were owned by the emperor. The emperor, however, owned these things, not in his personal capacity, but in his capacity as custodian on behalf of the people. The public's right to continue using the sea and the sea-shore was therefore upheld in Roman-Dutch law.[47] This principle was highlighted in *Anderson and Murison v Colonial Government*,[48] where De Villiers CJ explained that the "Government [is] in some sense, the custodian of the sea-shore."

3.4 Things which belong to the state

The common law principles governing the ownership of the sea and the sea-shore were subsequently altered in the Sea-shore Act.[49] As pointed out above, this Act vests ownership of the "sea" and the "sea-shore" in the President.[50] The ownership vested in the President is not, however, full ownership. This is because the Act goes on to provide that the sea and the sea-shore may not be alienated or let, except in accordance with its provisions.[51] In addition, the Act expressly retains the public's common law rights to use and enjoy these areas, except insofar as these rights are inconsistent with the provisions of the Act.[52]

The fact that right of ownership vested in the President by the Act is not full ownership has been accepted by the courts. In *South African Shore Angling Association v Minister of Environmental Affairs*,[53] the court explained that unlike privately owned property, the sea and the sea-shore "are for the general use and enjoyment of the whole community."[54]

The "sea" is defined in 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."[55] The terms "tidal river" and "tidal lagoon" are also defined as that part of any river or lagoon "in which a rise and fall in the water level takes place as a result of the action of the tides."[56] The "sea-shore" is defined as "the water and land between the low-water mark and the high-water mark."[57] The low-water mark is defined as the "lowest line to which the

[47] See Badenhorst et al *The Law of Property* (n 46) at 34 and Van der Merwe *Things* (n 46) at para 214.
[48] (1891) 8 SC 293.
[49] 21 of 1935.
[50] S 2(1).
[51] S 2(3).
[52] S 13(1)(c). A similar distinction is drawn between the ownership and use of public rivers and the banks of public rivers. In *Butgereit v Transvaal Canoe Union* 1988 (1) SA 759 (A), the Appellate Division held that members of the public are entitled use the water in a public river, even if the bed of the river is privately owned. This is because the use of a public river is considered to be a *res publicae*. In *Transvaal Canoe Union v Garbett* 1993 (4) SA 829 (A), the Appellate Division held that members of the public are entitled to use the privately owned banks of a public river. This is because the use of the banks is also considered to be a *res publicae*.
[53] 2002 (5) SA 511 (SECLD).
[54] At 519.
[55] S 1, definition of the "sea".
[56] S 1, definition of "tidal rivers and lagoons".
[57] S 1, definition of the "sea-shore".

water of the sea recedes during periods of ordinary spring tides";[58] and the high-water mark is defined as "the highest line reached by the water of the sea during ordinary storms occurring during the most stormy period of the year, excluding exception or abnormal floods."[59]

The Act also contains several provisions which protect the interests of the public in the sea and the sea-shore. As pointed out above, the Act provides that no portion of the sea or sea-shore may be alienated or let, except in accordance with its provisions.[60] In order to facilitate the public's use of these areas, however, the Act does go on to create certain exceptions insofar as the alienation and letting of the sea and the sea-shore is concerned. In this respect, the Act envisages three different scenarios:

- First, the Act provides that the Minister, as defined,[61] may let the sea and the sea-shore for any of the purposes specifically authorized by the Act.[62] Before doing so, however, the Minister must be of the opinion that such letting either is in the interests of the general public or will not seriously affect the public's enjoyment of the sea and sea-shore.[63]

- Second, the Act also provides that the Minister may alienate or let the sea and the sea-shore for a purpose not specifically authorized by the Act. Before doing so, however, the Minister must obtain the consent, by resolution, of the National Assembly.[64]

- Third, the Act provides that the Minister may alienate or let a portion of the sea or the sea-shore to a local authority.[65] The Act goes on to provide, however, that no right acquired by a local authority may be transferred to any person other than a local authority or the government without the approval, by resolution, of the relevant provincial legislature.[66] In addition, the Act also provides that the Minister may, at any time, resume any such right, subject to the payment of compensation for improvements.[67]

The authorized purposes for which the Minister may let the sea or sea-shore are as follows: the erection of bathing boxes or tents; the erection of beach shelters; the erection of tea-rooms and refreshment places; the training of horses; the holding of races and the provision of places for recreation, amusement or display; the provision of landing sites for aircraft and the establishment of aerodromes; the construction of breakwaters, sea walls, promenades, embankments, esplanades, buildings and other structures; the construction of bathing pools and enclosures; the erection of whaling stations or fish-canning or other factories; to legalise any encroachments; the

[58] S 1, definition of the "low-water mark".
[59] S 1, definition of the "high-water mark".
[60] S 2(3).
[61] As is discussed below, the administration of many of the provisions of the Sea-shore Act has been assigned to the premiers of each of the four coastal provinces. The word "Minister" is therefore defined in the Act so as to include these provincial premiers.
[62] S 3(1)
[63] Proviso to s 3(1).
[64] S 6(1).
[65] S 4(1).
[66] S 4(2)(a).
[67] S 4(2)(b).

carrying out of any work of public utility; the laying of drainage or sewage systems; the laying of water-pipes or cables; the erection of boat-houses; or the carrying out of work which in the opinion of the Minister serves a necessary or useful purpose.[68]

Apart from the provisions set out above, the Act also provides that the Minister may make regulations to control swimming in the sea, the removal of materials from the sea and the dumping of rubbish on the sea-shore.[69]

Lastly, as pointed out above, the Act expressly retains the publics' common law rights to use and benefit from the sea and the sea-shore.[70] In *Consolidated Diamond Mines of SWA (Pty) Ltd v Administrator of South West Africa*,[71] the Appellate Division held in this respect that "the public have certain simple rights to the foreshore such as to go on to it, to bathe, to fish, to dry nets, to draw up boats . . . (and) any substantial interference with these rights would be a wrongful act."[72]

3.5 The Administration of the Act

Although the Sea-shore Act was passed by the national Parliament, most of its provisions are administered by the four coastal provinces. The administration of these provisions was assigned to the coastal provinces in 1995 in an attempt to align the Act with South Africa's new constitutional order which began in 1994.[73]

Amongst the many changes introduced by the new constitutional order is a reformed system of provincial government.[74] In terms of this reformed system of provincial government, the four existing provinces (two of which were coastal)[75] and ten homelands (three of which were coastal)[76] have been abolished and replaced with nine new provinces (four of which are coastal).[77] In addition, each of the nine new provinces has been granted legislative and executive powers in respect of certain functional areas, many of which are relevant to coastal management. Some of these functional areas are concurrent (ie they have been allocated to the national, provincial and local governments);[78] while others are exclusive (ie they have been allocated to the provinces and municipalities alone).[79]

---

[68] S 3(1)(a) – (o).
[69] S 10.
[70] S 13(c).
[71] 1958 (4) SA 572 (A).
[72] At 621.
[73] The administration of the relevant provisions of the Sea-shore Act was assigned to the coastal provinces by the President on 7 April 1995 in terms of R27 in *Government Gazette* No 16346. It is interesting to note that s 2 of the Act, which vests ownership of the sea and the sea-shore in the President, was not assigned to the provinces.
[74] South Africa's system of provincial government is provided for in chapter 6 of the Constitution (Constitution of the Republic of South Africa, 1996).
[75] The Cape and Natal provinces.
[76] KwaZulu, the Transkei and the Ciskei.
[77] The Northern Cape, the Western Cape, the Eastern Cape and KwaZulu-Natal provinces.
[78] The functional areas of concurrent national, provincial and local competence are set out in Schedule 4 of the Constitution. Amongst these are the following: agriculture, disaster management, environment, housing, nature conservation, pollution control, regional planning and development, tourism and urban and rural development.
[79] The functional areas of exclusive provincial and local competence are set out in Schedule 5 of the Constitution. Some of these functional areas fall within the exclusive competence of the provinces alone, for example: provincial land use planning, provincial recreation and amenities and provincial roads. Others fall into the competence of both

The legislative and executive powers each sphere of government has in respect of these functions must, however, be exercised in accordance with the system of co-operative government established by the Constitution.[80] An important aspect of this system of co-operative government is that national laws which fall into the functional areas over which the provincial governments also have legislative and executive power should ideally be administered by the relevant provincial government.[81] Given that main substance of the Sea-shore Act falls into many of the functional areas over which provincial governments have concurrent or exclusive powers, the administration of its provisions was assigned to the coastal provinces in order to give effect to the division of functions amongst the different spheres of government and the system of co-operative government.[82]

3.6 Criticisms of the Act

Over the past decade or so, the provisions of the Sea-shore Act have been closely examined by academic and other commentators.[83] While most of these commentators are in favour of the provisions vesting ownership of the sea and sea-shore in the President for the use and benefit of the public, they are also critical of many of the other provisions of the Act. Amongst the criticisms that have been leveled against the Act are the following:

First, 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. This approach differs from that followed in other countries whose legal systems are based on Roman law, for example France, Germany and Spain.

Second, 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

---

the provincial governments and the local government, for example: building regulations, local tourism, municipal planning, beaches and amusement facilities, cleansing, local amenities, public places, pontoons, ferries, jetties and piers.

[80] The system of co-operative government is expressly provided for in Chapter 3 of the Constitution. This chapter begins by providing that the three spheres of government are distinctive, interdependent and interrelated (s 40(1)). It then goes on to set out eight principles of co-operative government. In this respect, the Constitution provides that all spheres of government must: (a) preserve the peace, national unity and indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government; (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of governments in the other spheres; (f) not assume any power or function except those conferred in terms of the Constitution; (g) exercise there powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (h) co-operate with one another in mutual trust and good faith (s 41(1)).

[81] See I Currie and J de Waal *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2001) 120.

[82] The President's power to assign the administration of national laws to the provinces was originally set out in s 235 of the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) and is now set out in item 14 of Schedule 6 of the Constitution.

[83] See for example: JI Glazewski *SAJELP* (n 14) 1; AEF Heydorn, JI Glazewski and BC Glavovic *Environmental Management in South Africa* (n7); and MR Sowman "The status of coastal management in South Africa" (1993) 21 *Coastal Management* 163.

example, regulations providing for the use of beaches and bathing in the sea by different race groups were made in terms of the Sea-shore Act[84] itself as well as the Reservation of Separate Amenities Act.[85] 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.[86]

Third, 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*),[87] 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 either by the state or by private persons, access to the sea-shore has, and remains, restricted.

Fourth, 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.[88] 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.[89] 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.

Fifth, the Act does not make sufficient provision for co-operation amongst the different agencies of government who are responsible for administering it. As was pointed out above, coastal management falls into several different functional areas of concurrent national and provincial powers. 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. The administration of Sea-shore Act has therefore largely been assigned to the coastal provinces. No mechanisms have, however, been included in the 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.

---

[84] S 10.

[85] 49 of 1953 read with the Reservation of Separate Amenities Amendment Act 10 of 1960. When the apartheid system began to crumble in the early 1990s, these Acts were repealed in terms of the Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990.

[86] See: *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).

[87] In terms of the doctrine of immemorial user, a public servitude of access is deemed to have come into existence if it can be proved that, from time immemorial (30 years or more), members of the public have been acting as if there was a public servitude of access over the land concerned. See CG van der Merwe "Servitudes" in *LAWSA: First Reissue Vol 24* (2000) at para 467.

[88] See JI Glazewski *Environmental Law in South Africa* (n 6) at 314.

[89] See B Cican-Smith and RW Knecht *Integrated and Coastal Management Concepts and Practices* (1998) at 39.

4. The Draft Integrated Coastal Management Bill

4.1 Introduction

As was pointed out above, the White Paper, after having highlighted the shortcomings of the Sea-shore Act, suggested that it should be amended or possibly replaced by a new coastal law. In response to this suggestion, the government has recently prepared a draft Integrated Coastal Management Bill. Although this draft Bill has not yet been published, early indications are that it not only provides for the repeal of the Sea-shore Act, but also makes some significant changes to the legal status of the coastal zone. Amongst the more important of these changes are the following: (a) the creation of a new thing named "coastal public property"; (b) the demarcation of a new regulatory area referred to as the "coastal buffer zone"; (c) the enhanced protection of the public character of the coast; and (d) the introduction of a coastal access right.

4.2 Coastal Public Property

First, the draft Bill replaces the "sea" and "sea-shore" with a new thing it refers to as "coastal public property". This new thing is defined in much greater detail than either the "sea" or the "sea-shore" are defined in the Sea-shore Act. The draft Bill thus begins by identifying the different components which make up coastal public property. These components are: (a) the coastal waters; (b)the sea-shore; (c) any admiralty reserve owned by the state; (d) state owned land that has been declared to be coastal public property; (e) any natural resources on or in any of the components set out above as well as any natural resources on or in the exclusive economic zone or the continental shelf; and (f) any harbour, work or other installation owned by the state and which is on or in any of the components set out above. [90]

Having identified the different components which make up coastal public property, the draft Bill goes on to define the coastal waters and the sea-shore in more detail.

Insofar as the coastal waters are concerned, the draft Bill provides that coastal public property also consists of the land submerged by coastal waters as well as existing and future islands located within the coastal waters and which are not privately owned.[91] The coastal waters themselves are defined in the draft Bill as both the land and the water between the low-water mark and the 12nm limit of South Africa's territorial waters.[92]

Insofar as the sea-shore is concerned, the draft Bill provides that coastal public property also consists of the sea-shore of privately owned islands located within the coastal waters, but excluding any portion of the sea-shore that was lawfully alienated before or after the Sea-Shore Act came into operation.[93] The sea-shore itself is defined in the draft Bill as the land and water between the low-water mark and the high-water mark.[94]

---

[90] Clause 11.
[91] Ibid.
[92] Clause 1.
[93] Clause 11.
[94] Clause 1.

The draft Bill also includes the following areas in its definition of the sea-shore: (a) any land reclaimed from the coastal waters after the commencement of the Bill; (b) coastal cliffs if the base of the cliff is in continuous contact with the sea for an hour or more during each normal spring tide; and (c) any area that was considered to be part of the sea shore in terms of the Sea-shore Act.[95]

Unfortunately, the definition continues to exclude the beach and sand dunes which are located above the high-water mark from coastal public property and therefore from public ownership. This is somewhat surprising given that it appears to be based on the Spanish *Ley de Costas* (Costal Act) 1988, which does include the beach in its definition of coastal public property.

The *Ley de Costas* divides the Spanish coast into three zones: (a) coastal public property; (b) the coastal buffer zone;[96] and (c) the zone of influence.[97] Coastal public property is considered to be public property, while the coastal buffer zone and the zone of influence are considered to be private property.[98] The definition of coastal public property, which the preamble to the *Ley de Costas* explains marks a return to Spain's Roman law tradition, is set out in articles 3, 4 and 5.

Article 3 begins by providing that coastal public property includes: (a) the sea-shore which is the area "between the lowest water mark of high spring tides and the highest limit reached by the waves in the worst storms or the highest water mark of spring tides, whichever is higher;"[99] and (b) the beach or those "areas where free and unattached materials are deposited, such as sand, gravel, pebbles, including rocks, sediment and dunes, with or without vegetation, formed by the actions of the sea or the sea wind, or other natural or artificial causes."[100]

Apart from the sea-shore and the beach, article 3 also provides that coastal public property includes "the territorial sea and inland waterways, with their beds and subsoil" and the "continental shelf".[101] This is in accordance with article 132(2) of the Spanish Constitution which states that the coastal strip, beaches, territorial sea and the natural resources of the exclusive economic zone and continental shelf are public property.[102]

---

[95] Ibid.

[96] The coastal buffer zone extends for a minimum of 100 meters from the inland limit of the shore, and can be enlarged to a maximum of 200 meters by the government. The first 20 meters of this zone is set aside as a pedestrian promenade. Apart from this promenade, the coastal buffer zone is considered to be a "green area" and no development or building may take place, with the exception of some leisure and sport facilities. See GM Garcia, J Pollard and R Hughes "Coastal Zone Management in the Costa de Sol: A Small Business Perspective" (2002) 36 *Journal of Coastal Research* 470 at 474.

[97] The zone of influence extends for a minimum of 500 meters from the inland limit of the shore. All development and building within this area must comply with certain requirements aimed at protecting the coastal public property. For example, sufficient land must be set aside for parking and building density may not exceed the average allowed for urban land. See Garcia, Pollard and Hughes *Journal of Coastal Research* (n 95) at 474.

[98] Ibid.

[99] Article 3(1)(a).

[100] Article 3(1)(b).

[101] Articles 3(2) and (3).

[102] Spanish Constitution, 1978.

According to article 4 coastal public property also includes: (a) land which is used for "access to the seashore for the deposit of material"; (b) "land gained from the sea as a consequence of works or drainage"; and (c) "land encroached upon to form part of the seabed".[103] Finally, article 5 provides that islands located in the territorial sea, rivers and inland waterways also form a part of coastal public property, except where they are privately owned.

While the failure to include the beach and sand dunes above the high-water mark is disappointing, other aspect of the definition of coastal public property are to be welcomed.

The inclusion of admiralty reserves in the definition should resolve much of the legal uncertainty that has affected the legal status of these areas and enhance efforts aimed at conserving the natural environment in the coastal zone. The inclusion of sensitive coastal areas such as coastal islands and costal cliffs as well as any natural resources occurring in or on the continental shelf or exclusive economic zone, in the definition should also facilitate conservation efforts in this area.

In addition, the detailed manner in which coastal public property has been defined should open up those parts of the coast from which members of the public have frequently been excluded in practice, for example the sea-shore of private islands or the tops of coastal cliffs. It should also make to easier to identify those parts of the coast in respect of which a right of public access must be established.

4.3 The Coastal Buffer Zone

Second, the draft Bill applies to a much wider geographic area than the Sea-shore Act does. This is because it makes provision, not only for coastal public property, but also for a "coastal buffer zone" whose function is to promote, *inter alia*, integrated coastal management. The draft Bill thus expressly provides that the purpose of the coastal buffer zone is to allow for the specific regulation of land which is adjacent to coastal public property or which play an important role in a coastal ecosystem in order to:

(a) protect the ecological integrity and productive capacity of the coastal zone;
(b) to protect people, property and economic activities from coastal processes, including a rise in sea-levels; and
(c) to make land available near the sea-shore for rescue operations or depositing materials and objects washed up by the sea.[104]

Like coastal public property, the coastal buffer zone consists of a number of different components. These components are: (a) any urban land that is situated within 100 meters inland from the high-water mark; (b) any rural land that is situated within 1 km inland from the inland boundary of coastal public property; (d) any land which has been declared to be a sensitive coastal area; (e) any part of the littoral zone which is not coastal public property; (f) any coastal protected area which is not coastal public property; (g) any coastal wetland, lake, lagoon or dam; and (h) any part of the sea-shore or admiralty reserve which is not coastal public property.[105]

[103] Articles 4(1), (2) and (3).
[104] Clause 21.
[105] Clause 20.

The boundaries of the coastal buffer zone are accordingly based on a combination of arbitrary administrative lines and ecological criteria. While the use of arbitrary lines is convenient from a legal and administrative point of view because of the certainty they provide, they are not appropriate from an environmental point of view. This is because the coastal environment constitutes a dynamic zone which varies in width from area to area. The inclusion of ecological criteria in the definition of the coastal buffer zone should therefore promote integrated coastal management by allowing the boundaries of the coastal zone to be extended where this is necessary.

4.5 Ownership and Use of Coastal Public Property

Third, the draft Bill retains the public character of the coast, but changes its classification from a thing owned by the state on behalf of the people to a thing owned directly by the people themselves. It thus provides that ownership of coastal public property vests in the citizens of the Republic.[106] Having vested ownership of the coast in the citizens, the draft Bill goes on to vest the administration and management of the coast in the state. It thus provides that coastal public property must be held in trust by the state on behalf of the citizens.[107]

The most significant implication of this change in ownership appears to be a total ban on the alienation or acquisition of a portion of the coast. The Bill thus expressly provides that coastal public property cannot be alienated, attached or acquired by prescription. The Bill also provides that rights over it cannot be acquired by prescription. It does, however, provide that parts of the coast may be let by the appropriate authorities.[108]

The state's new responsibilities as trustee are also dealt with in some detail. In this respect, the draft Bill provides that as trustee the state must ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community. In addition, the Bill provides that the state must maintain the right to take whatever reasonable measures it considers necessary to conserve and protect coastal public property.[109]

In addition to the ownership and management of coastal public property, the draft Bill also deals with the public's right to use and enjoy coastal public property.

In this respect, the draft Bill confers a right to use and enjoy coastal public property on any person in the Republic, provided this use does not: adversely affect the rights of any other person to use and enjoy coastal public property; prejudice the state's duty to protect the environment; or cause adverse effects on the environment itself. The Bill also provides, however, that the right to use and enjoy coastal property may be restricted in order to safeguard the environment; or to promote the interests of a particular community; or to promote the interests of the nation.[110]

[106] Clause 15
[107] Clause 16.
[108] Clause 15.
[109] Clause 16.
[110] Clause 17.

Taken together, these provisions also place greater emphasis on the public character of coastal public property than the equivalent provisions of the Sea-shore Act did.

4.6 Access to Coastal Public Property

Finally, the draft Bill also provides members of the public with a right of reasonable access to coastal public property. Like the right to use and enjoy coastal public property, this right may be restricted in order to safeguard the environment; or to promote the interests of a particular community; or to promote the interests of the nation.[111]

In order to give effect to this right, the draft Bill makes provision for "coastal access land". Coastal access land is defined as strip of land which is adjacent to coastal public property and which can be used by the public to access that coastal public property. The responsibility for identifying and designating strips of land as coastal access property is placed on each municipality whose area includes coastal public property. Once a municipality has identified and designated a particular strip of land as coastal access property that land becomes subject to a public access servitude in terms of which members of the public may use that land to gain access to coastal public property.[112]

Given that coastal access land will frequently be owned by a private person, these provisions could be challenged on the basis that they infringe the constitutional right to property, and in particular the constitutional prohibition on uncompensated expropriations.[113] This is because the courts have held that a servitude imposed upon a landowner without his consent may well constitute an expropriation,[114] and the draft Bill itself makes no provision for the payment of compensation. In order for a coastal access servitude to pass constitutional muster therefore it will have to satisfy the requirements of the general limitation clause.[115]

The general limitation clause provides that a right may only be limited by a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. When it comes to determining whether a limitation is reasonable and justifiable certain factors must be taken into account. These are: (a) the nature of

[111] Ibid.
[112] Clauses 22 – 25.
[113] The constitutional right to property is set out in s 25 of the Constitution. Insofar as the protection of private property is concerned, this section draws a distinction between the deprivation of property (s 25(1)) and the expropriation of property (s 25(2)). Insofar as the deprivation of property is concerned, it provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Insofar as the expropriation of property is concerned, it provides that "property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."
[114] See *Nhlabathi v Fick* 2003 2 All SA 323 (LCC) at para 32.
[115] S 36. Fundamental rights litigation in South Africa takes place in two stages. At the first stage, a court must consider whether any of the rights guaranteed in the Bill of Rights has been infringed by the law or conduct in question. If the court does find that a fundamental right has been infringed it must proceed to the second stage. At the second stage, the court must determine whether the infringement is justifiable in terms of the general limitation clause. Only if the court finds that the infringement is not justifiable may the law or conduct in question be declared unconstitutional. See I Currie and J de Waal *The Bill of Rights Handbook* 5ed (2005) at 26.

the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

The constitutional validity of the coastal access servitudes depends therefore upon: (a) the importance which the courts will attach to a right of coastal access; (b) the extent to which a public access servitude interferes with a landowner's rights; (c) the extent to which a balance has been struck between the public's right of coastal access and the landowner's rights; and (d) the extent to which a public access servitude is used to address past racial discrimination. Much will therefore depend upon the manner in which the municipalities go about designating coastal access land in order to give effect to the right of coastal access.

5. Conclusion

The Sea-shore Act was passed in 1935. Over the past 70 years there have been dramatic changes in the physical state of the South African coast; in the system of government in South Africa; and in the South African government's approach to coastal management. As a result of these changes, the provisions of the Sea-shore Act governing the ownership of and access to the coast are no longer appropriate. In particular, the Act's failure to adequately protect the rights of the public; to provide a right of physical access; and to promote integrated coastal management have been the source of much criticism.

The government's decision to replace the Sea-shore Act with a new coastal law is therefore to be welcomed. The length of time it has taken to implement this decision is, however, a source of some concern. While a draft Integrated Coastal Management Bill has been prepared, there is still no indication of when it will be released for public comment and debate, let alone presented to Parliament and enacted into law. Given the significant changes which the draft Bill makes to the legal status of the sea and sea-shore such as creating a new thing, namely coastal public property; vesting its ownership in South Africa's citizens and introducing of a new right of coastal access, this delay is unfortunate.